

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS  
COMMERCIAL COURT (QBD)  
FINANCIAL LIST  
FINANCIAL MARKET'S TEST CASE SCHEME

BETWEEN

THE FINANCIAL CONDUCT AUTHORITY

Claimant

-and-

- (1) ARCH INSURANCE (UK) LIMITED
- (2) ARGENTA SYNDICATE MANAGEMENT LIMITED
- (3) ECCLESIASTICAL INSURANCE OFFICE PLC
- (4) HISCOX INSURANCE COMPANY LIMITED
- (5) MS AMLIN UNDERWRITING LIMITED
- (6) QBE UK LIMITED
- (7) ROYAL & SUN ALLIANCE INSURANCE PLC
- (8) ZURICH INSURANCE PLC

Defendants

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CLAIMANT'S TRIAL SKELETON

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## **Introduction**

### **A. The Financial Conduct Authority's ("FCA") Claim**

1. COVID-19 and the resulting public health controls imposed by the Government are causing substantial loss and distress to businesses, particularly (but not solely) small and medium enterprises ("SMEs"); and as a corollary, to those individuals that depend on such businesses for their livelihoods. Many are under immense financial strain to stay afloat. A large number of disputed insurance claims have been made by SMEs under policies covering business interruption ("BI") losses, particularly – and relevantly in this action – under extensions or other coverage clauses that do not require property damage, instead being focussed entirely on events causing an impact to the insured business. These policyholders are generally not sophisticated or well-resourced insurance buyers in the way a large corporate would be. It is against that background that the FCA, as Claimant in a claim brought under the Financial Markets Test Case Scheme, thus seeks legal certainty for the benefit of all stakeholders, and to achieve this urgently in the public interest to facilitate the continuation of businesses to the extent they have survived in the meantime or to bring some relief and opportunity for those that have not.
2. The Defendant insurers<sup>1</sup> (amongst other insurers that the FCA could have invited to be defendants to this action) sold standard form insurance policies including BI cover, principally to SMEs operating in the UK ("the policyholders"). Following the widespread losses resulting from the spread of the COVID-19 pandemic within the UK ("the pandemic") and associated government action, numerous claims were made by policyholders under these business interruption policies, principally under non-damage insuring provisions of the type with which this test case is concerned, seeking an indemnity against their losses. Some of the Defendant insurers appear to have accepted some claims under certain forms of policy but under the wordings which are the subject of this test case, claims have been rejected by the Defendants outright. We say this recognising, as the Court has already noted at CMC 2, that other policies are not an aid to construction of the Wordings which are the subject of the test case but in order to debunk at the outset any suggestion that these types of non-damage insuring provision simply do not respond to COVID-19 as a matter of some unexpressed principle.

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<sup>1</sup> References in this skeleton to insurers include Lloyd's managing agents who sold policies on behalf of Lloyd's underwriters where appropriate.

3. The position of individual insurers varies, and is subject to the detail in the wordings, but there are some very clear themes which insurers have taken to deny claims which emerge as points of significant commonality and which will be front and centre in this test case. They are that (a) the policy extensions do not cover pandemics, but only local events; (b) any loss was caused by matters other than the policy trigger (which, on the Defendants' cases, may include the existence of disease nationally, or country-wide action or behaviours in response to COVID-19 and that (c) businesses are not prevented from accessing or using insured premises or interrupted if they can continue to operate for any (however limited) purpose. These are revealed by the Defendants' denial letters sent to policyholders and by the Defendants' Defences. The significance of the denial letters is that the intervention of the FCA was prompted by the generic grounds on which the insurers were relying to support blanket denials of cover. Extracts from sample denial letters are quoted in the Schedules to the Particulars of Claim but key passages which reveal the blanket denials that were being communicated and the grounds for them are set out below:

**Arch:**

Government or Local Authority Action extension

“This extension to the policy provides coverage when access to your premises is prevented, i.e. your premises are closed, by order of the government or local authority.... Although your business will most likely have been affected by the government’s social distancing advice, issued alongside the closure orders, it is not among the businesses which have been ordered to close. Access to the premises has not been prevented and, for that reason, the Government or Local Authority Action clause does not respond.”<sup>2</sup>

**Argenta:**

Notifiable Human Disease clause

“There is no cover available under the policy for those losses which have been caused by the nationwide spread of coronavirus and the Government action taken to prevent its spread. What you will need to establish, in order to qualify for any benefit under the cover available, is what additional losses occurred as a consequence of the local outbreak only.”<sup>3</sup>

**Ecclesiastical:**

Prevention of access clause

“... the losses in this case are due to an excluded cause, that being the decision of Government to take certain measures to seek to control the spread of the pandemic. This action is not an event which is insured under your policy.”<sup>4</sup>

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<sup>2</sup> {A/2/59}

<sup>3</sup> {A/2/64}

<sup>4</sup> {A/2/71}

**Hiscox:**

Non-damage denial of access clause

“i. I understand that your business has continued to trade. An important requirement for cover is that the business activities are interrupted – i.e. they have had to stop – as a result of the relevant denial or hindrance in access. This requirement of cover is therefore not met.

ii. A public authority has not denied you access or hindered your access to the Insured Property. Whilst the government has ordered the general closure of many businesses across the UK to reduce the spread of Coronavirus, your business and the type of service it offers was not included within the list of businesses that are subject to a legally enforceable order to close. This means that you can still access the Insured Property. ...

iv. Even if your business had been included within the list of those that the Government has ordered to close, this clause would not offer cover for your claim because it is concerned with a specific “incident” which occurs within a 1 –mile radius of the Insured Property that creates a physical denial or hindrance in access to the Insured Property. ...

v. ... even if the requirements identified above could be met ... your financial losses have arisen from more than one cause. The fact of such other causes also means that the policy does not respond to your claim because to be covered, losses must arise “solely and directly” from the matters listed in the clause.”<sup>5</sup>

Public Authority clause

In addition to the points made above:

“For the Public Authority Restriction Clause to respond, it is a requirement that the relevant Restriction causes you to be unable to use the Insured Property. I understand that the Insured Property is capable of being used because it is not subject to a public authority restriction... The relevant public authority restriction in use must be one that has been “imposed“, which means that it must have the force of law. Mere requests, guidance or advice, however authoritative its sources, are insufficient. ... The “occurrence” of a contagious disease that results in a restriction being imposed, must be one that is specific to you or the Insured Property/its locality. .. the Cover does not extend to circumstances where the restriction has been imposed in response to a national or international pandemic.”<sup>6</sup>

Trends clause

“Even if you could demonstrate that the requirements for cover referred to above were met, the amount you would have earned, would have been affected by the general Government actions aimed at addressing the pandemic. The restrictions placed on the movement of people and the impact COVID-19 has had on economic activity and confidence generally would all have impacted your ability to trade.”<sup>7</sup>

**MS Amlin:**

Notifiable disease and Action of competent authorities clauses

“If there have been cases of COVID-19 within 25 miles of your premises, for a claim to succeed, it will be necessary to establish a direct link between these cases and the impact to your business. Cover is not available for any losses resulting from the presence of SARS–Cov–2 or COVID-19 in the wider population or the country generally. Moreover, if you have suffered losses because of a general decrease in business which cannot be attributed to any

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<sup>5</sup> {A/2/77}

<sup>6</sup> {A/2/78}

<sup>7</sup> {A/2/79}

specific localised incident of SARS– Cov–2 or COVID-19 then this policy will not offer cover.”<sup>8</sup>

**QBE:**

Disease clause:

“It is important to note that this Extension will only provide cover where loss is in consequence of the occurrence of COVID-19 at the relevant locations, and not where losses are in consequence of, for example, wide-scale government measures. The effect of (Government mandated blanket shutdowns, or the effect of the COVID-19 outbreak on the regional, national or global economy, will not trigger cover. Cover will only be available where a specific outbreak of COVID-19 at the premises, or within the specified radius, has had a direct effect on the business.”<sup>9</sup>

**RSA1:**

Disease clause

“... if a specific case of COVID-19 occurred at or within 25 miles of your insured property, and this specific case directly led to its closure or restriction – for example if it was closed for cleaning required by Public Health England... – an indemnity claim could be payable for losses of revenue. Claims could also be payable if, as a direct result of a local outbreak, you could evidence cancellations by customers, and subsequent loss of revenue. The policy does not cover losses arising from a general reduction in the number of bookings or increased cancellations as a result of the Coronavirus pandemic, including as a result of social distancing measures, self-isolation requirements or restrictions on travel.”<sup>10</sup>

**RSA 2:**

Prevention of – Public Emergency clause

“The Prevention of Access – Public Emergency cover... only covers emergencies likely to endanger life or property in the vicinity of the Premises. The intention of this cover is for incidents such as fire damaged buildings or escapes of water in the vicinity of an Insured’s premises where there is an insured peril and imminent risk to life or property. The extension is concerned with isolated occurrences at your premises or within closed (sic) proximity and not any wider nationwide health strategy. The Government instruction to close premises like your own was not because of an emergency likely to endanger life in the vicinity of your premises but rather to prevent the spread of the virus.”<sup>11</sup>

**RSA3:**

Infectious Diseases clause

“The policy does not cover losses that result from any measures of social distancing, lack of demand, reduced footfall or general downturn in public consumption. The Infectious Diseases Extension requires either an occurrence of a Notifiable Disease at the premises or within 25 miles of the Premises... Whilst there may well be a confirmed case within 25 miles of your premises, the policy requires there to be a causal connection between any such occurrences and the interruption or interference with your business. The Infectious Diseases extension is concerned with isolated occurrences at your premises or within a 25 mile radius and not any wider national or international outbreak.”<sup>12</sup>

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<sup>8</sup> {A/2/103}

<sup>9</sup> {A/2/116}

<sup>10</sup> {A/2/128}

<sup>11</sup> {A/2/132}

<sup>12</sup> {A/2/136}

**RSA 4:**

Notifiable Diseases clause

“... The policy does not cover losses arising from a general reduction in turnover or increased costs as a result of the wider Coronavirus pandemic – including as a consequence of social distancing measures, self-isolation requirements or restrictions on travel.”<sup>13</sup>

Prevention of Access – Non-Damage Clause

“Many of our customers are facing restrictions in order to comply with Government guidance. In most cases, however, this is not a response to any action or advice of the relevant authority or agency in the Vicinity of our customers’ premises, as is required by the policy, but a direct consequence of UK wide measures adopted by the Government. Even without any locally imposed restrictions within the Vicinity, businesses would still be sustaining losses due to the nationwide measures.”<sup>14</sup>

**Zurich:**

Action of competent authorities clause

“... [t]here was no action by a competent authority that related to your premises or its vicinity and which has prevented access. The Government’s order related to nationwide measures to prevent the spread of COVID-19, applied to all relevant businesses nationwide and have had the effect of suppressing business rather than impeding access ... Your policy does not provide cover for pandemics.”<sup>15</sup>

4. The primary issues at the heart of this dispute are therefore actually quite simple to comprehend and are capable of being answered so as to determine whether insurers’ blanket denials are right or wrong, without resort being necessary to complex factual scenarios. That is consistent with the purpose of the Financial Markets Test Case Scheme, which is to address issues of general importance, that is issues of importance to the vast majority of policyholders, and not to descend into the detail of issues of quantum and the adjustment of individual claims. To illustrate the simplicity of this, the FCA has included indicative examples demonstrating how the policies trigger based on assumed facts at the end of the specific wording section for each Defendant below (these examples do not substantively address causation issues, given that such issues overlap and are addressed fully below). The FCA’s case is that the Defendants are wrong to reject policyholders’ claims and/or are wrong in the way the in which they have addressed the causation of insured losses and seeks declarations to establish the basis upon which the insurance provided by such provisions under representative standard form policies issued by the Defendants (“the Wordings”) respond to non-damage BI losses.

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<sup>13</sup> {A/2/141}

<sup>14</sup> {A/2/141}

<sup>15</sup> {A/2/150}

5. The FCA is seeking by this test case, to remove the general ‘road-blocks’ which have been advanced by insurers by way of general denial to claims irrespective of individual facts, so that policyholder claims can proceed to be considered and adjusted on their individual merits. This litigation is concerned with the removal of such general road blocks, and not with the trial of hypothetical sample test cases in order to provide answers to detailed individual factual permutations.
6. The FCA advances the policyholders’ arguments on coverage and policy construction, supported by two groups of policyholders which the Court has permitted to intervene in the claim (with the FCA’s consent).
7. This claim is focused on insuring provisions which (individually or in combination) provide cover against interruption and interference resulting from disease (with or without public authority action) and dangers or emergencies (with public authority action), and on issues of causation which arise in ascertaining insured losses. The issues of causation of loss include the effects of “trends” provisions, which provide for the adjustment of certain losses by reference to underlying trends which would have affected the businesses. Such trends clauses may be part and parcel of the wording or optional, may be upwards only or apply both upwards or downwards, and may in terms apply only to “damage” or also to “insured perils”.<sup>16</sup>
8. SMEs are often operated from a single premises with few employees.<sup>17</sup> The FCA published a thematic review of the handling of insurance claims for SMEs in May 2015.<sup>18</sup> This concluded that “SMEs are less likely to be sophisticated customers and many exhibit similar knowledge and experience to that of retail consumers when buying general insurance products.”<sup>19</sup> The policies should be construed in that context, consistently with the regulatory responsibilities upon insurers to treat their customers fairly.<sup>20</sup> None of the policies concerned involve any form of bespoke negotiations of the relevant insuring provisions and associated policy terms.

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<sup>16</sup> “Insured peril” is widely used in the Wordings in preference to “cause” or “event” for its neutrality in terms of issues of causation and occurrence etc., which raise legally contentious issues.

<sup>17</sup> A House of Commons Standard Note dated 9 December 2014 (SN/EP/6078) concluded that 99.9% of UK businesses were SMEs (employing less than 250 people), employing over 14 million people and contributing 49.8% of the Gross Value Added to the UK economy. 96% of UK businesses were micro-enterprises employing less than 10 employees, employing over 33% of the workforce and contributing 19% of the Gross Value Added. <https://commonslibrary.parliament.uk/research-briefings/sn06078/> {J/2.1}

<sup>18</sup> <https://www.fca.org.uk/publication/thematic-reviews/tr15-06.pdf> {J/2.2}

<sup>19</sup> <https://www.fca.org.uk/publication/thematic-reviews/tr15-06.pdf> Para 1.3 {J/2.3}.

<sup>20</sup> These regulatory obligations control the conduct of business by insurers and form part of the factual matrix within which the contracts were formed. The very existence of those regulatory obligations recognises the fact that the wording of insurance policies is determined by insurers and regulatory control is necessary to ensure that the wording used is in policyholders’ interests. These principles are incorporated into the FCA Handbook. Specifically, Principle 6 of the

9. Declarations are sought in respect of the Wordings which are intended to reflect similar issues arising under policies across the business interruption insurance market for SME policyholders, including policies underwritten by insurers other than the Defendants. In very broad summary, the issues can be summarised as follows:
  - 9.1. In respect of insuring provisions which require public authority action, whether the UK Government's actions taken (mainly) in March 2020 (i) are those of a relevant authority (*e.g.* 'public authority'), (ii) were taken in response to a relevant event (*e.g.* 'emergency', or disease), (iii) were of the nature covered by the clause (*e.g.* 'advice', 'restrictions'), and (iv) led to relevant disruption (*e.g.* 'prevention of access', 'inability to use');
  - 9.2. In the insuring provisions which require disease but without public authority action (Argenta1, MSAm1in1-2, QBE1-3, RSA1, RSA3-4), whether (and how a policyholder establishes whether) COVID-19 occurred or manifested itself within a defined distance of their Premises;
  - 9.3. In all such insuring provisions, whether the necessary causal tests are satisfied, in particular those required between the relevant insured peril and the loss; and, within the insured peril, between the disruption and whatever 'trigger' the clause refers to;
  - 9.4. The application of any 'but for' causation test and trends clauses, in particular the correct "counterfactual" if any (being the hypothetical scenario considered on the premise of the insured peril having not occurred, against which losses caused by the insured peril are to be determined) and the High Court decision in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA*;<sup>21</sup> ("*Orient-Express*") and
  - 9.5. Whether any exclusions relied on by a minority of the insurers apply.
10. The FCA's case in summary is that, in relation to the Wordings:<sup>22</sup>
  - 10.1. The response of the UK Government to COVID-19 was (and is) a single body of intervention which prevented and hindered access to and use of business premises,

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Principles for Business (set out in PRIN 2.1.1) states that "*A firm must pay due regard to the interests of its customers and treat them fairly.*" (commonly known as the duty to Treat Customers Fairly or "TCF") and rule ICOBS 2.5.-1R states that "*A firm must act honestly, fairly and professionally in accordance with the best interests of its customer.*" **{J/1}**

<sup>21</sup> [2010] EWHC 1186 (Comm), [2010] Lloyd's Rep IR 531, Hamblen J **{J/106}**.

<sup>22</sup> See PoC para 4 **{A/2/3}**. (References in this skeleton to the PoC are to the Amended Particulars of Claim.

caused closure of and restrictions on activities within the premises, and interrupted and interfered with business activities. This includes (most obviously) businesses required to close by the Government such as pubs, most shops and restaurants, but also businesses that were not ordered to close (whether at all or in their entirety), because the package of measures (including the “stay at home” instruction) was such that it satisfied the policy trigger.

- 10.2. Where insuring provisions require the presence of the disease to occur within a certain radius or vicinity of the premises, (i) the insured can (in addition to specific proof in a particular case) prove the presence of COVID-19 at a certain date on the balance of probabilities by statistical or other means without necessarily proving that there was a medically diagnosed case; (ii) those insuring provisions do not require the event to occur *only* within that vicinity or radius, so that wide area events within the locale are covered (there generally being no exclusion for such events or for pandemics); and (iii) certain events (*e.g.* danger, emergency), were nationwide, so automatically occurred within the relevant vicinity.
- 10.3. Nothing in the Wordings or in the law entitles the insurer to deny cover, or requires the Court to find a lack of cover or reduce the indemnity, by reason of loss not being caused by the insured peril but because it was caused by COVID-19 more generally (such as other public authority action, or public reactions to the pandemic). Moreover, if and to the extent that it is necessary and appropriate to consider what would have happened ‘but for’ the insured peril (whether under a ‘trends’ clause or otherwise), the correct counterfactual is a scenario in which there was no COVID-19 and no Government intervention related to COVID-19 – not an artificial one in which there was, for example, Government intervention but no COVID-19 or vice versa. Were insurers to succeed in their arguments as to causation it must follow the counterfactual is a scenario with a metaphorical island of immunity from COVID-19/public authority action/prevention of access (etc) surrounding or affecting the insured premises, but those causes remain everywhere else in the UK. Ironically, the effect of insurers’ argument in some cases could be that the insured could assert it would then have had a captive customer base within such metaphorical disease-free island with the likely (insured) increase in revenue that would follow. The FCA advances a case which does not allow for the recovery of such a windfall profit. It remains to be seen how the insurers will address this.

11. The declarations sought by the FCA are set out in the PoC and are divided between general declarations (PoC section P<sup>23</sup>) and insurer-specific declarations (PoC Schedules<sup>24</sup>). Three insurers (Arch, Argenta, QBE) have counterclaimed seeking declarations of their own,<sup>25</sup> and the FCA's case on those is set out in its Reply.<sup>26</sup>
12. This claim does not address other insuring provisions (such as those requiring property damage, or insuring provisions covering losses caused by an apparently exhaustive list of diseases), or the quantification of loss/measure of indemnity.
13. The FCA's standing to bring this claim, the process by which the claim came about (including the selection of insurers and policies) and the terms of the Framework Agreement reached between the parties have been addressed in previous skeleton arguments<sup>27</sup> and in a witness statement filed by the FCA<sup>28</sup>, which are not repeated here.

**B. The evidence before the Court**

14. The evidence for the purpose of trial is as follows:
  - 14.1. The parties have agreed a number of "Agreed Fact" documents: see Section C of the Trial Bundle). For the purpose of this skeleton argument these documents are taken as read.
  - 14.2. Factual evidence has been filed on behalf of Arch, Ecclesiastical and MS Amlin: see Section D of the trial bundle.
  - 14.3. The FCA produces an Assumed Facts document at Annex 2 to its Particulars of Claim {A/4}. The Defendants produced more detailed scenarios. The Parties have been liaising over these and are seeking to agree them.

**C. Housekeeping**

15. The Opus 2 electronic trial bundle is arranged as follows:

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<sup>23</sup> {A/2/47}

<sup>24</sup> {A/2/56}

<sup>25</sup> Arch Def para 68 {A/7/21}; Argenta Def para 70 {A/8/21}; QBE Def para 80 {A/11/33}

<sup>26</sup> Reply para. 68 {A/14/35}

<sup>27</sup> See, in particular, the FCA's skeleton argument for the first CMC {F/8}

<sup>28</sup> {F/2}

- 15.1. Bundle A: Statements of Case, Orders/Rulings, and List of Issues, Trial Timetable and Reading List
- 15.2. Bundle B: Policies (Lead Policies and Other Representative Policy Wordings)
- 15.3. Bundle C: Agreed Facts<sup>29</sup>
- 15.4. Bundle D: Factual Evidence
- 15.5. Bundle E: Assumed Facts
- 15.6. Bundle F: Preliminary Documents
- 15.7. Bundle G: Interveners' Applications
- 15.8. Bundle H: Correspondence
- 15.9. Bundle I: Skeleton Arguments
- 15.10. Bundle J: Authorities
16. The Core Bundle comprises the Statements of Case, List of Issues, Trial Timetable, Agreed Facts, Complete Policies for the Lead Wordings and Extracts from the Complete Policies for the Lead Wordings. Its referencing/pagination is the same as for the main bundle.
17. References to the trial bundle are in the form **{Bundle/tab/page}** e.g. **{A/1/3}**.
18. The FCA filed a trial timetable on 8 July 2020. It will be updated when the Defendants provide their allocation of time between themselves on 14 July 2020 and an updated version will be included at Section A of the Core Bundle and Trial Bundle.
19. The structure of the Wordings in this action is as follows:
  - 19.1. Each of the eight Defendants' have between one and four 'types' of Wording in issue, the different types having material, sometimes very considerable, differences in the non-damage BI clauses that the FCA is relying on.
  - 19.2. Each type has a 'lead' wording selected, and then some 'non-lead' wordings that are other Wordings within that type that are issued by the Defendant and in issue. The

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<sup>29</sup> Note: Not all of the Agreed Fact documents have been fully agreed at the date of this skeleton.

non-lead wordings are in most cases materially identical to the lead wording, although in some cases there are (especially in relation to quantification clauses and trends clauses) minor material differences which are referred to below, which may necessitate looking at some of the non-lead wordings.

- 19.3. The lead and non-lead wordings are listed in the Schedules to the PoC dealing with each insurer, with the lead marked with an asterisk. They are also listed, most conveniently perhaps, in the Representative Sample of Policy Wordings **{B/1}**
- 19.4. The lead Wordings are all contained in an electronic folder at **{B/2-22}**, with the non-lead wordings in separate insurer folders in **{B/23-85}**.
- 19.5. As mentioned above, the lead Wordings are also in the hard-copy Core Bundles, as are (separately) the key extracts from them.
- 19.6. The FCA will seek to ensure that declarations sought and made in relation to each Defendant apply to all wordings in the specified type, including non-lead wordings. To the extent that the Defendants contend that there is a material difference in the non-lead wordings that may affect the Court's findings and declarations, the Defendants are invited to draw that to the FCA's and the Court's attention.

#### **D. Structure of these submissions**

20. The submissions are structured as follows:
  - 20.1. Background to BI insurance and the risk of epidemics, pandemics and associated public authority action (Section 2).
  - 20.2. The facts relating to the COVID-19 pandemic and the public authority response (Section 3)
  - 20.3. Principles of construction relevant to the issues before the Court (Section 4)
  - 20.4. The relevant insuring provisions (Section 5) covering in turn:
    - (a) Common trigger terms and issues (Section 6)
    - (b) Prevalence of COVID-19 in the UK (Section 7)

- (c) Causation – general issues (Section 8)
- (d) Specific Wordings 1: Public Authority Denial of Access Clauses (Section 9)
- (e) Specific Wordings 2: Disease Clauses (Section 10)

20.5. Conclusions.

## 1) **BACKGROUND**

### A. **Business interruption insurance**

21. Loss of profits or other costs (such as increased cost of working) caused by insured perils is just as keenly felt (and often more so) as loss in the form of material damage to business property. BI insurance plays a vital role in protecting the balance sheet and supporting the commercial endeavour of SMEs by providing protection against unforeseen losses arising from a wide range of insured perils, extending considerably beyond loss of profits attributable merely to physical damage to insured premises. It is perhaps noteworthy that Hiscox states in the Introduction to its BI Policy Wording “*Thank you for choosing Hiscox to protect your business.*” and Ecclesiastical on the cover of its Parish Plus policy states: “*Put your faith in us*”.
22. In the third edition of their seminal book “Principles and Practice of Profits Insurance” (3<sup>rd</sup> edn, 1966), Walter Honour and Gordon Hickmott describe how the first serious attempt to insure business profits was made as long ago as 1797, but it was not until the 19<sup>th</sup> century, following the development of reliable and uniform accounting standards and practice, that “profits insurance” began to take off. As Honour and Hickmott put it, “*To employ capital to its full potential value involves the burden of risk, the weight of which is enhanced in a highly organised credit economy. In taking over this burden, so far as it is practicable, insurance performs an essential economic service*” (p12)<sup>30</sup>. Business interruption insurance, like any insurance, is an important form of risk transfer upon which many businesses rely to withstand losses which would otherwise cause them to cease trading.
23. The turnover basis of insurance, the foundation of modern policies, was first introduced in 1899. After various iterations, a revised policy was adopted by British insurance offices in 1939, substantively similar but a structural and terminological improvement on its predecessors. Honour and Hickmott note that:
- “The adoption of the new standard policy wording by all insurers – Lloyds, tariff companies and non-tariff companies – was a most important progressive move. In terminology and structure, standardisation is of tremendous advantage in promoting a better understanding of the policy throughout commerce and industry, as well as in professional accountancy and insurance circles.”
24. The basic form of BI cover is triggered by destruction or damage to insured property. As stated above, this claim does not seek to test the limits of such cover. However, such cover is

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<sup>30</sup> {J/149}

often supplemented by insuring provisions which provide cover for losses arising from certain forms of damage to third party property which may have an adverse impact on an insured business. Key suppliers or customers with their own damaged premises may interrupt the production or sales of the insured, and damage to the property of utilities may interfere with the electricity, gas, water, internet/phone or other supplies required by the insured business. Such BI covers extend the locations at which damage will trigger cover, often without geographical limits.<sup>31</sup>

25. BI insurance can also cover a range of perils which do not involve any physical damage to property (“non-damage” covers). Outbreaks of diseases, food-poisoning, lock-outs, non-damage interruptions to utility supplies and murders/suicide leading to interruption or interference with the insured business are examples of non-damage perils. The effects of actions taken by public authorities in response to a range of threats, including disease, emergencies and other threats or dangers are available in the standard form policies, either as a part of standard cover provided by the policy or as optional extensions of cover.
26. These additional forms of cover may be subject to their own sub-limits, either a percentage of the sum insured or a fixed amount, and may include their own indemnity periods.
27. The FCA’s claim concerns non-damage insuring provisions which provide cover against interruption and interference resulting from disease, dangers or emergencies and/or various forms of public authority action. These provisions are considered further in Sections 5 to 7 below.

**B. The risk of epidemics, pandemics and associated public authority actions**

28. There has been an ongoing risk of epidemics, pandemics and consequential governmental action. As set out in Agreed Facts 7, the world has seen a number of epidemics and pandemics since the early 20<sup>th</sup> Century, of which the parties to these proceedings would have been aware. Those include the Spanish Flu pandemic of 1918-19, the Asian Flu pandemic of 1957-58, the Hong Kong flu pandemic of 1968-69, the SARS outbreak in 2002 and 2003, the MERS outbreak in 2012, Ebola outbreaks including in 2014-16 and the Zika virus in 2016. As also set out in Agreed Facts 7<sup>32</sup>, there were various governmental responses to those widespread

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<sup>31</sup> e.g. Ecclesiastical 1.1, Extension 9 (Supplier cover) and Extension 10 (Utilities cover – including damage at any land-based telecommunications service provider) {B/4/48}. See also Arch1 (Public Utilities & Telecommunications) {B/2/36}; Hiscox1 (Public Utilities – EU wide cover) {B/6/41}; RSA4 (Offsite Utilities){B/20/29}.

<sup>32</sup> {C/12}

diseases, of which the parties also would have been aware. Those governmental responses (dependent in some cases on the characteristics and perceived severity of the disease) included seeking to prepare a vaccine, isolating patients, issuing advice to known contacts to prevent/delay the spread of the disease, school closures, broadcasts to the public to remain at home if with symptoms, preparation and implementation of emergency epidemic plans, focused plans and advice on prevention, surveillance, early detection, safe hygiene and avoiding contact with infected bodily fluids, community training and control measures. Further:

- 28.1. during the Spanish Flu pandemic, a number of US cities adopted measures such as closing theatres and dance halls, banning public gatherings, staggering business hours and implementing community-wide business closures;
  - 28.2. in response to the SARS outbreak, Beijing (as just one example) closed numerous public entertainment sites, such as theatres and bars; and
  - 28.3. in response to Swine Flu, Mexico City closed all schools, museums and other cultural venues, and the Mexican government shut down government offices and non-essential businesses, and ordered people to stay indoors for five days.
29. In 2017, the UK Government – in the light of the risk of further influenza outbreaks – published the National Risk Register of Civil Emergencies, the stated purpose of which was to inform the public about events which could cause widespread damage and would require a governmental response, and to provide advice on guidance on how the public could prepare. The Register indicated the risk of an influenza pandemic, and explained that the consequences could include up to 50% of the UK population experiencing symptoms, between 20,000 and 750,000 fatalities and high levels of absence from work. It also described the risk of other “*emerging infectious diseases*” with several thousand people experiencing symptoms, and up to 100 fatalities.
30. It is also noted that the Civil Contingencies Act 2004<sup>33</sup> provided for governmental action in response to “*emergencies*” which “*involve, cause or may cause loss of human life, human illness or injury... damage to property*” and gave ministers powers to act urgently. (The wording closely reflects the ‘emergency’ wording adopted in Arch, RSA 2 and Ecclesiastical policies.) The 2004 Act was not in the result used for the COVID-19 pandemic; rather, the UK Government passed the

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<sup>33</sup> {J/8}

Coronavirus Act 2020<sup>34</sup>. Further, the source of the power to make the 21 March and 26 March Regulations was the Public Health (Control of Diseases) Act 1984<sup>35</sup> described in Agreed Facts 5<sup>36</sup>, section 13(1)(a) of which gave the Secretary of State power to make regulations “*with a view to the treatment of persons affected with any epidemic, endemic or infectious disease and for preventing the spread of such diseases*”. Both the 1984 and 2004 Acts represent publicly available laws which contemplated the need for government action in response to an emergency involving a threat to human life or illness.

31. Plainly, there was significant information and general knowledge as to the risk of epidemics and pandemics occurring periodically, and at least the potential for governmental action in response. Although what has happened in the country by way of the Government action in response to COVID-19 is unprecedented in the UK, the risk of a pandemic and the possibility of Government action in response to it must be taken as being background facts for the purposes of construction of the policies. Moreover, the insurers (who would clearly have been aware of the risk of pandemics and associated governmental action as a result of the above), could have expressly excluded cover for those risks had they wished to do so.

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<sup>34</sup> {J/13}

<sup>35</sup> {J/5}

<sup>36</sup> {C/9}

### 3) **THE COVID-19 PANDEMIC AND PUBLIC AUTHORITY RESPONSE**

#### A. **The COVID-19 pandemic**<sup>37</sup>

32. On 31 December 2019, the World Health Organisation (“WHO”) received information about a cluster of pneumonia cases of unknown cause, which had arisen in Wuhan City, Hubei Province, China.
33. On 12 January 2020, it was announced that a novel coronavirus had been detected in case samples, and analysis of genetic sequences indicated that this was the cause of the outbreak. The virus was named severe acute respiratory syndrome coronavirus 2 (“SARS-CoV-2”) and the associated disease is COVID-19. The disease began to sweep across the world, with a likely arrival in the UK, triggering a UK government response.

#### B. **The UK Government action**<sup>38</sup>

##### Initial national action

34. On 22 January 2020, in light of the risk of the virus to the UK nationally, the UK Government took national action: the Department of Health and Social Care (“DHSC”) and Public Health England (“PHE”) raised the UK-wide risk level from “*very low*” to “*low*”, “*due to evidence on the likelihood of cases being imported into this country*”. PHE stated that it had “*issued advice to the NHS*” and was “*keeping the situation under constant review*”.
35. Eight days later, on 30 January 2020, the WHO’s International Health Regulations (2005) Emergency Committee met and announced that the outbreak now met the criteria for a Public Health Emergency of International Concern
36. On the same date, the DHSC raised the risk level again, from “*low*” to “*moderate*”: the four UK Chief Medical Officers announced they considered it “*prudent for our governments to escalate planning and preparation in case of a more widespread outbreak*” – appropriate, given a “*widespread outbreak*” indeed subsequently occurred.

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<sup>37</sup> The information in this sub-section is sourced from the Agreed Facts 2: COVID-19 Disease {C/3} and {C/4} (close to agreed at the date of this Skeleton).

<sup>38</sup> The information in this sub-section is sourced from the Agreed Facts 1: Chronology {C/1} and {C/2}.

37. On the following day, 31 January 2020, the Chief Medical Officer of England announced that cases of coronavirus had occurred in England: two patients had tested positive for COVID-19.
38. On 3 February 2020, the UK Government launched UK-wide advice to the public, including appropriate use of tissues and relevant hand-washing or use of sanitiser to kill germs.
39. On 10 February 2020, the UK Government took further action by enacting the Health Protection (Coronavirus) Regulations 2020<sup>39</sup>, which were said to apply when the Secretary of State made a declaration that the incidence or transmission of COVID-19 constituted “*a serious and imminent threat*” to public health and the incidence is of such a point that the measures in the regulations may reasonably be considered as an effective means for preventing further transmission. The regulations provided for screening and detention of individuals in prescribed circumstances.
40. On 22 February 2020, by relevant legislation COVID-19 was made notifiable in Scotland. On 29 February 2020, Northern Ireland followed suit, as did England on 5 March 2020 and Wales on 6 March 2020.
41. On 25 February 2020, the UK Government issued further restrictive advice: travellers arriving in the UK from certain affected regions were advised to self-isolate on arrival, even if exhibiting no symptoms; and employers and businesses were advised to incorporate certain practices. Those included guidance as to hygiene (e.g. hand-washing and sanitisation) and returned travellers from affected regions were not to attend work.
42. On 27 February 2020, a case of COVID-19 in Northern Ireland was detected for the first time; on the following day, in Wales; and on 1 March 2020 in Scotland. On 2 March 2020, the UK saw its first death from COVID-19.
43. Continuing its nation-wide action, the UK Government on 3 March 2020 announced a COVID-19 “*action plan*” and also issued guidance for health professionals and other organisations. On the following date, it issued a guidance document entitled, “*What is social distancing?*”, advising individuals to practise good hygiene and that steps may be needed as regards self-isolation, working from home and limiting non-essential contact with others. It also advised that COVID-19 is spread by spending 15 minutes within two metres of an infected person. That led, of course, to the two-metre rule.

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<sup>39</sup> {J/14}

### Further UK Government action, as the WHO then declares COVID-19 a pandemic

44. As noted above, on 5 March 2020, COVID-19 was made a notifiable disease in England. The UK Government announced that it had taken “*urgent steps*” to do so. On the same date, the Chief Medical Officer for England announced the first death of a patient with COVID-19 (though as stated, reports indicated the first death was earlier).
45. On 11 March 2020, the WHO declared COVID-19 a pandemic – it announced: “*we are deeply concerned ... by the alarming levels of spread and severity ... We have therefore made the assessment that COVID-19 can be characterized as a pandemic*”. On the same date, the UK Government advised: “*The advice of the Chief Medical Officer is that close contact is defined as being within 2 metres of someone who has active symptoms for more than 15 minutes*” – again, advice on the two-metre distance.
46. On the following day, 12 March 2020, the UK Government took action by raising the risk level to the UK from “*moderate*” to “*high*”. It also in a public announcement advised anyone “*who shows certain symptoms to self-isolate for 7 days, regardless of whether they have travelled to affected areas. This means we want people to stay at home and avoid all but essential contact with others for 7 days from the point of displaying mild symptoms, to slow the spread of the infection*”. Therefore, through advice on self-isolation, staying at home and avoiding non-essential contact, the UK Government inhibited activity, relating to anyone showing even mild symptoms. This would have an intertwined impact, restricting individuals and also businesses. Further statements issued by the UK Government that day instructed, for those with symptoms: “*stay at home and do not leave your house for 7 days*”.

### The UK Government’s 16 March “stay at home” announcement

47. On **16 March 2020**, the UK Government built on its previous action, in an announcement to the public from the Prime Minister. He stated:
  - 47.1. Self-isolation if symptoms: In the previous week, the UK Government had advised “*everyone to stay at home*” if they had key symptoms.
  - 47.2. Further restrictions needed: “*Today we need to go further*”, because scientific advice was showing fast growth of the disease (“*...according to SAGE [the Scientific Advisory*

Group for Emergencies] *it looks as though we're now approaching the fast growth part of the upward curve. And without drastic action, cases could double every 5 or 6 days*"<sup>40</sup>).

47.3. Self-isolation for 14 days, if with symptoms: *“ensure that if you or anyone in your household has one of those two symptoms [a high temperature or a new and continuous cough], you should stay at home for fourteen days”* and do *“not go out even to buy food or essentials, other than for exercise, and in that case at a safe distance from others”*; if necessary seek help with that; and if that is not possible, *“do what you can to limit your social contact when you leave the house to get supplies”*.

47.4. Even if without symptoms, stay at home: *“even if you don't have symptoms and if no one in your household has symptoms ... now is the time for **everyone**”* (emphasis added) – affecting, in the UK Government response to the pandemic, in an intertwined, inextricable manner, individual movement and businesses –

- (a) *“to stop non-essential contact with others”*;
- (b) to avoid *“unnecessary social contact of all kinds”*;
- (c) *“to stop all unnecessary travel”*;
- (d) *“to start working from home where they possibly can”*;
- (e) to *“avoid pubs, clubs, theatres and other such social venues”*;
- (f) to ensure they are *“avoiding confined spaces such as pubs and restaurants”*;
- (g) to avoid *“mass gatherings”*, which would also mean critical workers could be deployed away from such events so as *“to deal with this emergency”*; and
- (h) in a few days' time, *“to ensure that those with the most serious health conditions are largely shielded from social contact for around 12 weeks”*.

48. Concomitant with that announcement, on the same date, the UK Government took action by issuing *“guidance on social distancing for everyone in the UK”*, stating that it *“advises on social distancing measures we should all be taking to reduce social interaction between people in order to reduce the transmission of coronavirus (COVID-19)”*. Again, the Government response to the pandemic interlinked physical restrictions on individuals with a combined impact on businesses.

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<sup>40</sup> The government Reported Cases showed a total of 3,218 confirmed cases by 16 March 2020, up from 10 days previously when there were 340 as of 6 March 2020.

## The 17 March meeting with insurers

49. On 17 March 2020, a meeting took place between members of the insurance industry, including Hiscox, RSA and Zurich, the Association of British Insurers (“ABI”), Lloyd’s of London, the FCA, the Prudential Regulation Authority and the UK Economic Secretary to the Treasury. Subsequently, members of the UK Government made public statements as follows:
- 49.1. *“Let me confirm that, for those businesses which do have a policy that covers pandemics, the government’s action is sufficient and will allow businesses to make an insurance claim against their policy”.*
- 49.2. *“[A]fter extensive meetings today ... the insurance industry will honour insurance contracts that would have been triggered if the advice had been to ban certain things, rather than it being advisory not to do them. That has been agreed and negotiated by my hon. Friend [the Economic Secretary to the Treasury] ... and I thank the insurance industry for doing the right thing”.*
- 49.3. Consistently with that statement: *“What we did ... was to agree with the insurance companies as regards anyone who had a policy that would have paid out had we said, ‘The restaurant is shut,’ rather than, ‘It is best if people do not go to restaurants.’ ... We ensured that the insurance company would do the right thing, and they have said that they would”.*
- 49.4. According to the UK Government’s published “COVID-19 Fact Sheet” of 18 March 2020 (emphasis in original): *“If the only barrier to your business making an insurance claim was a lack of clarity on whether the government advising people to stay away from businesses, rather than ordering businesses to shut down, was sufficient to make a claim on business interruption insurance: ... The government’s medical advice of 16 March is sufficient to enable those businesses which have an insurance policy that covers both pandemics and government ordered closure to make a claim – provided all other terms and conditions in their policy are met”.*
- 49.5. Where COVID-19 is not named on policies, *“for those businesses which have an appropriate policy that covers pandemics and unspecified notifiable diseases, as well as government-ordered closure, the government’s medical advice of 16 March is sufficient to allow businesses to make a claim against their insurance, provided the other terms and conditions in their policy are met”.*
- 49.6. Following the 17 March 2020 “roundtable with the insurance industry”, “the Government’s social distancing instructions” would be **“treated the same as government-ordered closure for insurance purposes”** (emphasis added).

50. The Government's view was that its advice to the public not to go out and to stay away from certain businesses, as well as to socially distance was intertwined with, and indeed equated to, a business closure order for insurance purposes.
51. That represented a credible view as to how the policies should respond. It is notable that there was no statement issued by the ABI, Lloyd's of London or the insurers present at the round-table meeting which challenged this view and told the Government that its view was incorrect. Had that been done, the Government would have had the opportunity to pass mandatory legislation earlier than it did.
52. To the contrary, on 17 March 2020, the ABI stated that: "***The Chancellor's statement today is consistent with our statement this morning where we said in the event businesses have the right cover [i.e. cover for closure due to any infectious disease<sup>41</sup>], this type of notification could help make a claim. But, as the Chancellor acknowledged, the vast majority won't have purchased extended cover and this remains unchanged***"<sup>42</sup> (emphasis added) and on 18 March 2020, it issued a further statement that:

**"Only a very small minority of businesses choose to buy any form of cover that includes local closure due to an infectious disease.**

"An even smaller number will have cover enabling them to potentially claim on their insurance for the presence or impact of the Coronavirus pandemic. **The Government's clarification yesterday will help some of these policyholders claim if the other terms and conditions of the policy are met.**

"We strongly recommend that every business should check with their insurer or broker if they wish to confirm the type of cover that they have purchased."<sup>43</sup> (emphasis added)

#### Continuing action: further announcements and legislation on individuals/business closures

##### *Schools, the Coronavirus Bill and combined statements on individuals and businesses*

53. On 18 March 2020, the UK Government announced that across the country, schools would close from the end of 20 March 2020 onwards, save for making provision for the children of key workers, as well as vulnerable children, to attend schools.
54. Additionally on that date, the UK Government issued a further statement, intertwining a message regarding individuals and businesses: "*Whole household to stay at home for 14 days if one*

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<sup>41</sup> ABI Statement on Business Insurance and Coronavirus 17 March 2020 <https://www.abi.org.uk/news/news-articles/2020/03/statement-on-business-insurance-and-coronavirus/>

<sup>42</sup> Update: ABI Comment on business insurance & COVID-19 <https://www.abi.org.uk/news/news-articles/update-on-business-insurance/>

<sup>43</sup> Coronavirus: Business Insurance – further guidance from the ABI <https://www.abi.org.uk/news/news-articles/2020/03/coronavirus-business-insurance-further-guidance-from-the-abi/>

*member in that household thinks he/she has the symptoms. Avoid all unnecessary gatherings – pubs, clubs, bars, restaurants, theatres and so on and work from home if you can”.*

55. On 19 March 2020, the Coronavirus Bill was rushed through Parliament, given the danger and emergency situation. It included measures for containing and slowing the virus, including (again interlinking impacts on individuals and businesses) provisions as to events and gatherings, premises, elections and police powers. Further details are addressed below in relation to the legislation as enacted, the Coronavirus Act 2020<sup>44</sup>.
56. On 20 March 2020, the UK Government, through the Prime Minister, made a further national statement, inextricably connecting, in its response to the pandemic, a package of action linking restrictions on individuals with business closures and restrictions. “*Following agreement*” across “*all the devolved administrations*” (emphasis added):

we are collectively **telling ... cafes, pubs, bars, restaurants to close tonight** as soon as they reasonably can, and not to open tomorrow. Though ... they can continue to provide take-out services. We’re **also telling nightclubs, theatres, cinemas, gyms and leisure centres to close** on the same timescale. Now, **these are places where people come together, and indeed the whole purpose of these businesses is to bring people together**. But the sad thing is that today for now, **at least physically, we need to keep people apart**. ... some people may of course be tempted to go out tonight. But please don’t. You may think you are invincible, but there is no guarantee you will get mild symptoms, and you can still be a carrier of the disease and pass it on to others. So that’s why, as far as possible, **we want you to stay at home**, that’s how we can protect our NHS and save lives.

#### *The 21 March Regulations and subsequent instructions*

57. Consistently with the announcement of 20 March 2020, **on 21 March 2020**, the UK Government enacted the Health Protection (Coronavirus, Business Closure) Regulations 2020 (“**21 March Regulations**”)<sup>45</sup>. Made “*in response to the serious and imminent threat to public health*” posed by COVID-19, the scheme of the 21 March Regulations was as follows:
- 57.1. A person carrying on a business listed in Part 1 of the Schedule – restaurants, cafes, bars and pubs – was required: (i) to close any premises, or part of the premises, in which food or drink were sold for consumption on those premises, and (ii) to cease selling food or drink for consumption on the premises (regulation 2(1)).

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<sup>44</sup> {J/13}

<sup>45</sup> {J/15}

- 57.2. A person carrying on a business listed in Part 2 of the Schedule – cinemas, theatres, nightclubs, concert halls, museums and galleries, gyms and other prescribed businesses – was required to “*cease to carry on that business*” (regulation 2(4)).
- 57.3. A person who, without reasonable excuse, contravened regulation 2, committed an offence (regulation 3), enforceable by persons designated by the Secretary of State (regulation 4).
58. The following day, 22 March 2020, the UK Government reminded the public of the need to stay two metres apart: “*You have to stay two metres apart; you have to follow the social distancing advice ... take this advice seriously, follow it, because it is absolutely crucial*”. Again interweaving with this UK national regime on business closures and individual restrictions, on the same day the UK Government issued national guidance on enforcement of business closures.
59. In a similar vein, on 23 March 2020, PHE published guidance on physical distancing: “*If you leave your home, you must stay at least 3 steps (2 metres) away from other people*”.
60. On **23 March 2020**, the UK Government, through the Prime Minister, also issued repeat instructions, in a combined speech affecting individuals and businesses (emphasis added):

To put it simply, if too many people become seriously unwell at one time, the NHS will be unable to handle it ... And that’s why we have been asking people to stay at home during this pandemic. And though huge numbers are complying - and I thank you all - the time has now come for us all to do more. From this evening I must give the British people **a very simple instruction - you must stay at home**. Because the critical thing we must do is stop the disease spreading between households. That is why people will only be allowed to leave their home for the following very limited purposes:

- shopping for basic necessities, as infrequently as possible
- one form of exercise a day - for example a run, walk, or cycle - alone or with members of your household;
- any medical need, to provide care or to help a vulnerable person; and
- travelling to and from work, but only where this is absolutely necessary and cannot be done from home.

That’s all - these are the only reasons you should leave your home. You should not be meeting friends. If your friends ask you to meet, you should say No. You should not be meeting family members who do not live in your home. **You should not be going shopping except for essentials like food and medicine - and you should do this as little as you can**. And use food delivery services where you can. If you don’t follow the rules the police will have the powers to enforce them, including through fines and dispersing gatherings.

**To ensure compliance with the Government’s instruction to stay at home, we will immediately:**

- **close all shops selling non-essential goods**, including clothing and electronic stores **and other premises** including libraries, playgrounds and outdoor gyms, and places of worship;

- **we will stop all gatherings of more than two people in public** – excluding people you live with;
- **and we’ll stop all social events**, including weddings, baptisms and other ceremonies, but excluding funerals.

Parks will remain open for exercise but gatherings will be dispersed.

... **I know the damage that this disruption is doing and will do to people’s lives, to their businesses and to their jobs.** ... And therefore I urge you at this moment of national **emergency** to stay at home, protect our NHS and save lives.

61. Further, on 23 March 2020, the UK Government issued national guidance on further business closures, stating that the closures on the original list from 20 March 2020 were now enforceable in law (through the 21 March Regulations), and the Government would “*extend the law and enforcement powers to include the new list of premises for closure*”. The UK Government subsequently updated that guidance, to reflect developments and updates to the legislation, on 25, 26 and 27 March, and 1 and 13 May 2020.
62. On **24 March 2020**, the UK Government issued specific advice in relation to the holiday accommodation industry, stating that those businesses by now should have taken steps to close for commercial use and to remain open only for limited prescribed purposes. It provided guidance on closure requirements.
63. On **25 March 2020**, the Coronavirus Act 2020<sup>46</sup> came into force, to respond to the emergency situation and enable measures designed to amend existing legislation or create new statutory powers to mitigate the impact of the emergency situation. The Explanatory Note<sup>47</sup> to the legislation describes it as “**part of a concerted effort across the whole of the UK to tackle the COVID-19 outbreak**”, with the intention to “*enable the right people from public bodies across the UK to take appropriate actions at the right times to manage the effects of the outbreak*” (emphasis added). The Note also states “*these are extraordinary measures*” and the provisions “*relate to a wide spectrum of areas across the UK*”, “*focused on responding to circumstances that may arise as a result of the COVID-19 pandemic*”. The Coronavirus Act 2020 included provisions regarding enforcement of closure of educational institutions such as schools.

*The 26 March Regulations – further closures and restrictions*

64. Continuing its concerted action, combining steps taken in relation to individuals and businesses, in response to the pandemic, the UK Government then enacted the Health

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<sup>46</sup> {J/13}

<sup>47</sup> {J/12}

Protection (Coronavirus, Restrictions) (England) Regulations 2020 (“**26 March Regulations**”)<sup>48</sup>, with similar legislation enacted on the same date or soon afterwards in Wales, Scotland (which both formally prescribed the two-metre rule in the statute) and Northern Ireland. This put the 23 March 2020 announcement into effect and was the final step in completing the lockdown, building on the incremental advice and action and measures up to that point. The scheme of the 26 March Regulations (repealing the 21 March Regulations) was as follows:

- 64.1. Category 1 businesses: A person responsible for carrying on a business in Part 1 of Schedule 2 – restaurants, cafes, bars and pubs – was required (i) to close any premises, or part of the premises, in which food or drink were sold for consumption on those premises, and (ii) to cease selling food or drink for consumption on the premises (regulation 4(1)).
- 64.2. Category 2 businesses: A person responsible for carrying on a business or providing a service listed in Part 2 of Schedule 2 – the same businesses as those listed in Part 2 of the Schedule to the 21 March Regulations (cinemas, theatres etc), plus a few additional businesses (such as hair salons) – was required to “*cease to carry on that business or to provide that service*” (regulation 4(4)). Certain of those businesses could still use premises to broadcast a performance to people outside the premises (over the internet, radio or television) (regulation 4(5)).
- 64.3. Category 3 businesses: A person responsible for carrying on a business listed in Part 3 of Schedule 2 – such as food retailers, pharmacies, hardware stores, banks, medical or health services and dry cleaners – was permitted to continue carrying on that business (regulation 5).
- 64.4. Category 4 businesses: A person responsible for carrying on a business, not listed in Part 3 of Schedule 2 – of offering goods for sale or for hire in a shop, was required: (i) to cease to carry on that business or provide that service except by making deliveries or otherwise providing services in response to orders received (online, by phone or post); (ii) to close any premises not required to carry on its business or provide its services as permitted under the 26 March Regulations; and (iii) to cease to admit any person to its premises who was not required to carry on its business or provide its service as permitted under the 26 March Regulations. However, this did not apply to

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<sup>48</sup> {J/16}

any business which provided hot or cold food for consumption off the premises (regulation 5(1) and (2)).

- 64.5. Category 5 businesses: Certain businesses – such as accountants, lawyers, recruitment agencies, construction and manufacturing – were not listed in the 26 March Regulations, as either having their premises closed (and to cease trading) or expressly permitted to stay open.
- 64.6. Category 6 businesses: A person responsible for carrying on a business consisting of the provision of holiday accommodation (for example, hotels, bed and breakfasts, holiday apartments) had to cease carrying on that business, save for certain limited prescribed circumstances (regulation 5(3)).
- 64.7. Category 7 businesses: A person responsible for a place of worship had to ensure that the place of worship was closed, save for limited prescribed uses (regulation 5(5)). (As noted, schools were closed by Government announcement on 18 March 2020, with enforcement powers contained in the Coronavirus Act 2020.)
- 64.8. Restrictions on individuals' movement: Coupled with the restrictions on businesses (including closures) and individuals associated with them, the 26 March Regulations contained intertwined restrictions on movement. No person could leave the place where they were living “*without reasonable excuse*” (eg to get food or medical supplies, obtain or deposit money, exercise, seek medical care, assist someone, or travel for work “*where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living*”) (regulation 6).
- 64.9. Restrictions on gatherings: Similarly, interlinked with restrictions on individual movement and the business closures/restrictions, there were restrictions on gatherings; no one could participate in a gathering in a public place of more than two people except in very limited circumstances (regulation 7).
- 64.10. Enforcement: certain authorities (later designated by the Secretary of State) could take enforcement action in relation to the above provisions (regulation 8), and offences and penalties were prescribed (regulations 9 and 10) – themselves serving as a restriction and hindrance, insofar as failure to close business premises, cease business or comply with restrictions on movement could lead to enforcement action and penalties.

64.11. Application during the "*emergency period*": The restrictions and requirements contained in the 26 March Regulations applied during the "*emergency period*", which was stated to start when the 26 March Regulations came into force, and to end "*on the day and at the time specified in a direction published by the Secretary of State terminating the requirement or restriction*" (regulation 3(1)). Under Regulation 3(2), the Secretary of State was required to review the need for restrictions and requirements "*at least once every 21 days, with the first review being carried out by 16th April 2020*". As soon as the Secretary of State considered that any restrictions/requirements were no longer necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in England of COVID-19, he had to publish a direction terminating the restriction or requirement. Such termination could be as to one or more requirement or restrictions, or "*in relation to a specified business or service or a specified description of business or service*". (Similarly, under the 21 March Regulations, the Secretary of State had to review the need for restrictions every 28 days; but of course the 26 March Regulations superseded the 21 March Regulations a few days later.) Therefore, the combined impact of the nation-wide disease and the governmental responsive action was incremental and on a continuum, day on day (reflecting in turn the rapid acceleration of case growth during March, and indeed with daily governmental updates as to disease increases and the Government's approach), and the decision to lock down was required by law to continue to be revisited, and a positive decision taken to continue. For as long as COVID-19 remained a national issue, it was the national cause, in combination with lockdown, of losses.

#### Subsequent action by the UK Government

65. As noted above, subsequent to the above legislation, the UK Government updated its 23 March guidance document on businesses, on 26 March and subsequent occasions; and the devolved administrations produced similar legislation in their jurisdictions. On 4 April 2020, the Secretary of State made relevant designations as to enforcement powers under the 26 March Regulations<sup>49</sup>. On 16 April 2020, following its legislative review obligations, the UK Government extended the existing restrictions for the following three weeks, and subsequent to that, minor amendments were introduced to the 26 March Regulations on 22 April 2020 and 13 May 2020 (and on later dates, outside the scope of consideration in these proceedings). On 28 April 2020, the Secretary of State for Health and Social Care, explained that the

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<sup>49</sup> {J/17}

lockdown had been imposed universally across the UK at the same time, since “*the shape of the [infection] curve*” was similar across the whole country.

66. Overall, and as addressed in the context of discussion of the trigger mechanisms and causation below, the UK national Government proceeded in its response to this nation-wide disease in a nation-wide way, indivisibly combining action in respect of restrictions on individuals with action relating to inhibitions on businesses.

The action relied upon in this Claim

67. Paragraph 47 of the PoC<sup>50</sup> relies on orders to close premises or cease businesses on 20, 21, 23, 24 and 26 March 2020 as triggering various terms in the Wordings.
68. Paragraph 49 of the PoC relies, in particular, in relation to Category 6 businesses- holiday accommodation, on Government requirements from 16 March 2020 including on 24 March 2020.
69. Paragraph 48 relies on social distancing, self-isolation, lockdown and restricted travel and activities from 16 March 2020 as triggering various terms in the Wordings. This refers to the Government actions listed in paragraph 18 of the PoC, but some of those pre-date the 16 March 2020 and others are not Government actions. Those relied on for these purposes are those set out in paragraphs 18.9, 18.14, 18.15(b), 18.16-24 and 18.26 of the PoC.

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<sup>50</sup> {A/2/32}

#### 4) **PRINCIPLES OF CONSTRUCTION**

##### General principles

70. The Court will be familiar with the general principles of contractual construction, which are unlikely to be controversial. The FCA relies on the principles as expounded by the Supreme Court in the recent trilogy of *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900<sup>51</sup>, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619<sup>52</sup>, and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173<sup>53</sup>.
71. Contractual interpretation involves ascertaining what a reasonable person, with all the background knowledge which was known by, or would reasonably have been available to, both parties in the situation they were in at the time of the contract, would have understood the parties to mean by the language they used.
72. The key principles were distilled by Lord Hodge in *Wood* at paras 10 to 14:
- 72.1. Interpretation is a unitary exercise, involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. This requires considering the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, giving more or less weight to elements of the wider context.
- 72.2. The court can give weight to the implications of rival constructions by reaching a view as to which is more consistent with business common sense. That said, it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve its interest.
- 72.3. The extent to which textualism and contextualism will assist the court in its task will vary according to the circumstances of the particular agreement. Some contracts may be successfully interpreted principally by textual analysis, because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. Other contracts may be interpreted by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance.

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<sup>51</sup> {J/109}

<sup>52</sup> {J/127}

<sup>53</sup> {J/134}

73. Where the parties have used unambiguous language, the Court must apply it; the parties generally have control over the language they use (though in the case of standard form contracts that control may be one-sided) and it is not for the court to re-write or improve a contract: *Rainy Sky* at para 23, *Arnold* at para 20. The Court must therefore be alive to the possibility that one side may have agreed to something which with hindsight did not serve its interest: *Wood* at para 11. Thus, as Lord Neuberger put it in *Arnold* at para 19, a construction based on the commercial purpose of the contract is:

“not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.”

74. Thus it is no answer for insurers to protest that the payment of COVID-19 business interruption losses would produce losses substantially greater than the losses for which they planned. Insurance is intended to cater for both foreseen risks and those risks which are unforeseen and unexpected. An enquiry into commercial common sense is an investigation as to the situation prevailing when the contract was made. Insurance contracts necessarily concern uncertain future events, the occurrence of which is unknown and often unexpected when the contract is formed. Thus, just as an insurer bears the risk of a change in the legal landscape which occurs after the contract is entered into (*Employer's Liability Insurance Trigger Litigation* [2012] UKSC 14; [2012] Lloyd's Rep IR 371 at 391, per Lord Mance at para 70)<sup>54</sup>, so it bears the risk of factual fortuities which may occur on a scale previously unencountered (though in this case, the risk of pandemics and consequent government action was a foreseen and foreseeable risk - see paragraphs 28 to 31 above).

#### Subjective intention of the insurer

75. The subjective intentions of the parties are irrelevant to interpretation. Accordingly, pleas by insurers, widely publicised prior to this claim, to the effect that they did not intend to cover pandemics are inadmissible.<sup>55</sup> Any subjective intention is, in any case, all the more irrelevant in this case given insurers can, and do, define and exclude from their own cover epidemics and pandemics, and actions relating to them, but (subject to one exception)<sup>56</sup> chose

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<sup>54</sup> {J/112}

<sup>55</sup> PoC para 31 {A/2/23}

<sup>56</sup> RSA3 - see RSA's Def, para 84. {A/12/29}

not to argue that their wordings do so in any of the 21 lead Wordings (and non-lead Wordings) before the court in the test case.<sup>57</sup>

76. In the COVID-19 context:

76.1. in *SAS Maison Rostang v AXA France LARD SA* (22 May 2020)<sup>58</sup> (addressed further below at paragraph 152, AXA argued that the pandemic risk is uninsurable and that they could not guarantee such risk. The Paris Commercial Court held that AXA did not rely on any public legal provision mentioning the uninsurable character as a result of a pandemic, and so it was incumbent on AXA conventionally to exclude this risk; yet pandemic risk was not excluded in the signed contract between the parties.<sup>59</sup>

76.2. Similarly, in *Café Chameleon CC v Guardrisk Insurance Company Ltd*<sup>60</sup>, 26 June 2020 (addressed further below at paragraph 320, the High Court of South African Western Cape Division held that the stated intention of the insurance industry not to provide pandemic cover did not assist the respondent insurer. It was held to be inconceivable to reasonably expect that an ordinary person who is not involved in the insurance industry must have such insight and knowledge of the industry when entering into an insurance contract (para.65).

## **A. Particular features of the interpretation of insurance contracts**

### Contextual construction

77. The relevant context to be applied when construing the Wordings includes both the nature of the policies itself and the broader context in which they were agreed. The policies should be construed consistently with their commercial purpose, derived from their terms and such context.<sup>61</sup> In *Durham v BAI (Run off) Ltd* [2012] UKSC 14, [2012] 1 WLR 867<sup>62</sup>, amongst the employers' liability policies construed by the Supreme Court were those which provided an

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<sup>57</sup> PoC para 33: Zurich2 excludes from its notifiable disease cover 'any infectious diseases which have been declared as a pandemic by the World Health Organisation' {A/2/23}, while policies in Hiscox1, Hiscox2 and Hiscox4 exclude from event cancellation cover any cancellation or abandonment directly or indirectly due to 'any action taken by any national or international body or agency to control, prevent or suppress or in any way relating to any infectious disease'. {B/6/43}

<sup>58</sup> {J/143}

<sup>59</sup> See p.5 of the translation of the judgment. Unfortunately, the policy terms are not set out in the judgment and appear to be unobtainable on the basis the policy is a private document.

<sup>60</sup> {J/144}

<sup>61</sup> "...the niceties of the language have to give way to a commercial construction which is more likely to give effect to the intention of the parties." *Tesco Stores Ltd v Constable & Others* [2008] 1 Lloyd's IR 636, Tuckey LJ, para 20 {J/102}.

<sup>62</sup> {J/113}

indemnity against liabilities for injuries “sustained” during the policy period. This fell for consideration in the context of claims for mesothelioma involving injuries which were caused by exposure to asbestos during the policy period, but which did not occur until many years later. The Supreme Court relied on the nature and purpose of the policies, derived from their immediate context and terms, to conclude that the only approach consistent with the nature and underlying purpose of the policies was to construe them as intended to provide cover for injuries “caused” during the policy period regardless of when the injuries were actually sustained (Lord Mance, para 50). These conclusions were justified even if 99% of cases involved injuries which were caused at the time when they were sustained – the exceptional cases which defeated the commercial purpose could not be regarded as insignificant (Lord Mance, para 26).

78. A key contextual feature of the context of insurance contracts is that they are offered in standard form to multiple policyholders. Here, all the policy wordings being tested were provided by insurers (other than RSA4 which was prepared by Marsh/Jelf and agreed to by RSA which then expressly adopted it as its own wording.) The implications of this are considered further under *contra proferentem* below.

79. The standard form of the policies and the class of the policyholders to whom they are sold by insurers also limits the degree of background knowledge which insurers are entitled to assume. In relation to standard form contracts, in *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 W.L.R. 215. Lord Bingham of Cornhill said<sup>63</sup>:

There may reasonably be attributed to the parties to a contract such as this such general commercial knowledge as a party to such a transaction would ordinarily be expected to have, but with a printed form of contract, negotiable by one holder to another, no inference may be drawn as to the knowledge or intention of any particular party. The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed.

80. The “class of persons” to whom these policies are addressed are SME businesses of limited expertise when it comes to matters of insurance. The test of reasonable availability is not always easy to apply and requires restraint in its application.<sup>64</sup> This applies with particular force when dealing with such a class.

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<sup>63</sup> {J/95}

<sup>64</sup> See for example the split in the Court of Appeal as to what material was reasonably available to banking customers regarding CHAPS banking practice in *Tidal Energy v Bank of Scotland* [2014] 2 Lloyd’s Rep 549 {J/124} (comparing Lord Dyson MR at paras 59-60 with Tomlinson LJ at para 47 and Floyd LJ at para 24).

81. The words in the clauses are quite clear and the question will be how would they be understood by a business which limited knowledge of insurance matters. As will be seen, the policies refer to matters such as prevention and restriction of access and use, disease, actions of governments and emergencies. It is hard to think of events that more obviously qualify as falling within the ambit of such matters than the events in March 2020 in the UK. Further, on no Wording is there any clear and express statement that cover will be lost by widespread authority action or disease, or that provisions buried in trends clauses can somehow nullify cover. It is essential that when this Court considers the construction issues, it addresses the matter objectively but by putting itself in the shoes of the typical parties. In the policyholders' case, that will be as an SME policyholder, perhaps a restaurant owner in the suburbs, bringing the claim for a sub-limit of £25,000, and not as if the claimant was a fully advised sophisticated businessman or woman.
82. Similar considerations apply to the legal context within which the contract is made. Although the parties are taken to have contracted against the background of established, longstanding and settled lines of authority this principle does not extend to every decided case – were it otherwise the law would never develop and appeals would never be required.
83. In particular, in the current context, contrary to what RSA's (and possibly other insurers') assertion that the parties would have contracted against the background of the decision of Hamblen J in *Orient-Express Hotels Ltd v Assicurazioni General SpA* [2010] EWHC 1186 (Comm), [2010] Lloyd's Rep IR 531<sup>65</sup> ("*Orient Express*")<sup>66</sup>, this decision did not amount to a longstanding and settled line of authority. The first point is that the decision in *Orient Express* is distinguishable in that it was a dispute as to damage BI cover, and in fact proceeded on the basis that insuring provisions extending cover to losses arising from damage to property other than the insured property did provide indemnity. In this case, the FCA also relies on extensions to cover as providing indemnity but in contrast to *Orient Express* the extensions do not require damage to other property and are of a different nature. However, even if *Orient Express* were not distinguishable, the parties are not to be taken to have agreed the policies on the assumption that it was correctly decided, particularly in circumstances where these policies were not negotiated terms and it is unreal to suggest that knowledge of the *Orient-Express* was within the contemplation of these policyholders

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<sup>65</sup> {J/106}

<sup>66</sup> RSA Def para.30(b)(ii) {A/12/13}

84. In any event, as an appeal from an arbitral award limited to review on the basis of an error of law under section 69 Arbitration Act 1996<sup>67</sup>, alternatively as a first instance decision by the court (and without a line of earlier authority to support it)], the parties are to be taken to understand that it was always open to correction. Thus in *Re Spectrum Plus Ltd* [2005] 2 A.C. 680<sup>68</sup> Lord Hope of Craighead said, in overruling a longstanding first instance judgment:

It is a tribute to the great respect which Slade LJ's outstandingly careful judgments, both at first instance and the Court of Appeal, have always commanded that his decision in that case has remained unchallenged for so many years. But the fact is that it was a decision that was taken at first instance, and it has now been conclusively demonstrated that the construction which he placed on the debenture was wrong. This is not one of those cases where there are respectable arguments either way. With regret, the conclusion has to be that it is not possible to defend the decision on any rational basis. It is not enough to say that it has stood for more than 25 years. The fact is that, like any other first instance decision, it was always open to correction if the country's highest appellate court was persuaded that there was something wrong with it. Those who relied upon it must be taken to have been aware of this. It provided guidance, and no criticism can reasonably be levelled at those who felt that it was proper to rely on it. But it was no more immune from review by the ultimate appellate court than any other decision which has been taken at first instance.

85. Further, in *Lymington Marina Ltd v MacNamara* [2007] EWCA Civ 151; [2007] Bus. L.R. D29<sup>69</sup> Arden L.J. said:

In my judgment there can be no necessary implication that, where parties come to an agreement, that agreement must be interpreted on the basis of the law as it stood when the agreement was made as if it were in some time warp. It is part of the factual matrix known to both parties that both statute law and the common law develop over time. Developments in the common law apply retrospectively unless, exceptionally, the court makes an order for prospective overruling....

86. If the context and background drive a court to the conclusion that “*something must have gone wrong with the language*” the contract should be construed in order to get “*as close as possible*” to the meaning which the parties intended: *Chartbrook Ltd v Persimmon Homes Ltd* (HL) [2009] UKHL 38, [2009] 1 AC 1101<sup>70</sup>, paras 14 and 22-25. The correction should be framed to get as close as possible to the meaning which the parties intended, “*there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant*” (para 25). The two preconditions to the exercise of the Court's corrective role there identified merit emphasis, namely it must be clear that something has gone wrong and it must be clear what the correction should be.

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<sup>67</sup> {J/6}

<sup>68</sup> {J/96}

<sup>69</sup> {J/99}

<sup>70</sup> {J/103}

## Exclusions

87. There are a small number of exclusions in issue:
- 87.1. an exclusion in Ecclesiastical1.1-2 relating to closure by a competent local authority as a result of disease (see paragraphs 528ff below),
  - 87.2. the diseases sub-limit in RSA2.2 that RSA contends is mis-drafted and should be an exclusion (see paragraphs 616ff below), and
  - 87.3. the ‘premises not directly affected’ exclusion in Argenta1 (see paragraphs 931ff below).
88. The law concerning the proper construction of exclusions in insurance policies and interpretation *contra proferentem* was reviewed by the Supreme Court in *Impact Funding Solutions Ltd v Barrington Services Ltd* [2016] UKSC 57, [2017] AC 73. Lord Hodge’s judgment at paragraphs 5-7 (citations omitted)<sup>71</sup>:
- “5. In determining the appeal, the court has, first, to construe the relevant terms of the policy against its factual matrix and, secondly, to construe the relevant terms of the disbursements funding master agreement (“DFMA”) between Impact and Barrington once again against its factual matrix.
7. ... the general doctrine, to which counsel also referred, that exemption clauses should be construed narrowly, has no application to the relevant exclusion in this policy. An exemption clause, to which that doctrine applies, excludes or limits a legal liability which arises by operation of law, such as liability for negligence or liability in contract arising by implication of law.... The relevant exclusion clause in this policy is not of that nature. The extent of the cover in the policy is therefore ascertained by construction of all its relevant terms without recourse to a doctrine relating to exemption clauses.
89. The second key extract is from Lord Toulson’s judgment at paragraph 35:
- “The fact that a provision in a contract is expressed as an exception does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly. Like any other provision in a contract, words of exception or exemption must be read in the context of the contract as a whole and with due regard for its purpose. As a matter of general principle, it is well established that if one party, otherwise liable, wishes to exclude or limit his liability to the other party, he must do so in clear words; and that the contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed.... This applies not only where the words of exception remove a remedy for breach, but where they seek to prevent a liability from arising by removing, through a subsidiary provision, part of the benefit which it appears to have been the purpose of the contract to provide. The vice of a clause of that kind is that it can have a propensity to mislead, unless its language is sufficiently plain. All that said, words of exception may be simply a way of delineating the scope of the primary obligation.”
90. Following *Impact Funding* the following principles apply:

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<sup>71</sup> {J/132}

- 90.1. There is no general rule that exclusions in insurance contracts should be construed narrowly or *contra proferentem*. If an exclusion clause, on proper analysis, merely delineates the scope of the insurers' primary obligations, it is construed in the ordinary way.
- 90.2. The ordinary principles of construction may, however, result in an exclusion clause being given a narrow interpretation, if a broad interpretation would render the clause inconsistent with or repugnant to the commercial purpose of the policy.<sup>72</sup>
- 90.3. Further, if the exclusion clause prevents a liability from arising in the first place, by removing, through a subsidiary provision, part of the benefit which it was the purpose of the policy to provide, then it must be expressed in clear words. This is because such a clause can have a propensity to mislead unless its language is sufficiently plain. If it is not sufficiently expressed, then it should be interpreted against the insurer.
- 90.4. Interpretation *contra proferentem* can be applied in cases of real doubt or ambiguity.
91. The *Impact Funding* case was considered by Peter MacDonald Eggers QC (sitting as a High Court judge) in *Crowden v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (Comm)<sup>73</sup>; [2018] 1 Lloyd's Rep IR 83 at paras 62-65. The judge decided that if there was a genuine ambiguity in the meaning of a clause, and the effect of one of those constructions is to exclude all or most of the insurance cover which was intended to be provided by the policy, then the Court would be entitled to opt for the narrower construction. That result is achieved either by the normal process of opting for the more commercially sensible construction in cases of ambiguity, or by interpretation *contra proferentem*.

*Contra proferentem and the proferens*

92. Where, following the application of the principles set out above, there remains genuine ambiguity about the proper construction of the policy, that ambiguity is to be resolved by applying a construction which favours the insured. This arises in numerous situations below where there exists ambiguity (for example in relation to the few exclusion clauses relied upon, various trends clauses as to their scope), and causal connection and trends wording as to the appropriate counterfactual.

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<sup>72</sup> Where a clause is ambiguous, it should be construed in a manner consistent with and not repugnant to the purpose of the insurance contract: *Manchikalapeti & ors v Zurich Insurance plc (trading as Zurich Building Guarantee & Zurich Municipal) v East West Insurance Company Ltd* [2019] EWCA Civ 2163, 187 Con LR 62 **{J/141}**.

<sup>73</sup> **{J/135}**

93. In order to apply this principle, it is necessary first to identify which party is the proferens of the document being construed, against whom the principle should operate. The proferens may be either:
- 93.1. the party who drafted the wording (“*Whoever holds the pen creates the ambiguity and must live with the consequences*”, per Binnie J in *Co-operators Lift Insurance Co v Gibbems* 2009 SCC 59)<sup>74</sup>; or
- 93.2. the party in whose favour the clause operates (“*where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made*”, per Brett MR in *Burton v English* (1883) 12 QBD 218)<sup>75</sup>.
94. Application of both or either of these principles to provisions which delimit the scope of coverage provided by an insurance policy (i.e. provisions intended to limit the scope of cover in favour of the insurer) requires genuine ambiguity to be resolved against the insurer. “[T]he insurers frame the policy and insert the exceptions for their own benefit” (per Lord Hodge in *Impact Funding Solutions Ltd v Barrington Services Ltd* [2016] UKSC 57; [2017] AC 73 at 79C-E). Lord Hodge correctly identified that in the case of insurance contracts, both means of identifying the proferens will result in the application of the principle in favour of the insured. That the insurer will “frame the policy” simply means that the insurer determines the wording which reflects the insurer’s choice as to the scope of the policy. The wording is in substance that of the insurer. Exclusions are included “for their own benefit”, as are limitations (or alleged limitations) in the scope of cover defined by the insuring provisions or definitions of the policy. It is trite that an exclusion of coverage (in whatever contractual guise) operates in favour of the insurer and against the insured. Whichever basis is used to identify the proferens of a clause which delimits cover in a policy of insurance will identify the insurer as the proferens.
95. An analogy may be drawn with the construction of a condition precedent which has the potential effect of completely excluding liability in respect of an otherwise valid claim for indemnity. Given the nature of such a clause, if it is to have that effect, it must be clear; any ambiguity must be resolved in favour of the insured: *Zurich v Maccaferri* [2016] EWCA Civ 1302; [2018] 1 All ER (Comm) 12 at paras 32-33<sup>76</sup>.

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<sup>74</sup> {J/104}

<sup>75</sup> {J/34}

<sup>76</sup> {J/136}

96. The proferens must be identified according to the substance of the underlying relationship between the parties to the agreement, rather than the factual identity of the draftsman. Such an individual may be termed the ‘grantor’ of the clause even if they were not in fact responsible for its drafting.<sup>77</sup> For standard form policies where wording is provided by a broker there would need to be specific evidence to establish that the broker was acting on behalf of an insured when formulating the standard form. Such wordings would typically be agreed between the broker and insurers prior to the policies being marketed to prospective policyholders. The proper analysis in such cases is that the insurer adopts standard form wordings produced by the broker not on behalf of policyholders, but on its own behalf. By choosing to underwrite on this basis the insurer adopts the standard form wording as its own product. It follows that the contra proferentem principle applies in both its forms to such wordings.
97. This conclusion is consistent with the decision in *Involnert Management Inc v Aprilgrange Limited* [2015] 2 Lloyd’s Rep 289<sup>78</sup>, which concerned the content of proposal forms. The content of the document was the unilateral choice of the insurer even if the insurer did not choose the precise wording themselves (see, per Leggatt J at [194]). Similarly, policy wording may be “*in character and substance*” the insurers’ wording even if not physically drafted by the insurer themselves (see *Birrell v Dryer* (1884) 9 App Cas 345<sup>79</sup>, per Lord Watson).
98. The commercial reality of the policies at issue is that they are offered on terms determined by insurers and which define the scope of the policy in the manner which most benefits insurers. There is no room for any finding other than that the insurer is the proferens in such circumstances.
99. The situation may differ if the evidence in any particular case were to demonstrate that in fact a broker was acting as the agent of the insured in negotiating bespoke terms. However, in the present case, the policies under consideration in this claim were all standard form policies and were not bespoke policies or subject to individual negotiation. Some (e.g. the majority of Zurich’s policies) were sold through online portals.<sup>80</sup> Accordingly, the fact that the policyholders of Arch, Argenta, RSA (as to Types 2.1, 2.2, 3 and 4), QBE and Zurich placed the risk acting through brokers (see Agreed Facts 9<sup>81</sup>) is irrelevant. The wordings were and

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<sup>77</sup> See *Lenison* at Chapter 7(8)(d) and the cases cited therein {J/150}.

<sup>78</sup> {J/128}

<sup>79</sup> {J/35}

<sup>80</sup> Agreed Facts 9 para. 8 {C/15/2}

<sup>81</sup> {C/15}

remain the insurers' wordings. Indeed, in the case of RSA4, the policy accurately records the position, in a contractually conclusive form, by providing in its Interpretation clause, that the policy 'is accepted by and adopted as the wording of the Insurer, notwithstanding that the policy or part thereof, may in fact, have been put forward in part or full by the Insured and/or its brokers or other representatives'.<sup>82</sup> That contractually binding term reflects the reality of standard form wordings drafted by brokers. Although RSA now concedes that it was bound by that term (see its Amended Defence), it is important to record this concession.

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<sup>82</sup> General Condition 7(ix), p15 {B/20/20}

## 5) THE INSURING PROVISIONS

100. Section 6 of this skeleton argument considers common points arising on the proper construction of the trigger for insurance coverage provided by the relevant insuring provisions in each Wording. Section 7 considers disease prevalence. Section 8 considers points of general application on causation. Then coverage (including exclusions where relied on) and causation are considered on a policy specific basis in Section 9 (Public authority denial of access clauses) and Section 10 (Disease clauses).
101. For ease of reference, the relevant insuring provisions for each Wording are located in the trial bundle as follows:
- 101.1. Arch1: **{B/2}**
  - 101.2. Argenta1: **{B/3}**
  - 101.3. Ecclesiastical type 1.1 **{B/4}** and type 1.2: **{B/5}**
  - 101.4. Hiscox type 1 **{B/6}**, type 2 **{B/7}**, type 3 **{B/8}** and type 4 **{B/9}**
  - 101.5. MS Amlin type 1 **{B/10}**, type 2 **{B/11}** and type 3 **{B/12}**
  - 101.6. QBE type 1 **{B/13}**, type 2 **{B/14}** and type 3 **{B/15}**
  - 101.7. RSA type 1 **{B/16}**, type 2.1 **{B/17}**, type 2.2 **{B/18}** type 3 **{B/19}** and type 4 **{B/20}**
  - 101.8. Zurich type 1 **{B/21}** and type 2 **{B/22}**.

## 6) COMMON TRIGGER TERMS AND ISSUES

102. The individual insuring provisions and their construction and application are considered in Sections 9 and 10) below. In the present section, there is some introductory consideration of the proper meaning of common words and phrase, and of some common issues (such as the effect of a vicinity requirement) which appear in the insuring provisions.

### A. Government, public authority, civil authority

103. There are a number of different policy wordings which require public bodies to take some form of action in order for the policy to offer coverage. The public bodies are referred to by way of differing terminology.

#### Government

104. Many policies require action of the 'government'. The UK Government naturally falls within these definitions and this is not disputed by the Defendants.

#### Public authority

105. Hiscox1-4 (disease clauses) require proof of action by 'a public authority'. MSAm1in3 and RSA2.1-2.2 require proof of action by 'a competent public authority' (and the term 'Public Authority' is capitalised in RSA2.1-2.2 but, while the policy says (e.g. top of p9 of RSA2.1<sup>83</sup>) this should mean the terms are defined, no definition of these words is in fact provided).

106. Several cases have considered the meaning of the term 'public authority' used in the Human Rights Act 1998<sup>84</sup>. While obviously a different context, some guidance can be taken from these decisions. These cases conclude that, in the 1998 Act, the phrase 'public authority' is not a term of art, but is clearly intended to refer to bodies whose nature is governmental (in a national or local sense). The most obvious examples of public bodies include government departments, local authorities, the police and the armed forces, whose classification as public bodies is based on factors such as the possession of special powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, a statutory constitution and the exercise of public functions.

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<sup>83</sup> {B/17/9}

<sup>84</sup> {J/7}

107. The central government is the predominant example of a ‘public authority’ and it is not disputed by these Defendants that the Government satisfies this definition.<sup>85</sup>
108. As for what is required for the public authority to be ‘competent’<sup>86</sup>, guidance can be taken from the decision of the Supreme Court of New South Wales in *Cat Media v Allianz Australia Insurance* [2006] NSWSC 423, (2006) 14 ANZ Insurance Cases 61-700<sup>87</sup>. The insured had contracted with a manufacturer whose licence had been suspended by the Delegate of the Secretary of the Department of Health and Ageing. The insured sought to recover under a disease closure clause in a BI policy, which insured against loss arising from ‘closure or evacuation of the whole or part of the Premises by order of a competent public authority consequent upon: i. human infectious or contagious disease occurring at the Premises...’. It was held that the ‘competent public authority’ was simply the public authority with jurisdiction to order closure or evacuate in response to disease and the other trigger events, which differed according to the relevant event. I.e. it was the public authority that was competent. The competent public authority in relation to such actions resulting from disease was the Department of Health and/or relevant instrumentality under its control, and so on the facts the suspension of the insureds’ manufacturer’s licence by the Delegate was not a ‘closure or evacuation’ order by a competent public authority.
109. A further example of a ‘competent’ authority is provided by *Midland Mainline Ltd v Commercial Union Assurance Co* [2003] EWHC 1771 (Comm)<sup>88</sup>. Following the Hatfield rail disaster, Railtrack imposed emergency speed restrictions at various sites across the rail network. The claimant’s BI policy provided cover for “the Insured being prevented from or hindered in the use of or access to any station depot or track or other part of the rail network... caused by (a) the action of the Insured or other competent authority for reasons of public safety...”. It was not in dispute that Railtrack was a ‘competent authority’ within this clause.
110. In the context of COVID-19 and a BI policy, in *Café Chameleon CC v Guardrisk Insurance Company Ltd*<sup>89</sup>, 26 June 2020 (addressed further at paragraph 320 below), the High Court of South Africa, Western Cape Division held that “competent” essentially means an authority that has jurisdiction in the area (at para. 44.1).

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<sup>85</sup> PoC para 44.2 {A/2/29}, Hiscox Def para 85.4 {A/10/23} (where the admission is implicit), Ecclesiastical/MSAmlin Def para 92 {A/9/34}, RSA Def para 47 {A/12/19}.

<sup>86</sup> MSAmlin3 {B/12/50}, RSA2.1 {B/17/35}, RSA 2.2 {B/18/50}

<sup>87</sup> {J/98}

<sup>88</sup> {J/88}

<sup>89</sup> {J/144}

## Civil authority

111. The natural meaning of a ‘civil authority’ is (at least) any authority of the state operating in the civilian as opposed to military (or religious) sphere.<sup>90</sup> The Government is, of course, the archetypal civil authority (save perhaps where it is a military government, which is not the case in the UK).
112. MSAm1 and Zurich2 require proof of action by ‘the police or other competent local, civil or military authority’, while Zurich1 in materially similar terms requires proof of action by ‘the Police or other competent Local, Civil or Military Authority’ (which terms are not defined despite capitalisation).
113. For the purposes of the test case Wordings and establishing coverage, the FCA does not need to and does not rely on the references to ‘local authority’<sup>91</sup> or ‘police’ or ‘military authority’ but only ‘civil authority’, although policyholders may of course seek to rely on such terms elsewhere in relation to wordings that are not being tested and which do require local authority or police action to establish coverage.
114. MSAm1 accepts that the Government was a competent civil authority.<sup>92</sup> Zurich disputes it. Its argument is addressed below at paragraphs 647ff, but for present purposes it is enough to note that this kind of composite provision is deliberately broad, and intended to capture all relevant public authorities, including local, police, military, and central or local government authorities. The word “competent” again simply requires the specified authority (here a civil authority) have jurisdiction to act. As the government can (and has) done this within the powers available to it, it is a competent civil authority within these clauses.

## Statutory authority

115. Although present in a number of wordings, it is only in relation to Hiscox 2’s NDDOA clause that the FCA relies on the Government being a ‘statutory authority’ within the phrase ‘police or other statutory authority’.<sup>93</sup> Hiscox does not appear to deny that the Government satisfies this definition.<sup>94</sup>

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<sup>90</sup> See, e.g., *The Shorter Oxford Dictionary of English* (6 edn, 2007) meaning 1 of ‘civil’: “Of or pertaining to citizens; relating to the internal organization of a society, state, etc”.

<sup>91</sup> This is however relevant to whether an exclusion referring to “competent local authority” is applicable in Ecclesiastical 1.1-1.2: see paras 528ff below.

<sup>92</sup> Implicitly in MSAm1 Def paras 50 {A/9/21} and 69-70 {A/9/28}

<sup>93</sup> PoC para 44.4 {A/2/29}

<sup>94</sup> Hiscox Def para 83 {A/10/21}

## B. “Action” or “advice”

116. A number of the policies require “actions or advice” by the relevant public authority—see Arch1, RSA2, RSA4. Arch does not dispute that any of the relevant Government actions relied upon by the FCA fall within this definition.
117. Others refer only to ‘action’—see Ecclesiastical1.1-2, MSAm1in1 and 3 and Zurich1-2. Ecclesiastical appears to accept that “*advice, instructions, guidelines, announcements and legislation*” (in relation to churches<sup>95</sup>) all amount to action—see paragraph 495 below. MSAm1in appears to accept that “*advice, instructions and/or announcements*” and legislation were actions<sup>96</sup>. Only Zurich argues that ‘action’ does not include “*advice or guidance*”—see paragraph 640 below.
118. The natural meaning of ‘action’ is an act or thing done.<sup>97</sup> ‘Advice’ means a recommendation or suggestion.<sup>98</sup> In the context of public authority action, ‘actions’ and ‘advice’ are overlapping, since giving advice is, as an act or thing done, an action. There is no warrant for reading ‘action’ restrictively (as Zurich does) as excluding speech acts, especially for a public authority which acts through pronouncements, advice and other communications. The objective bystander would not regard the advice and guidance provided by the Government following the publication of the COVID-19 “*action plan*” on 3 March 2020 as a failure to take any ‘action’ in response to danger posed by COVID-19. The relevant action included social distancing guidance issued on 16 March 2020 and the statements of the Prime Minister on 16 March 2020. This was action even if not amounting to the exercise of a legal power backed by sanction. The relevant extension in Arch1 is headed ‘Government or Local Authority Action’ – showing the addition of ‘advice’ referred to in the clause itself is directed at ensuring comprehensiveness, rather than extending the cover provided.

## C. “imposed by”, “order of”, “enforced”

119. Hiscox1-4 (public authority clauses) and Hiscox 1-2 and 4 (NDDA clauses) and ‘MSAm1in2 refer to restrictions/denial or hindrance ‘imposed’, and Hiscox1-2 and 4 (NDDA clauses) and MSAm1in2 refer to denial or hindrance ‘by order of’ the government. RSA4 refers to ‘enforced’ closure.

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<sup>95</sup> Ecclesiastical/MSAm1in Def 54 {A/9/22}

<sup>96</sup> Ecclesiastical/MSAm1in Def 54 {A/9/22}

<sup>97</sup> See, e.g., the *Shorter Oxford Dictionary of English* (6 edn, 2007) meaning 3: “*A thing done, a deed, an act...*”.

<sup>98</sup> See, e.g., the *Shorter Oxford Dictionary of English* (6 edn, 2007) meaning 4: “*An opinion given or offered as to action...*”.

120. Hiscox says these must be “*mandatory, that is to say have the force of law and compliance with which is compulsory, not actions falling short of this, or advice*”<sup>99</sup>—see below paragraphs 372ff.
121. MS Amlin says that “*nothing short of legislation or legally enforceable requirement could suffice*”<sup>100</sup>—see below paragraphs 756ff.
122. RSA4 says that advice does not suffice, but orders (including by Government announcements on 20, 23 and 24 March 2020, not only legislation) do<sup>101</sup>—see below paragraph 567.
123. The FCA’s arguments in relation to each Wording are set out below, but in summary:
- 123.1. The Government is the highest public authority. If it tells its citizens to do something then that is mandatory, and is an ‘imposition’ and ‘order’ and any such closure is ‘enforced’ (in the sense that the demand to close was being imposed or pressed home and/or the Government was causing closure to happen by reason of necessity).
- 123.2. This is the case whether or not the instruction from the Government uses the word ‘order’ etc—in a time of crisis when the Government is speaking to citizens it may couch its instructions in all sorts of language, but the important thing is whether the core sense is that what the citizen is being told/asked to do is not understood to be optional giving the citizen a genuine choice but rather to be compulsory.
- 123.3. It is the case whether or not the instruction is backed by legislation or not. The 2m rule was never legislated. The power to close schools was legislated but not exercised as the instruction was enough. The closure of various businesses, prohibition on mass gatherings and “stay at home” instruction were instructed first, then legislated afterwards. The public would understand these all to be things that had to be done or complied with, and would so do or comply. They were not ‘voluntary’. They would not be expected to and would not work out the legal basis for the Government’s pronouncements and whether there were legal grounds for a police or other sanction for non-compliance. If they did happen to know that there was no sanction for non-compliance, they would equally know that in the event of non-compliance, the Government would seek to ensure compliance by one means or another.

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<sup>99</sup> Hiscox Def para 83.1 {A/10/21}

<sup>100</sup> Ecclesiastical/MS Amlin Def para 75.7 {A/9/31}

<sup>101</sup> RSA Def paras 46(c), 49-50 {A/12/19}

123.4. All of these requirements were ‘imposed’ or Government ‘order’ or ‘enforced’ within the meaning of these terms, being Government interventions that the Government (and indeed the insurer) would expect UK citizens to comply with.

#### **D. COVID-19 fulfils disease requirements**

124. It is common ground that COVID-19 fulfils the various disease requirements specified by insuring provisions triggered by disease, including that it became a qualifying notifiable disease within the meaning of the various different wordings to that effect on 5 March 2020 in England and 6 March 2020 in Wales.<sup>102</sup>

125. Understanding the nature of what a ‘notifiable disease’ means for these purposes is nevertheless of some relevance in construing these Wordings. The detail of the notification regime is set out in Agreed Facts 5<sup>103</sup>. In short:

125.1. The Health Protection (Notification) Regulations 2010<sup>104</sup> were made pursuant to a power in the Public Health (Control of Disease) Act 1984<sup>105</sup> to make regulations under the that “*make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales*”;

125.2. Those Regulations require doctors and laboratories to notify any suspected cases of diseases on the relevant list in Schedule 1 to the Regulations or causative agents in the list in Schedule 2 that “*presents or could present significant harm to human health*” to the local authority, who must then notify PHE.

125.3. On 5 March 2020 in England COVID-19 was added to the disease list and SARS-CoV-2 was added to the causative agents list.<sup>106</sup> Similarly for Scotland on 22 February 2020 when the Public Health (Scotland) Act 2008<sup>107</sup> was amended; in Northern Ireland on 29 February 2020 following similar amendment to the Public Health Act (Northern

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<sup>102</sup> PoC paras 18.7 {A/2/8} and 36-37 {A/2/24}, Argenta Def paras 14 {A/8/4}, 54 {A/8/13}, Ecclesiastical/MSAmlin Def paras 15.2 {A/9/7}, 66 {A/9/26}, Hiscox Def paras 50 {A/10/12}, 74 {A/10/18}, QBE Def paras 31.2 {A/11/7} and 46, RSA Def paras 16(b) {A/12/5} and 37 {A/12/15}, also Arch Def para 49.6 {A/7/16} and Zurich Def para 25 {A/13/7}

<sup>103</sup> {A/9}

<sup>104</sup> {J/11}

<sup>105</sup> {J/5}

<sup>106</sup> Regulation 2(2) of the Health Protection (Notification) (Amendment) Regulations 2020 {J/19},

<sup>107</sup> {J/9}

Ireland) 1967<sup>108</sup>; and in Wales on 6 March 2020 following similar amendment to the Health Protection (Notification) (Wales) (Amendment) Regulations 2020<sup>109</sup>.

126. The FCA does not in this test claim seek to establish a trigger prior to the disease becoming notifiable under the UK legislation. However, it remains open for policyholders in other fora to advance the argument (a point that arose in the Hong Kong case of *New Harbourview* considered below at paragraph 307ff) that on their proper construction the Wordings are triggered by the earlier occurrence of a disease which later becomes notifiable, rather than by the later rendering of a disease notifiable under statute.
127. The exception is RSA4, which (as RSA does not dispute) expressly backdates the trigger to the date of the outbreak of the notifiable disease by the wording ‘such disease will be deemed to be notifiable from its initial outbreak’. It is therefore necessary to fix the date of the initial outbreak, although this is unlikely to affect the date of cover because RSA4 also requires the occurrence of COVID-19 within the Vicinity of the Insured Location, and that will never be earlier than the ‘initial outbreak’ of COVID-19. The FCA’s case is that the date of the initial outbreak was 31 December 2019 (when the first cases in Wuhan were confirmed). This is unlikely to be a matter of particular significance in the present Claim given that the FCA uses 16 March 2020 as the date for the commencement of Government action and that Government action as a reference point for arguments about interruption or prevention or hindrance of access, but it remains open for individual policyholders to assert, for example under a disease clause, that their business was interrupted or interfered by the impact of the disease and accordingly the Court is asked to rule on this issue.

#### **E. “Prevent” and “hinder”**

128. On dictionary definitions, to “prevent” is to “act or do in advance” or “stop; hinder; avoid” and to “hinder” is to “do harm to; injure; damage” or “keep back, delay, impede, obstruct, prevent”.<sup>110</sup> “Prevention” is sometimes used with “hindrance”<sup>111</sup>, although some policy forms use “prevention” as the sole criterion. There are a number of policies which respond where the circumstances constitute “prevention of access to”,<sup>112</sup> “access... being prevented”,<sup>113</sup>

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<sup>108</sup> {J/4}

<sup>109</sup> {J/18}

<sup>110</sup> *Shorter Oxford Dictionary of English* (6<sup>th</sup> edn, 2007)

<sup>111</sup> Ecclesiastical1.1 {B/4} and 1.2 {B/5}, MSAMlin3 {B/12}, RSA2.1 {B/17} and 2.2 {B/18}, RSA4 (second DoA clause) {B/20}

<sup>112</sup> Arch1 {B/2}

<sup>113</sup> Ecclesiastical1.1 {B/4} and 1.2 {B/5}

“access... [will/shall] be prevented”,<sup>114</sup> or “prevent... access” to.<sup>115</sup> “Prevent” is also used in relation to ‘use’ in versions of this form of words: “prevents or hinders the use of or access to”<sup>116</sup>. Several of the Wordings respond to a prevention or hindrance of access or use of the premises. These clauses thus provide four combinations: prevention of access, prevention of use, hindrance of access, and hindrance of use. Some of the insurers with such language in their policies contend in their Defences that this prevention requires a total closure of the business<sup>117</sup> or requires entry to the premises to be physically obstructed or impossible.<sup>118</sup> This is wrong.

129. Policies that use ‘prevent’ encompass any action which stops either completely or partially the otherwise free access to or use of the Premises for its usual business purposes and activities. Policies that use ‘prevent and hinder’ also encompass any action which makes more difficult the otherwise free access to or use of the Premises for its usual business purposes and activities and there is no threshold in the policies or to be read into them for the degree of interference required to establish a ‘hindrance’; anything that makes access to or use of the Premises more difficult (subject, perhaps, to a de minimis threshold) should constitute a ‘hindrance’. These clauses are also unlimited as to the subject of the interference, meaning anything which prevents or hinders owners, employees and/or customers of an insured business is captured.
130. Finally, there is no requirement that the nature of the prevention or hindrance has to be a physical one, e.g. that customers are physically prevented from accessing the premises by police tape. This means anything which prevented access to any extent or made access to or use of the premises more difficult, whether physical or otherwise, is captured: for instance, curfews or guidance/orders to stay away from the premises, all of which impede the otherwise free access or use of a premises on which businesses rely.
131. Insurers may seek to rely on what the Courts have said about the meaning of “prevent” and “hinder” in other cases but those address the meaning of those words in the context of clauses in ordinary contracts for the supply or shipment of goods providing for the suspension or termination of the contract where the factual and contractual context and the subject-matter of the provision supported giving the word its narrowest possible meaning.

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<sup>114</sup> MSAm1in1 {B/10}, Zurich1 {B/21} and 2 {B/22}

<sup>115</sup> MSAm1in3 {B/12}, RSA2.1 {B/17}, 2.2 {B/18} and 4 {B/20}

<sup>116</sup> RSA2.1 {B/17} and 2.2 {B/18}, and 4 {B/20}, MSAm1in3 {B/12}, Ecclesiastical1.1 {B/4} and 1.2 {B/5}

<sup>117</sup> E.g. para 7.7 of Arch Def {A/7/4}

<sup>118</sup> E.g. para 39(4) of Zurich Def {A/13/16}

132. In *Tennants (Lancashire) Ltd v CS Wilson* [1917] AC 495<sup>119</sup>, the defendant failed to deliver part of a promised instalment of magnesium chloride to the claimant over the year 1914, due to a shortage in obtaining the material, the majority of which came from Germany. A contractual term provided that “Deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers (such as... war... ), causing a short supply of labour, fuel, raw material, or manufactured produce or otherwise preventing or hindering the manufacture or delivery of the article”. Various judges considered the meaning of these words.
- 132.1. Lord Atkinson said that ““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” (p518).
- 132.2. Earl Loreburn said that “hindering” meant “interposing obstacles which it would be really difficult to overcome”, and said that even a large price rise would not “hinder” delivery (p.510). On the facts, he agreed that the short supply “hindered delivery. It did not prevent delivery or make it impossible, but it hindered delivery” (p.510-511).
- 132.3. Lord Dunedin referred to the view given by Neville J in the Court of Appeal, reading “hinder” as meaning “in any way affecting to an appreciable extent the ease of the usual way of supplying the article” (p514).
- 132.4. Lord Finlay LC (dissenting) said that “prevention” must refer to physical or legal prevention, and that “hindering” must refer to an interference with the manufacture or delivery from the same cause as “preventing,” but interference of a less degree (p509).
133. *Tennants* was applied in *Peter Dixon and Sons v Henderson* [1919] 2 KB 778<sup>120</sup>. The defendant had agreed to sell wood pulp through 1911 to 1917, with the contract stating “The buyers or sellers may suspend deliveries under this contract pending any contingency beyond their control which prevents or hinders the manufacture of paper or the manufacture or delivery of pulp, namely, Act of God, War” etc. British ships were generally unavailable throughout the war, but foreign ships were available. The Court of Appeal upheld the arbitrators’ decision to find that the clause applied. Bankes LJ repeated the definitions given by Lord Atkinson and Earl Loreburn in *Tennants* (p.786). Eve J stated at p.788:

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<sup>119</sup> ¶/41}

<sup>120</sup> ¶/44}

“If... I have three alternative means of reaching this building, and on a particular occasion I find that two of such means have been suddenly suspended... and the third is so overcrowded as to preclude my using it, I should say that those facts would amount to a hindrance of my arrival here; none the less so, if by reason of some gratuitous lift in a motor car I ultimately reach my destination... it must be borne in mind that the mere fact that there was a possibility of surmounting the hindrance does not do away with or remove the hindrance. If the hindrance is insurmountable then it becomes prevention, and no longer hindrance”

134. In *Re Comptoir Commercial Anversois & Power, Son & Co* [1920] 1 KB 868<sup>121</sup> a shipping policy stated that “In case of prohibition of export, force majeure, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof shall be at an end”. Bankes LJ held that the judge was right to describe prevention as “a physical or legal prevention” (p885). Scrutton LJ addressed the meaning of “preventing” at 898:

“First, as to the prevention of shipment by hostilities, it is remarkable that the arbitrators, who find this as a fact, also find that the sellers shipped all the goods under their contracts in accordance with their tenders. They have obviously in my view put a very wide and erroneous meaning on the word ‘prevention’. Economic unprofitableness is not ‘prevention’, though a very high price for the article sold may be evidence of such a physical scarcity due to hostilities as amounts to prevention by hostilities. They have not considered whether the ships in which the contract goods were placed could physically go to the contract ports, but have rested themselves on the fact that the voyage might be financially unprofitable for the sellers, if they were not insured against war risk, and financed from shipment till payment. I agree with the judge below that no facts are found which amount to prevention by hostilities in the true meaning of that term.”

135. Finally, in *Westfälische Central-Genossenschaft v Seabright Chemicals Ltd* (Court of Appeal, 22 July 1980)<sup>122</sup> the claimant sought damages for the defendant’s failure to supply fertiliser. The contract stated that the defendant “shall not be responsible for any failure to fulfil any contract or part of any contract to the extent to which fulfilment has been delayed, hindered or prevented by acts of God, strikes, lock-outs, riots or civil commotions, war restriction, perils of the sea, accidents of navigation, breakdown or injury to ships, plant or facilities used for manufacture or transportation or any other circumstances beyond the control of the sellers”. Lawton LJ (Bridge and Dunn LJJ agreeing) held that the meaning of the word “hindered” in the *Tennants* case may be *obiter*, but that the judgments should be given “compelling force”. He relied only on the speeches of Earl Loreburn (p.510) and Lord Atkinson (p5.18), and concluded that:

“the hindering of deliveries does not come about merely because there is a difficulty. It only comes about if the difficulty is of such a nature as to be really difficult to overcome. In both industry and commerce difficulties in the performance of contracts constantly arise, and it is only if, to follow what Lord Loreburn said, the difficulty is of such a nature as to be likely to dislocate the running of a business that there has been “hindering” under this type of clause.

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<sup>121</sup> {J/45}

<sup>122</sup> {J/62}

It follows... that it is necessary... to look to see whether the difficulties undoubtedly met by Seabright... were of a kind which it was really difficult to overcome”.

136. Insofar as these cases suggest that “prevention” requires physical impossibility and “hindrance” requires obstacles which are “really difficult to overcome”, such tests are inappropriate, and overly strict, in the present context. The clauses considered in these cases were in reality operating as exclusion clauses in that they suspended or terminated a party’s obligations in the event that its performance was “prevented” or “hindered”. It is unsurprising that Courts read the term narrowly: reading the clauses too broadly would render it almost universally applicable to any difficulties brought about by normal economic vicissitudes, thereby subverting the force of the party’s contractual obligations. Furthermore, these case are addressing the simple situation of the supply or shipment of goods, not access to or use of premises which give rise to a far greater variation of factual circumstances. There is no justification for interpreting “prevent” or “hinder” in this narrow way here; the words should be given their ordinary and natural meaning.
137. The mere fact that action taken to prevent something happening by making it more difficult for it to happen does not result in complete prevention does not mean that there was not prevention to the extent that prevention was achieved. The Royal Society for the Prevention of Accidents seeks to prevent as many accidents from happening as is possible but would not realistically expect to prevent all accidents. Nonetheless, a material reduction in the number of accidents resulting from measures take at the instigation of the Society would accurately be described as having prevented the accidents represented by the reduction. Similarly, fire prevention strategies are aimed at preventing the occurrence or spread of fire but would not be expected to give an absolute guarantee that there would be no fire or spread of fire. Prevention does not have to be complete and absolute in order for there to be any prevention at all. Similarly, the mere fact that the action taken was only aimed at prevention to a defined extent does not mean that there was not prevention to that extent. For example, a road closure save for access by residents would still be a prevention of access for non-residents.
138. It would not be consistent with the ordinary use of language to say that access to a road which has been closed to all but residents only “hinders” rather than “prevents” access by non-residents simply because it was physically possible for non-residents to disobey the restriction and drive down the road, removing or manoeuvring around any barriers intended to obstruct use of the road as a through route and taking the risk of being caught and punished for doing so.

139. Some further examples help show why the insurer's arguments as to what prevention means (for example physical prevention or legal prohibition is required) are wrong; alternatively are met on the facts as set out.
140. If the police erected “do not cross” tape barriers across the road leading to the insured premises in an attempt to close off that section of the road to any pedestrian or vehicular traffic, there would be a prevention of access even if the barrier could easily be ignored and crossed by a pedestrian if there was no policeman there physically to enforce it and there were no powers to punish a person for doing so. To put it another way, the fact that someone could and did disregard and disobey the police tape would not result in there being no “prevention”.
141. None of the policy provisions express any limitation as to how the prevention may affect access or (where applicable) use. Where deployed in the context of business interruption insurance, ‘prevention’ must be given a meaning which reflects the purpose of the provision, judged in the context of the cover provided by the policy and the (usually wide) range of businesses it is intended to cover, i.e. whether the relevant persons (as to which see below) are prevented from having access or use of the premises to carry out the business. Insurers provide this type of cover because businesses depend on the ability of their owners, employees, suppliers and customers to access and use their premises *for the purposes of the business*.<sup>123</sup> That is the commercial context in which these clauses must be construed. Interference or interruption of a business may be caused by a total prevention of access to premises. However, it may be caused only by prevention of access by suppliers or customers, or access by a particular means (e.g. vehicular access) or access via a particular entrance. In each case, there is relevant prevention of access for the purposes of these provisions.
142. A business required to close completely by the 21 or 26 March Regulations – such as a pub – was clearly subject to a prevention (and hindrance) of access or use.
143. This is generally accepted by insurers, but many are seeking to draw a bright line in relation to those that were permitted to stay open. This is a substantive point, especially for those policies that are triggered only by ‘prevention’ (not hindrance).

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<sup>123</sup> See to similar effect Roberts, *Riley on Business Interruption* (10<sup>th</sup> edn, 2016) at 10.32 **{J/154}**. Businesses which are online-only may not be so dependent, but (save in all but the smallest of businesses) are still likely to require employees and suppliers physically to attend warehouses and other business premises to process orders, even if their customers are accessible remotely.

144. Those businesses which were permitted to stay open, either in part or in full, were also subject to a prevention of access or use because:
- 144.1. partial closure is sufficient;
  - 144.2. the corpus of Government advice, instructions and (later) orders to “stay at home”, socially distance, self-isolate, restrict travel and activities, and work from home were aimed at preventing people from accessing businesses either entirely or at least to a defined extent (e.g. a visit to a shop for basic necessities became the only form of shopping trip that was permitted; the Government sought to prevent access to any shops for any other purpose);
  - 144.3. and adversely affected the ability of owners, employees, suppliers and/or customers to access and use insured premises for the purposes of the business.
145. Even before the 21 or 26 March Regulations, or for those not required expressly to close by those Regulations, the Government had issued sufficient instructions to meet any prevention test. As set out above, by 16 March 2020 the Government was asking people to stay at home and observe social distancing; by 20 March the clear instruction was to keep people apart; by 23 March the instruction was that people “must stay at home” (emphasis added) and by 26 March the requirement to stay at home with very narrow exceptions was enshrined in the legislation with penalties for non-compliance.
146. Take a potential customer of a clothing shop (which was still allowed to stay open) on 24 March. That person had been told on 16 and 23 March to stay at home for all non-essential purposes. Attending that shop would be a non-essential purpose. That person has for all practical purposes been prevented from accessing the shop because he or she has been told in terms, by the Government, not to attend the shop. Further, the owner and operator of the business (the insured) has been told that people should not leave their homes to attend the insured's business shop. The shop owner/operator has also been told to “stay at home”. The legislation forcing closure has not yet been passed, but the practical effect is the same; he or she has been told not to go to the shop to open it and the potential customers have been told not to attend the shop. In all practical terms there has been a prevention of access.
147. The fact that, for example, the shop owner could attend the premises on 24 March to attend to a flood or fire is irrelevant – there is no access for the purpose which is insured, namely making money by selling clothing to customers.

148. The same applies to other businesses who were not expressly required to close after 21/26 March Regulations; in reality if a proposed customer for a recruitment agency or financial adviser set off to visit their premises on 28 March, the proposed customer could be stopped and fined by a police officer for leaving home for a reason that was not essential. Therefore, there has for the same reasons as set out above, been a prevention or denial of access in the proper sense of the word. The same applies to the insured running such business; they can physically attend the premises, but not for the purposes insured, as its customers were not allowed to attend their premises and/or had been instructed not to leave their homes.
149. The same applies where there has been a partial closure. Suppose customers could enter a restaurant to collect a takeaway meal, but were prohibited (by criminal law) from entering the restaurant in order to purchase any food or drink to consume on the premises. The owner is not prevented from entering the premises, nor are staff, but customers are prevented from accessing or using the premises for its purpose *qua* restaurant, which is the principal purpose or at the very least one of the principal purposes for which the premises is insured. There is no commercial sense in insurers treating such prevention as not being relevant ‘prevention’ for the purposes of the policy. Interpolating the words “prevention [or hindrance] of access to [and/or] use of the premises *qua* business” makes clear what these clauses are designed to achieve and is the only commercially sensible way in which such policy terms can be understood.
150. Consider the following further examples:
- 150.1. a retail business operating on two floors of a shopping centre, which suffers a fire in a stairwell (not part of the insured premises). The stairwell provides access to the first floor and houses the fire-escape. The fire service requires the first floor to be closed to the public because there is no fire escape. The shopkeeper is able to enter both floors to undertake tasks related to the business, such as the removal of stock or taking steps to repair the damage, however, his customers cannot – their access is prevented.
- 150.2. a restaurant with a takeaway service which usually brings in 20% of profits. The takeaway is operated from a collection point opening onto a street from the back of the premises, behind the kitchen. Access to the dine-in area is from the front of the premises, on a street running parallel to the road to the rear. The street at the front of the premises is subject to a security incident (siege/hostage/terrorist event etc.). The police close the road, effectively preventing access to the dining room for patrons of

the restaurant. The closure continues for 5 days, as the street is the subject of a criminal investigation. The dining room is closed for the entire period, but the takeaway remains open. Access to the dining room by customers is prevented.

151. In all of these examples, access has been prevented in the sense intended by the insuring clause – there is a degree of prevention which results in loss. As these examples illustrate, it would be commercially absurd to construe the insuring provision as required a total prevention of access for all persons in all circumstances. Alternatively, insofar as it is held that there is no prevention, there is hindrance under those policies that cover hindrance as well as prevention. Considering the identified categories of business:

151.1. *Category 1:* in the case of restaurants, cafes, bars and public houses, the effect of regulation 2(1) of the 21 March Regulations and regulation 4(1) of the 26 March Regulations was to prevent access – customers were prevented from entering the premises, irrespective of the carve-out in relation to the sale of food or beverages for consumption off the premises. There was also prevention (or hindrance) of access and/or use by virtue of the 16 March “stay at home” and “social distancing” announcements and the 20 March announcement.

151.2. *Category 2:* in the case of cinemas, theatres, nightclubs, gyms and other prescribed businesses, the effect of regulation 2(4) of the 21 March Regulations, requiring operators to cease those businesses, was to prevent customers or clients accessing the premises.<sup>124</sup> There was also prevention (or hindrance) of access and/or use by virtue of the 16 March “stay at home” and “social distancing” announcements and the 20 March announcement.

151.3. *Category 3:* in the case of certain food retailers (such as supermarkets), pharmacies, petrol stations, banks, medical or other health services and other prescribed businesses, regulation 5(1) of the 26 March Regulations expressly permitted those businesses to stay open. However, those businesses had to comply with UK Government advice on social distancing, safety and hygiene, to the extent such business could not comply the effect of the guidance was to prevent customers from accessing the premises. Further, access to such premises by customers or those working at the premises was only permitted insofar as it was compliant with Government guidance (e.g. on going out

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<sup>124</sup> Regulation 4(4) of the 26 March Regulations expanded that list of businesses required to close fully (for example to include hairdressers)

only to shop for basic necessities, for medical needs, for exercise and, only if it was not possible to work from home, for work, and complying with social distancing). Members of the public were, therefore, not permitted to access these premises other than for the permitted purposes and in a permitted way, which prevented (or hindered) access and/or use. There was also prevention (or hindrance) of access and/or use by virtue of the 16 and 23 March “stay at home” and “social distancing” announcements.

- 151.4. *Category 4*: in the case of shops offering goods for sale or hire, regulation 5(1) of the 26 March Regulations required the operator to cease the business and close, save for making deliveries or otherwise providing services in response to orders received through a website, telephone or post, and close premises not required for those purposes – the effect of the regulations was to prevent access to the premises required to close. There was also prevention (or hindrance) of access and/or use by virtue of the 16 and 23 March “stay at home” and “social distancing” announcements.
- 151.5. *Category 5*: there were also businesses not expressly required by the 21 March Regulations or the 26 March Regulations to close (fully or partially), nor expressly permitted by the 26 March Regulations to stay open. Those businesses, including manufacturers, accountants’ offices, financial services advisers, recruitment consultants and other service businesses, to the extent they remained open (fully or partially) were subject to the UK Government’s advice (and, in Wales and Scotland, legislation) on staying at home and social distancing. To the extent such business closed because they could not comply with the advice its effect was to prevent customers and/or those working at the premises from accessing the premises. Further, and in any event, access to such premises by customers or those working at the premises was only permitted insofar as it was compliant with Government guidance. If it was not essential it would not be. Inevitably this would mean that at the very least access to and/or use of the premises by customers and, in the vast majority of cases, by those working at the premises was prevented (or hindered).
- 151.6. *Category 6*: in the case of hotels and other holiday accommodation, regulation 5(3) of the 26 March Regulations required operators to cease the business, it had the effect of preventing guests from entering premises, irrespective of the carve-out in relation to the provision of accommodation to certain prescribed categories of individuals, such as critical workers. There was also prevention (or hindrance) of access and/or use by virtue of the 16 and 23 March “stay at home” and “social distancing” announcements.

151.7. *Category 7*: from the end of 20 March 2020, nurseries and educational establishments were closed (save for vulnerable children, children of critical workers and the provision of online lessons), this had the effect of preventing children from accessing premises. Regulation 5(5) of the 26 March Regulations had the same effect in respect of preventing access to places of worship, irrespective of the carve-out for funerals, to broadcast an act of worship or provide essential voluntary services or urgent public support. There was also prevention (or hindrance) of access and/or use by virtue of the 16 and 23 March “stay at home” and “social distancing” announcements.

152. Coverage for the degree of prevention of access suffered by such businesses is consistent with the judgment of the Paris Commercial Court in *SAS Maison Rostang v AXA France LARD SA* (22 May 2020)<sup>125</sup>. In that case the Court found, on an interim summary basis, that there was a total or partial administrative “closure” (*fermeture*) of business premises within the meaning of a business interruption policy issued by AXA where a French decree required a restaurant to “no longer welcome the public” but permitted it to remain open as a takeaway.<sup>126</sup> The contrary position adopted by insurers was dismissed as “not serious”.

## F. “Access” and “use”

153. As for the meaning of ‘access’ and ‘use’: where these words are used together they should be construed (in this context) as a pair. The natural meaning of the word “access” in this context is the right, permission, or ability to enter or approach a premises.<sup>127</sup> The natural meaning of (the verb) “use” in this context is to utilise or employ the premises for or with some aim or purpose,<sup>128</sup> and “use” (as a noun) simply means the act of using something.<sup>129</sup>

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<sup>125</sup> ¶/143}

<sup>126</sup> The decree prohibited accommodation of the public (“*ne peuvent plus accueillir du public*”) in various categories including N ‘Restaurants and drinking places, except for their delivery and take-away activities, the “room service” of hotel restaurants and hotel, and contract catering’ (“*Restaurants et débits de boissons, sauf pour leurs activités de livraison et de vente à emporter, le “ room service” des restaurants et bars d’hôtels et la restauration collective sous contrat*”). <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000041722917&dateTexte=20200323>

<sup>127</sup> See, e.g., *Oxford Dictionary of English*: “The means or opportunity to approach or enter a place”; Merriam-Webster: “Permission, liberty, or ability to enter, approach, or pass to and from a place or to approach or communicate with a person or thing”, “freedom or ability to obtain or make use of something”, or “a way or means of entering or approaching”; Black’s Law Dictionary: “A right, opportunity, or ability to enter, approach, pass to and from, or communicate with”.

<sup>128</sup> See, e.g., *The Shorter Oxford Dictionary of English* (6 edn, 2007): “\_\_\_”; Merriam-Webster: “To put into action or service: avail oneself of”, or “to carry out a purpose or action by means of”; and see also the various definitions given in “Words and Phrases Legally Defined” (Hay, 2018)

<sup>129</sup> See, e.g., *The Shorter Oxford Dictionary of English* (6 edn, 2007): “the act of using something; the fact or state of being used; application or conversion to some purpose”.

154. However, it is clearly possible for both the “access” to and the “use” of a premises to be prevented or hindered in circumstances which will have commonly arisen as a result of the action and advice of the Government.
155. An example of this is the impact of social distancing requirements on businesses subject to the Category 3 Restrictions such as pharmacies and food shops (whether supermarkets or convenience or grocery stores) and hardware stores. In order that a distance of two metres be maintained between those on the premises, customers could only be admitted to such premises in sufficiently small numbers to make it possible to maintain that distance. Clearly this would be a prevention or hindrance in the “use” of the premises. Hindrance of use is self-explanatory but it would or would also be prevention of use because the insured would be prevented from using the premises as it ordinarily would and/or only partial use is possible. But it would also be a prevention (or hindrance) of access, to the extent that such measure prevented additional persons from entering premises and prevented the free and unrestricted access to the premises for customers on which the insured relied for the normal operation of its business. This is disputed by the Defendants.

#### **G. “Closure” or “restrictions”**

156. The first PoA clause in RSA4 responds to interruption or interference as a result of “*defective sanitation or any other enforced closure of an Insured Location*”. RSA1 provides cover for loss as a result of “*closure or restrictions placed on the Premises*”.
157. As only RSA Wordings raise the question of the meaning of closure, it is discussed in the RSA4-specific section at paragraphs 568ff.

#### **H. “Interruption” and “interference”**

158. Most of the Wordings indemnify loss resulting from an “interference” and/or “interruption” with the insured business.<sup>130</sup> The core dispute arises for those policies with only ‘interruption’ wording, as to which Defendants’ position is generally that interruption requires a complete cessation of the business, and is not satisfied by partial cessation (e.g. where mail order or take-away continues, or service is still provided to a limited number of exceptional customers

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<sup>130</sup> Some Wordings, for example Arch, simply require a reduction in turnover or increase in costs of working resulting from (in the case of Arch) a prevention of access to the insured premises, without reference to ‘interruption’ or ‘interference’.

identified in the Regulations) or by the stay-at-home and related orders that prevented customers using the business.

159. These terms require some “operational impact” on the business which causes loss - see *The Silver Cloud* (CA) per Rix LJ at paragraph 113. The policy in *The Silver Cloud* include two insuring provisions, one of which required interference “with the scheduled itinerary” of a cruise ship and the other for a cruise to be “interrupted” with a resulting loss of time (see paragraphs 110-111 of the judgment). That clause, like the BI clauses in issue in this Claim, was concerned with the operational impact of the damage on the business, although the provisions in *The Silver Cloud* are narrower than those under consideration here<sup>131</sup> as they specify what part of the business’s operations must be interfered with/interrupted.
160. Subject to any additional requirements, interference or interruption with an insured business (or ‘your activities’<sup>132</sup> or its ‘usual activities’<sup>133</sup>) could be physical or economic, but a requirement for some “operational impact” (per Rix LJ) is key. These terms are intentionally wide, to capture the variety of means by which the specified triggers may impact on the operations of a business. For example, this could be by closure of premises in whole or part, loss or reduction of customers, restriction on the modes of business than can be carried on, loss or reduction in supplies, loss or reduction in the insured business’s capacity to generate turnover or simply an increase in the cost of working.
161. Hence it is unsurprising that, for example, Argenta has admitted that the advice, instructions and/or announcements referred to in paragraphs 46 and 49 of the PoC and the legislative measures pleaded in paragraph 47 of the PoC were capable of causing an ‘interruption’ to the business of policyholders for the purposes of Extension 4(d) of its policy.<sup>134</sup>
162. Whilst it is accepted that an ‘interruption’ to a business, in contrast with ‘interference’, requires some element of cessation, that requirement must be viewed in terms of the operational requirements of the business. A business would be ‘interrupted’ where it was not able to carry out its operations in the manner that it had been and would ordinarily have been carrying out those operations without contravening the advice, instructions and/or announcements referred to in paragraphs 46, 47 and 49. An example would be a clothing store which was unable to continue to sell clothes in store. It may have decided to extend or even commence

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<sup>131</sup> See para 107 of the appeal judgment and para 37 of the first instance judgment.

<sup>132</sup> Hiscox1 {B/6}, 2 {B/7}, 3 {B/8}

<sup>133</sup> Ecclesiastical1.1 {B/4} and 1.2 {B/5}

<sup>134</sup> Para 58 and 59 of Argenta’s Def {A/8/15}

its online sale capability. To the extent that it does carry out such a mail order service it may keep open any premises required for that business, but otherwise must close its premises.<sup>135</sup> However, the business that was insured was in whole or in part an in-store sales facility. That insured business or part of the insured business was truly interrupted, and a reasonable reader would understand that to be the case. The fact that the insured business changes and develops to keep some funds flowing, or happens to be a business with several parts only some of which are interrupted, is nothing to the point.

163. As to the degree of cessation, Hiscox's contention that 'interruption' to the insured's 'activities' within the meaning of Hiscox 1-4 requires a cessation of the insured's business or business activities and that "a constriction in flow" is not an interruption<sup>136</sup> goes too far. A mere constriction in customer footfall is not of itself enough to amount to an interruption, e.g. if the business stays open but just has a lower day of takings such as due to broader market forces. However, the 'interruption' to 'activities' in the Hiscox Wordings arises only where there is an inability to use the premises or a denial/hindrance of access. Where those terms are satisfied, an interruption is likely to follow. It is a question of the substance of the business before and after the inability to use the premises or denial/hindrance of access: if part of the business ceases (including through closure which was not mandated by any authority but was for business reasons as a result of the inability/denial/hindrance), or the reduced flow is sufficient to mean that in substance the business or part of it has ceased: vulnerable people being required to stay at home will for most businesses not interrupt their activities; all people staying at home save for essential journeys will, for example, for businesses reliant on customer footfall be sufficient to amount to an interruption of the business's activities, likewise requiring a business to keep 2m distancing between customers (and employees) would ordinarily be sufficient to amount to an interruption to the insured business's activities. It impedes access to and by customers to an extent that has a major operational impact, interrupting the normal functioning of the business.
164. And, as discussed above, an interruption of part of the business's activities is sufficient to qualify, just as partial closure can amount to closure (see *SAS Maison Rostang v AXA France LARD SA* (22 May 2020)<sup>137</sup>, discussed above at paragraph 152).

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<sup>135</sup> Reg 5(1) of the 26 March Regulations.

<sup>136</sup> Hiscox Def para 15.2 {A/10/6}

<sup>137</sup> ¶/143}

165. The meaning contended for by Hiscox would have remarkable effects which cannot have been intended. It would mean that in none of the three examples given at paragraphs 149 to 150 above would any indemnity be payable despite the operational interruption of a significant part of the insured's business. It would also mean that a factory with three production lines which suffered a fire damaging two of the production lines would suffer no interruption of its business simply because the third undamaged production line could still operate. That defies any commercial sense and cannot have been how the word "interruption" was intended to operate.
166. Indeed, in common with other policies, the Hiscox policies positively contemplate that the insured may well continue to receive income from the business notwithstanding the interruption because income actually received during the period of interruption is part of the indemnity calculation under the definition of "Loss of income"—the indemnity is for the difference between actual income and estimated income, thus assuming that 'interruption to your activities' does not cut off income. That must in turn be contemplating that the interruption may be partial. That is not surprising as almost all Wordings include an express obligation requiring the insured to take reasonable care to avoid or minimise interruption.<sup>138</sup> Furthermore, this is also consistent with the policy contemplating operational interruption, in the sense that the normal functioning of the business is interrupted, e.g. if it can no longer freely allow customers to visit its premises but must restrict numbers in the premises at any one time so as to ensure that social distancing is maintained. That would naturally follow from any social distancing requirements, given that most of the Wordings include a version of an obligation to take reasonable precautions to avoid illness or injury, and to comply with statutory and other obligations.<sup>139</sup>
167. In the present case the impact on policyholders is operational. The advice, instructions and/or announcements in paragraphs 46, 47 and 49 of the PoC were measures affecting the operations of affected businesses.
168. This is the only sound commercial construction of the requirement for interruption. The term cannot require that businesses have been specifically ordered to close, although many categories of businesses were.

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<sup>138</sup> All the Wordings in this Claim seem to have such a clause, other than MS Amlin's. Hiscox1 says "*You must... make every reasonable effort to minimise any loss, damage or liability and take appropriate emergency measures immediately if they are required to reduce any claim.*" {B/6/19}

<sup>139</sup> Hiscox's says "*You must take reasonable steps to prevent accident or injury*" {B/6/18}

169. Such interruption may have been short in duration, for example whilst the business underwent a period of restructuring to alter its premises (e.g. introducing plastic screens and distancing markings) and operations (for example altering production to allow for takeaway/mail order only) so as not to contravene advice, instructions and/or announcements. However, even a short period in which operations ceased would amount to an interruption (perhaps subject to a de minimis exception). The speed at which advice and instructions were issued and the unprecedented nature of the measures required in response to the spread of the virus may have meant that some businesses were able to carry on their operations after a short period of closure. Those businesses will still have been caused an interruption as a result of the measures referred to.

### **I. “Emergency” and “danger”**

170. Certain policies require that the action or advice of Government be due to “emergency”. For example, Arch1 requires “*an emergency which is likely to endanger life or property*” and Ecclesiastical1.1 and 1.2 require ‘*an emergency which could endanger human life or neighbouring property*’, with no vicinity limit (to which the interfering government action or advice is due). RSA2.1 and 2.2 require “*an emergency likely to endanger life or property in the vicinity of the Premises*”. Zurich1 and 2 and MS Amlin1 require a “*danger or disturbance in the vicinity of the Premises*”.

171. The FCA’s case is that there was such an emergency and danger from at least 3 March 2020 (when a UK Government action plan was published, quarantining was in place, and there were 176 Reported Cases across the country), alternatively 12 March 2020 (when the UK Government elevated the risk level to high, following COVID-19 being designated notifiable in the UK and characterised as a pandemic by WHO, and a week after the first reported UK death).<sup>140</sup> The national/public emergency, and the associated danger, affected all localities with the UK - the need to impose a lockdown in each locality was the necessary response to the presence of the danger posed by the (actual or potential) occurrence or manifestation of COVID-19 in each such locality. See further section 3 above and section 7 below.

172. Arch, Ecclesiastical and MS Amlin have admitted that the presence and/or the real risk of the presence of SARS-CoV-2 and/or of COVID-19 amounted to an emergency which could

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<sup>140</sup> PoC para 43 {A/2/28}. The WHO declared ‘Public Health Emergency of International Concern’ on 30 January 2020. The Prime Minister described the pandemic in the UK as an “emergency” in his statements of 16 March 2020. The preamble to the 21 March Regulations states that they were made in response to the “*serious and imminent threat*” posed by COVID-19. Their application depended on an “emergency”, in that Regulation 2 provided for the ‘*Requirement to close premises and businesses during an emergency*’.

endanger human life from 3 March 2020 (Arch) or 12 March 2020 (Ecclesiastical and MS Amlin) onwards.<sup>141</sup> RSA admits that there was a public emergency from 12 March 2020 but denies that it was an emergency within the vicinity of the premises.<sup>142</sup>

173. Thus there is a large measure of agreement that there was an emergency endangering life, the issues being the date it commenced and when it is satisfied where there is a vicinity clause.
174. The danger which was posed by the (actual or potential) occurrence or manifestation of COVID-19 underpinned the “emergency” in each case. This also amounted to a ‘danger’ for the purpose of those insuring provisions triggered by ‘danger or disturbance’. Where undefined, these terms should properly be given a of wide meaning and were clearly intended to cater for the wide range of circumstances in which action might be taken by authorities, whether in response to fires, riots, bomb scares or public health threats. Action taken in response to the danger of infection by disease is self-evidently sufficient to trigger such clauses.
175. Where ‘disturbance’ is used as an alternative to ‘danger’ (as in MS Amlin1 and Zurich1-2), there is no basis for constraining the natural meaning of ‘danger’ by reference to the meaning of ‘disturbance’ as the Defendants suggest. The use of ‘or’ makes it clear that these are separate and alternative bases of cover even if in some cases they may occur together. Neither term is defined in the policy. There is no basis to ascribe anything other than the ordinary and natural meaning to the word ‘danger’.

## **J. Provisions subject to a Vicinity Requirement**

176. A number of insuring provisions incorporate vicinity requirements, requiring the presence of disease at the insured premises or, which is more relevant for the issues tested in this Claim, to be within a certain distance of the premises (Argenta1, Hiscox4, MS Amlin1-2, QBE1-3, RSA1 and 3).
177. Vicinity requirements are also incorporated into some insuring provisions requiring an emergency, danger, incident within the specified vicinity without any reference to disease (Hiscox1-2 and 4, MS Amlin1-3, RSA2 and 4, Zurich1-2).

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<sup>141</sup> Arch Def para 36 {A/7/13}; Ecclesiastical/MS Amlin Def para 35 {A/9/18}.

<sup>142</sup> RSA Def para 34 {A/12/15}.

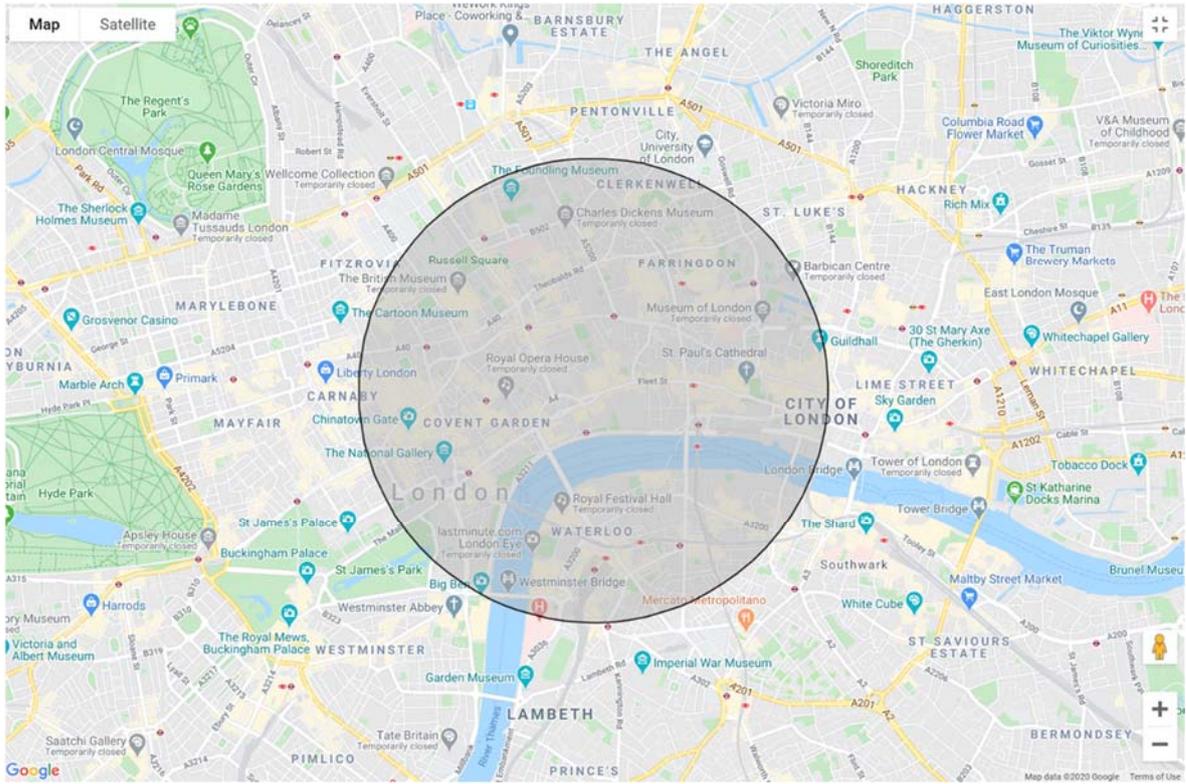
178. Where the requirement extends beyond the premises the distance is either specified as within 25 miles or 1 miles of the premises or alternatively, by reference to ‘within the vicinity’, either defined (RSA4)<sup>143</sup> or undefined (all other Wordings).
179. What is required to happen within the specified vicinity in terms of a relevant emergency, or danger is considered under the preceding heading. What is required in terms of occurrence, manifestation or sustaining of disease or other incidents is considered below in relation to specific insurers and the general issue of prevalence (section 7 below) but, in brief terms, the FCA’s case is that the requirements for disease/occurrence of disease or the sustaining or manifestation of disease or for other incidents are all satisfied by a person who has contracted COVID-19 being present within the specified vicinity, and would be diagnosable if tested, whether or not medically verified or symptomatic (Argenta agrees, MSAmclin seems to agree, QBE’s case is unclear, and Hiscox says that medical verification is required). This section considers the characteristics of the insured peril in circumstances where this is established within a specified vicinity.
180. By way of context, a 1 mile radius of the Royal Courts of Justice stretches as far as Piccadilly Circus to the west and Cannon Street to the east, covering 3.14 square miles. A 25 mile radius stretches almost as far as Maidenhead to the west and Basildon to the east, covering an area of 1963.5 square miles. That area is bigger than any city and around a quarter of the size of Wales.

Map showing 1 mile radius around the Royal Courts of Justice<sup>144</sup>

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<sup>143</sup> RSA4 defined “Vicinity” by reference to the 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*”. {B/20/35}

<sup>144</sup> Maps created using <https://www.mapdevelopers.com/draw-circle-tool.php>



Map showing 25 mile radius around the Royal Courts of Justice



181. The purpose of the clauses is to provide coverage in respect of interruption and interference with a policyholder's business. Vicinity requirements specify a minimum proximity for the occurrence of an insured peril from the insured's premises for trigger purposes: e.g. it must be 25 miles away or nearer. Once coverage is triggered the question is the extent to which the insured peril has caused insured losses.
182. A number of Defendants argue that their insuring provisions do not extend to covering the economic impact of wider pandemics, but instead are intended only to cover local interruption. They seek to argue that the vicinity provisions are intended, in effect, to provide a maximum extent for the insured peril (e.g. Hiscox says that because the clause says 'within' not 'within and without' it must mean only within<sup>145</sup>). This forms the basis of the Defendants' causation arguments because the Defendants say that any part of the insured peril which extends beyond that limit (thus the disease outside 25 miles etc) is to be treated as a separate and independent and, the Defendants say, the sole proximate cause (i) of nationwide government action and (ii) of interruption and loss. They also say that the disease outside the limit being a separate cause means that it is a concurrent independent cause, meaning that the only loss caused on a 'but for' basis by the peril within the limit is that which would not have arisen had there still been a disease all over the world save for within the 25-mile (etc) circle.
183. Such a construction would require clear words to exclude the effects of events which fall within but also extend beyond the specified vicinity, especially where (and this is addressed in more detail in relation to individual Wordings, starting with Hiscox 1, 2 and 4 NDDA clauses at paragraphs 730ff, also e.g. the discussion of QBE's Wordings at paragraphs 825ff):
- 183.1. The Wording contemplates that there might be a disease or other trigger occurrence extending beyond the limit. This is true in general (wherever a distance limit is imposed there may be events straddling the border) but most obviously true for
- (a) notifiable diseases (which are outbreaks of infectious diseases),
  - (b) cover contemplating government action (governments would usually only respond to wide area dangers),
  - (c) cover with 25 mile limits (dangers that can affect a business from 25 miles away, whether via public authority intervention or otherwise, are likely to be wide area).

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<sup>145</sup> Hiscox Def 80.2. {A/10/20}

- 183.2. Dividing an event (fire, disease, etc) into parts within and without a limit is unrealistic as the peril would not or would not be bound to have occurred in this way. See paragraph 245 below as the law's approach to determining the counterfactual that would actually have occurred, not an artificial construct. The suggested division approach is even weaker in the case of something, such as a disease, which is not an event but is a long-term occurrence. Allowing for diseases some considerable distance from the premises is a deliberate move away from simply insuring on premises events, and the latter has little to teach in relation to the former.
- 183.3. Further, such a division has no commercial purpose. The parties cannot have intended that in such cases it would be necessary to embark on a complex analysis of causation to determine what losses of the business were caused by the effect of the measures within the 25 mile vicinity and what effects were attributable to the very same measures outside the vicinity. Such a construction would require an entirely artificial exercise to divide up the effects of a single set of measures, one the insured and insurer are not equipped to do, and which would cost more than the relevant sub-limit to perform. Moreover, this is a cost the insured would not be able to recover, unlike reasonable accountant's charges in preparing a claim, which are recoverable under most Wordings.
- 183.4. The Defendants could easily have specified that the cover was to respond to interruption or loss that was solely caused the disease or danger within the limit and not concurrently caused by the disease or danger outside the limit. The Defendants could have specified not a trigger requirement, but an exclusion or limit on what is recoverable. They did not do so. The better reading of the 25 mile maximum remoteness distance is as 'something extra' (cf *The Silver Cloud*) to trigger the cover but which does not then cut down the insured peril: i.e. there is cover for diseases which extend within 25 miles, not only for diseases solely to the extent that they are within 25 miles.
184. Whether the Wordings cover pandemics follows from the above construction question—it does not dictate the answer to it—but the prima facie cover in the above circumstances is for wide area emergencies or diseases, and it is therefore for the insurers to exclude pandemics if they wish to. None have done so (although Zurich<sup>2</sup> and Hiscox<sup>1-2</sup> and 4 include pandemic exclusions for other covers).

185. In this context it pays to compare other insuring provisions, in respect of which such arguments might equally apply. One example is extensions that provide cover for business interruption caused by accidental interruption to utility services.<sup>146</sup> For example, the Ecclesiastical 1.1 wording provides cover for loss resulting from interruption of or interference as a result of the failure “of the supply to your premises of electricity, gas or water”.<sup>147</sup>
186. Such terms have the potential to make insurers liable for both local and wide-area events, provided the local supply is affected. The most common claims would be local to the insured premises. However, wider area events can and do occur. For example, on 9 August 2019, a blackout in England & Wales and some parts of Scotland caused loss of electricity to over 1 million customers.
187. Clearly, events such as accidental failure of public supplies of electricity have the potential to impact upon a large number of policyholders over a wide geographical area. If insurers wish to limit or exclude cover for such wider effect events they must use clear words to do so (see for example the sub-limit and exclusions to the Ecclesiastical Failure of Supply Cover<sup>148</sup>). The mere link between the insured premises and the insured peril does not import an element of locality.

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<sup>146</sup> This is a non-damage insuring provision, which can be contrasted with provisions covering losses caused by physical damage to the property of utility services (e.g. as found in the Hiscox policies).

<sup>147</sup> {B/4/45}

<sup>148</sup> {B/4/45}

## 7) PREVALENCE OF COVID-19 IN THE UK

### A. Introductory comments

188. On some policies, the trigger for cover requires COVID-19 to be present within a particular area relative to the premises (for example, within a radius of 25 miles, or 1 mile, from the premises). It might be thought that proof of COVID-19 was obvious, especially since one of the principal defences being run by the Defendants is that the cause of loss was a pandemic. However, it seems that is not the case and so this issue must be tackled.
189. It is of course important to keep in mind that a number of these claims will be sub-limited, for example to £10,000 or £25,000; it would be regrettable if policyholders faced a barrage of technical and scientific hurdles to establishing the simple fact of the presence of COVID-19 in their Relevant Policy Area (as defined in the Amended Particulars of Claim) when there is clear and transparent publicly available information. That is why the FCA has persevered in seeking to provide policyholders with such assistance and clarification as it is possible to achieve in the context of this hearing.
190. While the FCA has sought to put some structure around such proof, the concepts are very simple. Proof can be specific known cases to the insured or insurer, or cases as reported and published by the government at a local level, or deaths in hospitals. Then there are all the cases which went untested and unrecorded, and it is in relation to such cases that there has been the greatest controversy as to the quantification (rather than as to whether they exist at all).
191. It is accepted by the Defendants that the prevalence of COVID-19 was “*much higher*” in the UK during March 2020 than was reported by the UK Government, since testing during that time was very limited and there were asymptomatic cases.<sup>149</sup> We will never know precisely how “*much higher*”, and to expect to know that is to require the impossible. However, as set out in the Amended Particulars of Claim and below, there are methodologies by which a policyholder should be able to seek to demonstrate, on the balance of probabilities, that COVID-19 was present for the purposes of the policy wordings, based on the best evidence available. That evidence includes: (a) specific evidence showing COVID-19 in a particular case (“**Specific Evidence**”); (b) NHS and Office of National Statistics (“**ONS**”) death data (“**Death Data**”); (c) Reported Cases, as defined in the Amended Particulars of Claim, including an averaging methodology described below; and (d) estimates of the likely true

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<sup>149</sup> See RSA’s Amended Def (adopted by relevant Defendants) para 23(c) {A/12/9} and Agreed Facts 3 {C/5} and {C/6}

number of cases, prepared (using models) by suitably qualified academic institutions in conjunction with the UK Government. There is a sound and straightforward basis on which a policyholder can meet the standard of proof, as described further below. It will produce a reliable answer for the vast majority of cases, with a small minority (such as those relating to very rural areas) more difficult to demonstrate.

## **B. What needs to be proved: the *Equitas* approach**

192. In *Equitas Ltd v R&Q Reinsurance Co (UK) Ltd* [2010] 2 All ER (Comm) 855<sup>150</sup>, the court had to consider whether the fact that the LMX market had wrongly aggregated certain losses and included irrecoverable losses precluded Equitas from recovering under reinsurance contracts for recoverable losses, absent the ability to replicate the LMX spiral at each level without the introduction of the wrongly aggregated and irrecoverable elements.<sup>151</sup> It was “*common ground that Equitas has not sought to replicate or reconstruct the LMX spiral in this fashion and realistically common ground that it is (at least) now impossible to do so*”.<sup>152</sup> Similarly in the present case, it is impossible to replicate circumstances to assess the precise number and location of those infected with COVID-19.

193. Equitas alleged that its losses could be proved, on the balance of probabilities, through the use of actuarial modelling. R&Q responded that Equitas was entitled to nothing: unless Equitas could prove the sums were properly due, contract by contract – “*estimating and guesswork will not do*”<sup>153</sup> – Equitas could not recover; and R&Q challenged aspects of Equitas’s model, though without furnishing any rival model of its own.

194. Gross J found in favour of Equitas. In particular:

194.1. He held that Equitas was not required to adopt the precise process of regression on which R&Q insisted: “*a suitable actuarial model*” could be used.<sup>154</sup>

194.2. As regards the burden of proof (emphasis added), the court stated:

[T]he concern here lies with the ‘evidential and therefore a **shifting burden of proof**. If this be right, then Equitas is entitled to seek to discharge the legal burden resting upon it ... by **the use of the best evidence it has available**; should such **evidence prima facie suffice** to discharge that legal burden, Equitas does not need to undertake

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<sup>150</sup> **J/107**

<sup>151</sup> *Equitas* para 2

<sup>152</sup> *Ibid*

<sup>153</sup> *Ibid* para 4

<sup>154</sup> *Ibid* para 67

a process of regression; **it would be for R&Q to mount a sufficient response which necessitates Equitas doing so.**<sup>155</sup>

- 194.3. Further, the judge held that once established that an Equitas liability did, as a matter of the balance of probabilities, fall within the cover of the policy, liability would be established.<sup>156</sup>
- 194.4. Moreover Gross J considered that a claimant “*is left to take decisions on the manner of proving its claims, using the best evidence available and upon which the claim may or may not succeed*” and is not bound “*to prove a loss at each underlying level in the chain – a matter of which a claimant may ordinarily have no or the most limited knowledge*”.<sup>157</sup> Similarly here, a policyholder may have limited knowledge of the presence or cases of COVID-19 within a particular area, so must be able to rely on “*the best evidence available*”. And just as would be the case in *Equitas* if strict proof of loss were required, the market/policyholders in the present case would “*collapse beneath a sea of inquiry*”.<sup>158</sup>
- 194.5. In response to R&Q’s suggestion that the models relied on by Equitas could not discharge the burden of proof because “*statistical evidence could not bridge the gap*” between particular percentiles, and approximations were involved, Equitas stated that the models need only provide “*reasonable representations*”, that they drew on actual data, and there was no basis for a suggestion that certain characteristics “*might render an averaging process unrepresentative*”.<sup>159</sup> The parallels with the current case are clear. Gross J held, after considering the detail of the models employed (including certain assumptions within them): “*Equitas must be free to deploy such evidence as it chooses to satisfy the burden of proof*” and “*I can see no proper logical or principled objection to the use of the models here*”.<sup>160</sup> Notably, “*if the choice facing Equitas was to abandon its claims (because the LMX spiral could not be reconstructed) or to seek to make good its claim by using a model, I see no reason why it should be precluded from making the attempt*”.<sup>161</sup> The same applies to the policyholders in the present case.
- 194.6. On the facts before him, Gross J was “*satisfied ... that the models are capable of establishing a minimum figure for the recoverable losses ... to a standard of a balance of probabilities*”.<sup>162</sup>

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<sup>155</sup> Ibid para 70

<sup>156</sup> Ibid para 71

<sup>157</sup> Ibid

<sup>158</sup> Ibid para 77

<sup>159</sup> Ibid para 89

<sup>160</sup> Ibid para 107

<sup>161</sup> Ibid. See also the court’s conclusion at the end of para 109

<sup>162</sup> Ibid para 117

As discussed further below, the same should apply to the Imperial and Cambridge models referred to in the current proceedings.

194.7. Prior case law “*specifically left open the possibility of the use of statistical evidence to discharge the burden of proof in an appropriate case*”, and in the court’s view, *Equitas* was such a case.<sup>163</sup>

So is the present case.

195. Drawing from *Equitas*, then, and particularly the passage quoted above as regards the “*shifting burden of proof*”, two central issues arise for consideration in the present case:

195.1. first, what type of proof (in particular, the types of evidence which could be used, and the way in which that evidence can be used and/or applied) which could be sufficient for a policyholder to discharge the burden of proof (the methodology question); and

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

196. As per the above passage from *Equitas* regarding the “*shifting burden of proof*”, following a policyholder’s reliance on particular types of evidence, as prima facie discharging the burden of proof – a rebuttable presumption – it would then be open to an insurer to seek to demonstrate that the policyholder’s methodology was unreliable or that some other methodology would be appropriate in the particular circumstances. That approach is espoused in the Amended Particulars of Claim, and strikes the right balance between interests.

### **C. The types of evidence on which a policyholder may rely**

#### **(a) Specific Evidence**

197. The use of Specific Evidence (as defined above) is straightforward: as the Defendants have admitted,<sup>164</sup> a policyholder may be able to prove a case of COVID-19 at a particular location by the utilisation of Specific Evidence in a particular case. Therefore, for example, if a policyholder has Specific Evidence in the form of widespread reports that the care home down the road from the policyholder’s premises has been the location of an outbreak of COVID-

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<sup>163</sup> Ibid para 118

<sup>164</sup> RSA’s Amended Def (adopted by relevant Defendants) para 21(a) {A/12/8}; QBE’s Def para 35.1 {A/11/9}.

19, the policyholder should be able to rely on that evidence to prove the presence of COVID-19 for the purposes of the relevant policy wordings.<sup>165</sup>

## (b) Death Data

### *NHS Trust data*

198. As stated in the Amended Particulars of Claim paragraph 23<sup>166</sup>, policyholders may be able to prove a case of COVID-19 at a particular location using “*evidence from NHS data as to COVID-19 deaths in particular hospitals*”. This is straightforward data published by the government: see page 13 of Agreed Facts 3<sup>167</sup>. In its Defence paragraph 35.2, QBE admitted that this evidence may be used.<sup>168</sup> By contrast, RSA’s Amended Defence (and the Defendants adopting it) contended (paragraph 21(b)) that “*such data may not ... without more, be an accurate or reliable indicator as to the location of any particular death or deaths*”, because NHS hospital Death Data identify the NHS trust operating the facility in which patients died, but do not identify the specific facility in which a death occurred, “*save, by implication, where a particular NHS trust operates only a single facility*”.<sup>169</sup>
199. As contended in the FCA’s Reply,<sup>170</sup> this apparent impediment to reliance on the daily Death Data for a particular NHS trust does not apply if (a) as appears to be admitted in RSA’s Amended Defence paragraph 21(b), there is only one hospital in that particular NHS trust and that hospital is in the Relevant Policy Area, or (b) if all hospitals in that particular NHS trust are within the Relevant Policy Area.
200. Therefore, at the least, a policyholder may rely on NHS Death Data, as a type of evidence utilised to discharge the burden of proof, in the above two specific contexts. It can also rely on NHS Death Data outside those two contexts where it has additional Specific Evidence in conjunction with the NHS Death Data, to support its case.

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<sup>165</sup> As alleged in the Amended PoC, a further type of Specific Evidence on which a policyholder may rely is evidence as to hospital or care home admissions, for example in the Relevant Policy Area. The FCA acknowledges that a policyholder would need supplementary Specific Evidence to support its case, such as public information demonstrating that a hospital in question was reported as holding COVID-19 patients. The short point, though, is that this is a further type of evidence on which a policyholder may rely to support its case.

<sup>166</sup> {A/2/17}

<sup>167</sup> Note: Agreed Facts 3 not yet fully agreed at the date of this skeleton {C/5} and {C/6}

<sup>168</sup> {A/11/9}

<sup>169</sup> {A/12/8}

<sup>170</sup> {A/14/13}

## *ONS Death Data*

201. In a similar vein, a policyholder may also rely, as a type of evidence, on weekly reports as to COVID-19 deaths produced by the ONS, as explained in Agreed Facts 3<sup>171</sup>. The ONS produces those data by local authority, health board and place of death (including hospitals, hospices, care homes, homes and other locations).
202. As set out in Agreed Facts 3, a policyholder can prove the presence of at least one case of COVID-19 within the Relevant Policy Area in a particular week of the year (albeit not on a particular day in that week) if the ONS Death Data show that there was at least one death involving COVID-19 associated with the relevant local authority or health board for that week, and the local authority or health board is entirely within the Relevant Policy Area. Consequently, it is agreed that a policyholder can also prove the presence of at least one case of COVID-19 during the period immediately prior to that week although views may differ as to the time-frame between contracting COVID-19 and death. Separately, where the local authority goes beyond the Relevant Policy Area, an averaging process can be used (as described in further detail below).

### (c) Reported Cases and the averaging methodology

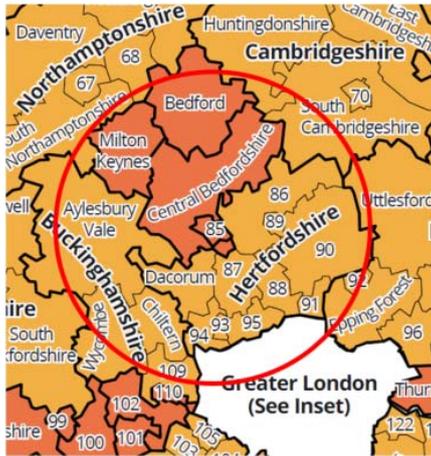
#### *Use by a policyholder of Reported Cases as a type of proof*

203. As set out in paragraph 24 of the Amended Particulars of Claim and in Agreed Facts 3<sup>172</sup>, the UK Government has released data showing confirmed cases of COVID-19 at national (eg England), regional (eg London, South West etc) and most helpfully local authority (upper and lower tier) (“**UTLA**” and “**LTLA**”) level, together with explanatory notes as to how to understand the data. Those data, defined as the Reported Cases, show new daily cases and also cumulative totals over time. To provide an example and put this into context, the screenshot below shows a red circle approximating a 25 mile radius around the centre of Luton and all of the LTLAs which fall within that circle. The table below shows an extract from the spreadsheet containing the data for just the LTLA of Luton. The fifth column in the table shows daily cases and the final column shows cumulative cases for Luton.

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<sup>171</sup> {C/5} and {C/6}

<sup>172</sup> {A/2/18} and {C/5} and {C/6}



Luton	E06000032	Lower tier local authority	26/03/2020	9		76
Luton	E06000032	Lower tier local authority	25/03/2020	11		67
Luton	E06000032	Lower tier local authority	24/03/2020	14		56
Luton	E06000032	Lower tier local authority	23/03/2020	7		42
Luton	E06000032	Lower tier local authority	22/03/2020	5		35
Luton	E06000032	Lower tier local authority	21/03/2020	3		30
Luton	E06000032	Lower tier local authority	20/03/2020	9		27
Luton	E06000032	Lower tier local authority	19/03/2020	4		18
Luton	E06000032	Lower tier local authority	18/03/2020	6		14
Luton	E06000032	Lower tier local authority	17/03/2020	5		8
Luton	E06000032	Lower tier local authority	13/03/2020	1		3

204. Initially, and most surprisingly given the data’s provenance, the Defendants rejected the Reported Cases as a form of proof. RSA’s Amended Defence (as noted, adopted by other Defendants) paragraph 22(b) states that “*no admission is made as to the relevance of such data, whether for the purposes of calculating the ‘Undercounting Ratio’ ... or otherwise*”.<sup>173</sup> QBE’s Defence paragraph 36 goes further, outright denying the “*relevancy of such data in these proceedings*”.<sup>174</sup> Since then, the Defendants have accepted in Agreed Facts 3 that the Reported Cases *may* be used by a policyholder as a form of proof, but through reliance on a daily (cf cumulative) total for the date on which the policyholder seeks to prove its claim. For example, if the policyholder wanted to establish its claim as at 10 March 2020, the Defendants say that the policyholder may rely on the new Reported Cases specifically for the date of 10 March 2020. The Defendants have taken issue with the use of cumulative totals, on the basis that they “*make no allowance for those who had recovered from COVID-19*”.<sup>175</sup>

205. The FCA’s position on the use of Reported Cases is as follows:

205.1. Even if one were to look solely at daily counts of new COVID-19 cases (as distinct from cumulative totals over time), a policyholder should not be restricted to referring to a single day’s new cases, being referable to the day as of which the policyholder

<sup>173</sup> {A/12/9}

<sup>174</sup> {A/11/9}

<sup>175</sup> See RSA’s Amended Def para 26 {A/12/11}.

wishes to make its claim. It is apparent from the Agreed Facts 2<sup>176</sup>, that the Defendants concur with the factual point that an individual remains infectious on average from 7-12 days, and 14 days in more severe cases.<sup>177</sup> Therefore, a policyholder should, at the very least, be able to refer to days surrounding the date as of which the policyholder wishes to make the claim.<sup>178</sup> This period need not be decided in the test case; merely that as a matter of principle an insured is not limited to looking at one day.

205.2. In any event, and more importantly, a policyholder should not be confined to reliance on daily totals, and should be able to use cumulative totals. The policy wordings in this area do not stipulate a timing for the incidence of the disease but merely that the interruption/interference with the business should result from or arise from or be in consequence of or follow the incidence of the disease. In terms simply of timing therefore (causation is addressed separately), the policyholder need only show that there was interruption or interference after the incidence of disease within the Relevant Policy Area. The presence of COVID-19 may have been a week or a month earlier,<sup>179</sup> and the interruption/interference must have been after it. For that reason, the FCA's reliance in the Amended Particulars of Claim on cumulative totals is sound, and a policyholder may refer to such cumulative totals as a type of evidence, not least because the period in question is narrow, ie chiefly the course of March. The narrowness of the period also provides the answer to the causation question because this all contributed to the national picture resulting in action at a national level.

*Targeted averaging can be used by a policyholder or insurer*

206. In many instances, no averaging will be needed because the Relevant Policy Area will be larger than the LTLA for which there are Reported Cases. The policyholder can simply rely on Reported Cases within any of the LTLAs within the Relevant Policy Area. See for example the extracts above relating to Luton LTLA.

207. Averaging will only be relevant where the Relevant Policy Area is smaller than the area for which there is data or does not overlap completely with the area for which there is data. An

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<sup>176</sup> Which was close to agreement at the date of this Skeleton {C/3} and {C/4}

<sup>177</sup> Further, the governmental advice on self-isolation (referred to in Agreed Facts 1) involved self-isolation periods of a similar length of time, indicating the UK Government's formal stance on the infectious period of the disease.

<sup>178</sup> For example, taking 10 days as the average infectious period, a policyholder could refer to Reported Case from the five days before and five days after the date in question, assuming a person might get tested around the middle of their infectious period.

<sup>179</sup> Accepting that beyond a few weeks (particularly if such cases had ceased) might be deemed historic; however that does not arise on our facts since the cases started generally in late February/early March and built from there.

averaging methodology may be necessary (as per the declarations sought at paragraph 28.4 of the Amended PoC<sup>180</sup>) when seeking to average (a) ONS Death Data across a local authority area, (b) Reported Cases across a regional or local authority area, or (c) Reported Cases as uplifted by an Undercounting Ratio (to reflect the likely actual number of cases) across a regional or local authority area, in order to consider whether deaths or cases occurred within the Relevant Policy Area.

208. The purpose of averaging in each case is simple: the data available will not always be for an area smaller than the Relevant Policy Area. The fact that the Relevant Policy Area is smaller than the area for which there is data cannot preclude a policyholder succeeding; therefore, some simple and fair methodology is required to address this point. In general as regards averaging, the Defendants have contended that averaging is “*not a reliable guide to the distribution of COVID-19 as it is inherently unlikely that cases of COVID-19 would be evenly distributed*”.<sup>181</sup> As to that contention:

208.1. The FCA has built into the Amended Particulars of Claim the content of the rebuttable presumption described above. Specifically, the starting point is that a policyholder should be able to adopt averaging, but that is subject in any given case to a policyholder’s or insurer’s entitlement to “*show that the application of the methodologies ... would be unreliable in relation to any particular Relevant Policy Area or that some weighting other than an average is appropriate*”.<sup>182</sup>

208.2. Further, it is entirely possible for a policyholder to apply “*targeted*” averaging, relevant to the Relevant Policy Area, taking into account population densities, and by reference to publicly available information. Specifically, a policyholder could: (a) identify the relevant case totals as at a particular date for a LTLA (“**Case Number**”); (b) identify the population size of the LTLA; (c) identify the population of the Relevant Policy Area (by reference to publicly available data showing postcodes within a particular radius and the combined population size of those postcodes); and (d) calculate the Relevant Policy Area population size as a proportion of the LTLA population size, and multiply that figure by the Case Number, to determine the weighted number of cases in the Relevant Policy Area, based on population density.

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<sup>180</sup> {A/2/20}

<sup>181</sup> RSA’s Amended Def para 28(a) {A/12/11}

<sup>182</sup> {A/2/20}

208.3. For example, if one were to take the postcode TR8 4\_\_\_<sup>183</sup>, that would be roughly in the middle of the 25-mile radius blue circle shown below.

208.1. If the policyholder wished to take (say) 16 March 2020 as the relevant date for making a claim: in Cornwall as at 16 March 2020, there was a total of 14 cumulative Reported Cases (taking the cumulative total, on the basis of the entitlement to do so as set out above).<sup>184</sup> The population of Cornwall based on the 2011 census was 532,273; and the population of a 25-mile Relevant Policy Area from the above postcode is approximately (based on public tools as to postcode populations) 350,000. That would amount to approximately 9-10 cases in the Relevant Policy Area.

208.2. Therefore, there is a straightforward way for a policyholder to address the concerns raised by the Defendants as to reliance on the Reported Cases (or ONS Death Data per LTLA) to conduct averaging, taking into account population densities, for a reasonable form of proof as to the number of cases within a Relevant Policy Area. And provided that number is at least one in a given case, the policyholder should prima facie be able to make a claim – subject to the rebuttable presumption set out above.

(c) A further type of proof: estimates as to the likely true prevalence of COVID-19

209. As set out above, the Defendants concede that the likely true number of cases of COVID-19 in the UK was “*much higher*” than that shown in the Reported Cases. In March, little testing was being done, and non-severe and asymptomatic cases would have been largely undetected.

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<sup>183</sup> Data is available for populations of specific postcodes, but particular premises are not identified here.

<sup>184</sup> Based on the gov.uk spreadsheet showing Reported Cases up to 18 May 2020.

210. Where the parties differ is the extent of the discrepancy between the Reported Cases and the likely true level of prevalence. The FCA has put forward a positive case as to a reasonable methodology for estimating that true level, relying on sophisticated analyses from Imperial College London and Cambridge University (combined with Public Health England). The Defendants, much like their equivalents in R&Q, have put forward nothing.
211. In the FCA's submission, and applying the *Equitas* approach, the Imperial Analysis and Cambridge Analysis (as defined in the Amended Particulars of Claim) are types of proof on which a policyholder could reasonably rely, and on the assumption they represent the best evidence available (and there are grounds for saying they do), they would be sufficient as a matter of principle to discharge the burden of proof.
212. As to the Imperial Analysis and the Cambridge Analysis:
- 212.1. The Imperial Analysis is based on sophisticated modelling, drawn from relevant death data, to estimate the likely true level of infection in the UK as at a particular date. It was published in the journal *Nature*, one of the world's leading, peer-reviewed scientific journals.
- 212.2. The Cambridge Analysis, put together in conjunction with Public Health England, used a previously developed model from 2009 (supported in a peer-reviewed publication) is very detailed and involved wide-scale collaboration from a team to provide estimates of incidence and prevalence. One of its authors Dr Daniela de Angelis says the following in a lecture describing the work: "*I am one of the members of the SPI-M Group, it's a sub-group of the emergency group of the government, the so-called SAGE. And, we've been working very hard in the last...I don't remember how long now...but around February, March and April, it's around three months, to provide evidence for decision making.*"<sup>185</sup> The stated objective was providing regular now-casts and forecasts of COVID-19 infections and deaths, and this real-time tracking of the epidemic is described by the authors as "*an essential component of a public health response to a new outbreak.*" The information is fed directly back to the SAGE sub-group, Scientific Pandemic Influenza sub-group on Modelling (SPI-M) and regional PHE teams. The Cambridge Analysis has been updated five times since its first publication on 10 May 2020. It is the antithesis of a partisan expert "report" it is real time genuine expert analysis aimed at getting as close to the true position as practicable.

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<sup>185</sup> <https://www.newton.ac.uk/seminar/20200522163017301>

212.3. The analysis, with the imprimatur of the UK Government, has been deployed in its decision-making, affecting the lives of UK citizens. If it is sufficient for the UK Government, it should be capable of being reasonably relied upon by a policyholder as regards its business.

212.4. As set out in the Amended Particulars of Claim,<sup>186</sup> it is possible – for example using the Cambridge Analysis – to compare the Reported Cases for any given date with the Cambridge estimation for that date (whether on a daily or cumulative basis). One can then “*reasonably estimate*” the ratio of Reported Cases to estimated cases – identifying (again in the words of the Amended Particulars of Claim) an “*appropriate Undercounting Ratio*”.

212.5. Also as pleaded in the Amended Particulars of Claim,<sup>187</sup> it should be open to a policyholder to rely, as a type of evidence, on the Imperial Analysis, the Cambridge Analysis and an appropriately inferred Undercounting Ratio, and then to apply that Undercounting Ratio as an uplift (to the Reported Cases) to a relevant regional Zone or UTLA or LTLA Zone. All that this is looking to achieve is that for, say, the region of East of England there might be one Reported Case for every 138 actual cases as at 16 March 2020.<sup>188</sup> Therefore, for East of England overall one would need to apply a factor of 138 to Reported Cases to get to estimated true cases. We have Reported Cases for all the LTLAs in East of England, so one can keep that local specificity and multiply those numbers by 138. In relation to this:

- (a) Since no one can be sure of the precise true number of people infected, policyholders need a reasonable methodology to reflect the likely true position – they should not be confined to the Reported Cases, which constitute a significant underrepresentation of the likely true infection level.
- (b) It is reasonable and helpful to use data which are regional (the data from Cambridge are regional), because they will avoid a London-biased result: ie the London regional figures can be identified separately from less populated areas in (say) the South West or areas that were less affected.

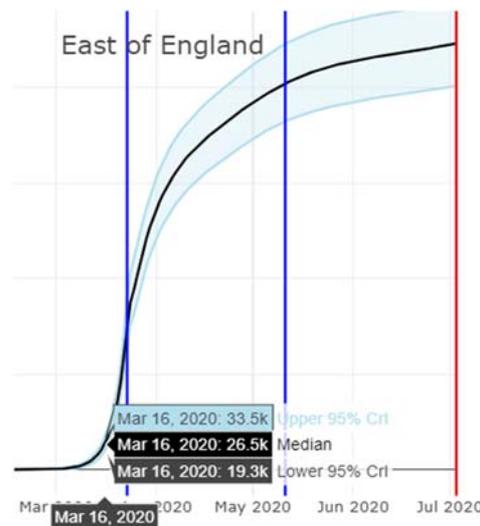
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<sup>186</sup> {A/2/20}

<sup>187</sup> {A/2/21}

<sup>188</sup> Based on the ratio of the cumulative total of 192 Reported Cases in the gov.uk spreadsheet showing Reported Cases up to 18 May 2020, against the estimated total of 26,500 cumulative infections from the Cambridge Analysis (dated 6 July 2020).

- (c) If one were not to adopt this sort of methodology, ie reliance on analyses from sophisticated institutions, with an uplift via an Undercounting Ratio, policyholders would be considerably disadvantaged. There is no realistic alternative approach to applying an uplift.
- (d) We are aware that the Defendants have raised concerns over differences in population density affecting the methodology. Currently, the FCA is not aware of any analysis which conducts estimates at a local authority level. Accordingly, a regional analysis (such as the Cambridge Analysis) is preferable to a national estimate and is the best available - and if estimates became available on a LTLA basis, they could be utilised; the wording of the Amended Particulars of Claim allows for reliance on other analyses from a suitably qualified institution. That said, it must be considered unlikely any institution would now conduct this historic exercise for a period some months ago given the time and effort required to perform such analysis.
- (e) As an alternative to the above process, namely uplifting Reported Cases, the estimated number of regional cases for each region could be subject to the “targeted averaging” referred to above. In the East of England example, one could take the estimated number of cases for the whole region as at 16 March 2020 (being 26,500), then apply it proportionately to the population in the Relevant Policy Area.



212.6. As to the alleged limitations of the Imperial Analysis and Cambridge Analysis set out in RSA's Amended Defence,<sup>189</sup> those contentions are dealt with in the Reply<sup>190</sup>. In brief, the Defendants' arguments lack substance: for example, they state that the Cambridge Analysis relies on assumptions, but assumptions are an inherent feature of a statistical model, and indeed the court in *Equitas* was quite content to allow the utility of modelling albeit that assumptions were involved. Just as the claimant in *Equitas* could never reconstruct the LMX spiral, a policyholder – in any case, but especially lacking a legal team or other assistance – could never hope to reconstruct the true number of cases of COVID-19 in the UK, because that is an impossible task. What it can and should be able to do is to rely on the Imperial Analysis or Cambridge Analysis as a type of proof to support its case.

213. Accordingly, the FCA seeks the declarations set out in its Amended Particulars of Claim, in particular as to the methodologies that may reasonably be deployed by a policyholder as a type of proof in establishing the presence of COVID-19 for the purposes of the policy wordings.

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<sup>189</sup> {A/12/10}

<sup>190</sup> {A/14/15}

## 8) CAUSATION

### A. Summary

214. The insurers' Defences have a common theme on causation – namely that the proximate cause or “but for” cause on a counterfactual, was not the “insured peril” (as they define their respective “insured peril”) but something else and that something else is the nationwide outbreak of COVID-19 and the impact of it and/or of the government response to it.<sup>191</sup> For those with “disease” clauses, it is the outbreak of the disease other than within the Relevant Policy Area or in the vicinity or locality in which the premises are located. For those with public authority/prevention of access clauses it is the impact the outbreak of COVID-19 had or would have had even without Government action.

215. The FCA's case as to the correct approach to causation is set out in this section but the principal errors in the Defendants' approach can be summarised as follows:

215.1. They overlook the need to have regard to the contractual context in which the causation tests are to be applied or to apply the causation tests in a sensible and realistic way. This is legally flawed.

215.2. For those with disease clauses:

- (a) They artificially proceed on the premise that the outbreak in the relevant locality has to be a self-contained cause, as if the policy responds to outbreaks which are only in the locality (i.e. as if the effect of the causation test is to create an exclusion which is not explicit in the policy in circumstances where losses are caused by a disease outbreak which occurs both within and without the locality). This disregards the fact that such a clause (e.g. one with a 25 mile radius covering almost 2000 square miles) must have contemplated a situation in which, potentially at the very least, there was an outbreak within a 25 mile radius because it forms part of a larger outbreak either regionally or nationally.

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<sup>191</sup> E.g. Arch Def paras 7.12 and 7.13 {A/7/5}, Argenta Def para 18 {A/8/5}, Ecclesiastical and Amlin Def para 4.2 {A/9/2}, Hiscox Def para 16.2 {A/10/7}, QBE Def paras 13 and 14 {A/11/5}, RSA Def para 9 {A/12/3}, Zurich Def paras 10 to 11 {A/13/4}.

- (b) They fail to apply the correct causation analysis, in that they fail to recognise that the presence of COVID-19 in each locality is an integral part of one single broad and/or indivisible cause, being the COVID-19 pandemic, or alternatively that the outbreak in each locality made its own concurrent causative contribution to the overall picture of a pandemic, which prompted the Government response.

215.3. For those with public authority/prevention of access clauses or other clauses with multiple ingredients, they artificially carve out *one* of the ingredients for the causation analysis while treating the other ingredients as being relevant for a counterfactual (e.g. carving out from a clause covering government action in response to an emergency likely to endanger life only the government action or its effect, leaving as the counterfactual the existence of the very emergency contemplated by the insuring provision.). This “salami slicing” of the insuring clause is legally flawed (and inconsistent with the Court of Appeal’s decision in *The Silver Cloud*, considered below) and commercially nonsensical.

215.4. Insofar as they rely on the *Orient Express* case either for the purposes of the application of a general “but for” causation test or for the application of a contractual “but for” causation test under a trends clause, the insurers:

- (a) Fail to recognise the distinction between the nature and subject matter of the insurance provisions in these policies as compared to the insurance provisions under consideration in *Orient Express*, which contemplated only damage to property;
- (b) Insofar as they rely on *Orient Express* as an example of the application of a “but for” test for the purposes of ordinary causation, overlook the fact that in that case Hamblen J acknowledged that the “but for” test was capable of being disapplied where fairness so required but this was an issue which had not been raised before the Tribunal whose award was being appealed, with the result that no error of law in the Tribunal failing to address this could be shown;
- (c) Seek to treat matters either explicitly or implicitly contemplated by the insuring provisions as separate “but for” causes for the purposes of a counterfactual;

- (d) Treat “trends” clauses as if they were applying an ordinary causation “but for” test, thereby disregarding the fact that the commercial purpose of trends clauses is to ensure that the ordinary vicissitudes of commercial life that would have affected a business anyway are taken into account when quantifying the insured’s loss. The ordinary vicissitudes of life cannot encompass fortuities explicitly or implicitly contemplated by the insuring provision under which the insured is claiming; and/or
- (e) Wrongly proceed on the premise that *Orient Express* is correctly decided. It is not and a “trends” clause should not include in the counterfactual the fortuity that caused the triggering event or events under the policy. That would be contrary to the commercial purpose of such a clause and cannot have been intended given that not excluding such a fortuity for the purpose of the counterfactual is capable of causing extreme results, including windfall profits for an insured (e.g. if it can claim to recover on the counterfactual that it was the only business left unaffected by the fortuity).

## **B. Introduction**

- 216. Issues of causation arise in relation to all the policy wordings as will be seen from the List of Issues (when agreed/finalised). The causation issues must be considered by reference to each policy Wording, because the wordings have different causal connector language (‘resulting from’, ‘due to’ etc), different trends clauses, and different insured perils. The causation issues arising in the policies are dealt with policy-by-policy in Sections 9 and 10 below.
- 217. However, there are certain legal principles of general application and general issues and these are addressed first before turning to the individual policies.

## **C. Proximate cause and the ‘but for’ test**

### Introduction and the role of the parties’ intention

- 218. The basic principles of the law of proximate cause are unlikely to be controversial. They are summarised in paragraph 5-065 of *Colinvaux* (12<sup>th</sup> edn)<sup>192</sup> (footnotes omitted):

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<sup>192</sup> Robert Merkin, *Colinvaux’s Law of Insurance* (12<sup>th</sup> edn, Sweet & Maxwell, 2019) **J/147**

It is necessarily the position that an insurer is to be liable only for those losses which occur as the result of the fortuitous operation of insured perils, although if there is only one cause of loss the assured is free to classify that cause as he thinks fit so as to bring it within the terms of the policy. It is frequently the case, however, that loss arises from a series of events, some of which are insured perils and some of which are either uninsured or excluded perils, and here it is the task of the court to determine which of those perils was the actual proximate cause of the loss. The principle is codified in s.55(1) of the Marine Insurance Act 1906<sup>193</sup>:

*“[U]nless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but ... he is not liable for any loss which is not proximately caused by a peril insured against.”*

There is no difference in the application of the law of proximity between marine and non-marine insurance law, and the test for causation is the same in insurance as in general tort law. The proximity rule is based on the presumed intention of the parties, and means that if the insured cause is within the risks covered, the insurers are liable in respect of the loss but if it is within the perils excepted the insurers are not liable. While it is relatively simple to state the doctrine of proximate cause, ascertaining the proximate cause of a loss in any particular case may be a matter of some difficulty. The vast number of authorities on the matter may be of little assistance for, as has been said by Chalmers:

*“[T]hough the rule is universally admitted, lawyers have never attempted to work out any philosophical theory of cause and effect, and it is probably as well for commerce that they have never made the attempt. The numerous decisions on the rule are rough and ready applications of it to particular facts. As might be expected, many of the decisions are difficult to reconcile. But the apparent inconsistencies may be regarded as depending rather on inferences of fact than on matters of law.”*

219. The “proximate” cause is said to be the “efficient” or “dominant” cause.<sup>194</sup>
220. A key point for present purposes is that the proximate cause rule is based on the implied intentions of the parties, as explained by Lord Sumner in *Becker Gray & Co v London Assurance Corp* [1918] AC 101 at 112-4.<sup>195</sup> Lord Atkinson in *Leyland Shipping Co Ltd v Norwich Union Fire Ins Sy Ltd* therefore noted that the proximate cause rules “*must be applied with good sense to give effect to, and not to defeat the intention of the contracting parties*”<sup>196</sup>. This means that it is subject to modification (to be made more strict or more relaxed than otherwise) by the express words used in the contract and more generally by construction of the policy.<sup>197</sup> Asking whether the loss was proximately caused by the insured peril so that cover responds, in circumstances in which there were other concurrent or intervening causes, is a question not of philosophy but of asking, on the proper construction of the policy, “*has the event, on which I put my premium, actually occurred?*”<sup>198</sup>

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<sup>193</sup> {J/3}

<sup>194</sup> *Leyland Shipping Co Ltd v Norwich Union Fire Ins Sy Ltd* [1918] AC 350 (HL) {J/50/1}, applied in *The Cendor MOPU, Global v Syarikat Takaful Malaysia* [2011] UKSC 5, [2011] 1 Lloyd’s Rep 560 {J/111}

<sup>195</sup> {J/49/12} See also *Nelson v Suffolk Insurance Company* 8 Cush 377 (1851) per Fletcher J at 490 {J/33}; *Leyland Shipping* per Lord Atkinson at 365 and Lord Shaw at 370 {J/43}

<sup>196</sup> At 364 {J/50/15}

<sup>197</sup> As section 55(1) Marine Insurance Act 1906 makes clear, by introducing the proximate cause principle with “*unless the policy provides otherwise*” {J/3}

<sup>198</sup> Lord Sumner in *Becker Gray* at 118 {J/42}

221. This is an important feature of an indemnity policy. There is no extra-contractual legal principle of causation at play, as there is when measuring tort damages. The payment under an indemnity policy is a primary obligation, not a secondary obligation to pay damages. The link between the loss and the peril, or any other links prescribed by the policy, are creatures of the policy agreement itself, not of an extra-contractual principle of compensation or similar. The policy determines when the insurer has agreed to pay out, i.e. what causal nexus is required. Of course, what causal nexus is required will usually be a matter of ‘common sense’.<sup>199</sup> And this will usually be the same as the causation test in tort because those rules are derived from the same common sense.<sup>200</sup> But the real question is one of construction, which is also of course a matter of common sense principles<sup>201</sup>: would the reasonable person in the position of the parties understand the nexus between the loss and relevant peril/event, or each link in the chain of required triggers, to be sufficient for the cover to respond? Or as Lord Shaw put it in *Leyland Shipping* at 369:<sup>202</sup>

I will venture to remark that one must be careful not to lay the accent upon the word “proximate” in such a sense as to lose sight of or destroy altogether the idea of cause itself. The true and the overruling principle is to look at a contract as a whole and to ascertain what the parties to it really meant. What was it which brought about the loss, the event, the calamity, the accident? And this not in an artificial sense, but in that real sense which parties to a contract must have had in their minds when they spoke of cause at all.

222. The application of any causation principles must therefore adapt to the apparent intentions of the parties. One can see this in contract (or voluntarily assumed tortious duty of care) cases. Typically third party wrongdoing, suicide or self-harm by a claimant, or unusual natural event, will ‘break the chain of causation’ i.e. obliterate the responsibility of the prior breach of the defendant. But whether this is so depends not only (or even primarily) upon the intervening event itself, but rather upon the contract and nature and scope of the defendant’s duty that was breached. The proximate cause test must be applied with the scope of the contract in mind. Thus, for example, these independent and abnormal occurrences do not break the chain of causation where the purpose of the duty breached was actually to provide protection against that third party wrongdoing, suicide or self-harm by a claimant, or unusual natural event.<sup>203</sup> This is because the parties would not have intended it to break the chain as that would undermine the clear apparent purpose of the voluntarily assumed duty. In other words, the

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<sup>199</sup> *Leyland Shipping* per Viscount Haldane at 361 and Lord Dunedin at 362 **{J/43}**

<sup>200</sup> Hence in *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2001] Lloyd’s Rep IR 237 at paras 21-2 **{J/83}** it was confirmed (rejecting counsel’s argument that contracts of insurance had a more restrictive causation test than tort law) that “[i]n the absence of agreement to the contrary, the presumption will be” that the tort proximate cause test applies.

<sup>201</sup> *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 per Lord Hoffmann at 912 **{J/77}**.

<sup>202</sup> **{J/50/20}**

<sup>203</sup> E.g. the tort case of *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360 (HL) **{J/81}**

parties intended the contract to respond and lead to compensation despite the occurrence of what might otherwise be an intervening proximate cause.

223. The classic example is *Stansbie v Troman* [1948] 2 KB 48<sup>204</sup> in which it was held that a theft did not break the chain of causation between a decorator's negligent failure to leave the house secure when he left and the loss. Counsel's argument that third party deliberate wrong-doing must be a new and independent cause breaking the chain of causation (as it would be in many other contract and tort cases) was rejected because the purpose of the contractual duty breached was "*to guard against the very thing that in fact happened*".<sup>205</sup>
224. The role of construction is all the greater in the case of an indemnity policy, where the causation question is a creature of the insurance contract, in contrast with a compensation for breach of contract case (such as *Stansbie*) where causation is at least in part an extra-contractual principle of damages that is merely influenced or coloured by the contract.

#### Concurrent causes

225. As set out further below, the FCA's primary case is that it is not possible to identify disease outside a vicinity, or disease as compared with Government action, as a separate cause that can be said (by the Defendants) to be proximate. The single proximate cause is the disease everywhere and the Government and human responses to it. If that is wrong, then the issues of concurrent causes arise and the FCA's secondary case is that the relevant trigger for cover is *a* proximate cause and there is cover notwithstanding the existence of one or more concurrent uninsured causes
226. The Privy Council has defined proximate cause in *Scottish Union & National Insurance Company v Alfred Pawsey & Co*<sup>206</sup> (The Times, 17 October 1908) as "*the active and efficient cause that sets in motion a train of events which brings about a result, without the intervention of any force started and working actively from a new and independent source*". Lord Shaw in *Leyland Shipping* (where a gale did not break the chain from earlier torpedo damage, which was within the excluded war risks peril) noted that "*Where various factors or causes are concurrent, and one has to be selected, the matter is determined as one of fact, and the choice falls upon the one to which may be variously ascribed the qualities of reality,*

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<sup>204</sup> ¶/51}

<sup>205</sup> ¶/51} See also e.g. *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184 ¶/118} at para 103: "*Mr Marsden, however, not only advised Mr Rubenstein on the investment of his capital, he recommended a particular investment. He, so to speak, put him in it. If such an investment goes wrong, there will nearly always be other causes (bad management, bad markets, fraud, political change etc): but it will be an exercise in legal judgment to decide whether some change in markets is so extraneous to the validity of the investment advice as to absolve the adviser for failing to carry out his duty or duties on the basis that the result was not within the scope of those duties.*"

<sup>206</sup> ¶/39}

*predominance, efficiency.*<sup>207</sup> Proximate means “*proximate in efficiency rather than proximate in time*”.<sup>208</sup> If the later cause does not break the chain and become the proximate cause in place of the earlier cause, then the earlier cause will remain the proximate cause.<sup>209</sup>

227. However, as the modern case law confirms, there will in some cases be more than one proximate cause.<sup>210</sup> In those cases, it is enough if the insured peril is a proximate cause. The leading case on multiple proximate causes is *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The “Miss Jay Jay”)* [1987] 1 Lloyd’s Rep 32 (CA)<sup>211</sup>. A yacht suffered damage due to the equally operative causes of faulty design/unseaworthiness on the one hand and an adverse sea on the other. The policy covered damage ‘directly caused<sup>212</sup> by... external accidental means’ and so responded. The Court considered and *obiter* approved the legal position for excluded perils set down in *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp* [1974] QB 57<sup>213</sup>, namely that where there are two concurrent proximate causes and one is covered and the other excluded, the policy does not respond.<sup>214</sup>
228. However, in *The Miss Jay Jay* there was no exclusion of unseaworthiness<sup>215</sup> and so, as Slade LJ observed at 39 quoting from *Halsbury’s*: “*there may be more than one proximate (in the sense of effective or direct) cause of a loss. If one of these causes is insured against under the policy and none of the others is expressly excluded from the policy; the assured will be entitled to recover.*” Given that the unseaworthiness was not “*such a dominant cause that a loss caused by the adverse sea could not fairly and on commonsense principles be considered a proximate cause at all*”<sup>216</sup>, the policy responded as both were proximate

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<sup>207</sup> At 370 {J/43}

<sup>208</sup> *The Miss Jay Jay*, below, Slade LJ at 37 col 2 and 39 col 2 {J/66}

<sup>209</sup> *Leyland Shipping*. {J/43}

<sup>210</sup> See the comments of Cairns LJ in *Wayne Tank* at 68-9 {J/58}, and Christopher Clarke LJ in *Atlasnavios Navegacao Lda v Navigators Insurance Ltd (The B Atlantic)* [2016] EWCA Civ 808, [2017] 1 WLR 1303 at paras 28-32 {J/130}

<sup>211</sup> {J/66}

<sup>212</sup> Held to mean the same as ‘proximately caused’: Slade LJ at 39 col2. {J/66}

<sup>213</sup> {J/58}

<sup>214</sup> {J/58}. The *Wayne Tank* principle does not apply here as there is no applicable exclusion, but if it were held to apply the FCA reserves the right to argue that the principle is not as absolute as it is sometimes taken to be, and really depends upon construing the parties’ intentions in a particular case to determine whether, reading the insuring clause and the exclusion together, the events that occurred are or are not intended to be covered. Note that, as summarised in *Colinvaux & Merkin’s Insurance Contract Law* Volume 2 B-0453-B0454 {J/148}, the Canadian and Australian courts have taken a different position to the English courts and sought to limit the effect of the *Wayne Tank* principle that an express exclusion prevails over words of cover, especially in independent concurrent cause cases. For example, in Canada clear words are required for an excluded concurrent proximate cause to oust coverage *Derksen v 539938 Ontario Ltd* [2001] 3 SCR 398 at [46] (followed recently in *Canadian Maritime Engineering Ltd v Intact Insurance Co* [2019] NSSC 328 at [35]). In Australia, it has been held that the policy would not respond only if the excluded clause was the sole cause: *McCarthy v St Paul International Insurance Co Ltd* (2007) 157 FCR 402 at [88, 109, 114] {J/100}.

<sup>215</sup> Lawton LJ at 36, Slade LJ at 40. Nor was there a warranty of seaworthiness: Slade LJ at 39 {J/66}.

<sup>216</sup> Lawton LJ at 37

causes.<sup>217</sup> Thus in *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1999] CLC 934 (HL)<sup>218</sup> per Lord Hobhouse at 947:

It is not disputed in the present case, and it is the law, that where there are a number of perils covered by the policy it suffices for the assured to prove that his loss was proximately caused by any one of the perils covered. Similarly, if there is an exclusion, the assured is not entitled to recover under the policy if the excepted peril was a proximate cause of the loss.

229. These principles were approved by the Supreme Court in *Ene Kos I Ltd v Petroleo Brasileiro SA* (“*The Kos*”) [2012] 2 AC 164,<sup>219</sup> Lord Mance confirming that there can be more than one proximate cause and “*the question in each case, whether under a contract of insurance or under a contract of indemnity, is whether an effective cause of the alleged loss or expense was a peril insured against or an indemnifying event.*”<sup>220</sup>

230. Concurrent causes can arise in two situations:

230.1. Interdependent concurrent causes: where there are two events each of which could not, without the operation of the other, have caused the loss<sup>221</sup> (i.e. each was a necessary cause but neither was sufficient on its own to cause the loss). Most of the concurrent cause cases considering proximate cause fall into this category, or at least are assumed to do so—e.g. in *The Miss Jay Jay* the combined effect of the unseaworthiness and the adverse sea caused the loss.

230.2. Independent concurrent causes: where there are two events, each of which was independently capable of causing the loss (i.e. each was sufficient on its own to cause the loss). In this situation, the ‘but for’ test for causation (if applicable) will not be met in respect of either cause since ‘but for’ each cause, taken alone, the other would still have caused the loss.

231. In either case, whether interdependent or independent, there are concurrent *proximate* causes only where the two causes are of equal or nearly equal efficiency in bringing about the

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<sup>217</sup> As Colinvaux observes at para 5-092 {J/147}, the specific conclusions in relation to unseaworthiness were modified in *The Cendor Mopu* but “*the general principle applied by the Court of Appeal in The Miss Jay Jay is nevertheless sound in respect of cases where there is an insured peril and an uninsured peril operating concurrently.*”

<sup>218</sup> {J/79}

<sup>219</sup> Lord Clarke at paras 70-75 {J/115}. (Lord Mance, who agreed with the result but dissented as to the majority’s reasons, also addressed concurrent causes at paras 40-43. He indicated at para.43 some disagreement with the blurring of the lines in a dictum of Potter LJ in *Handelsbanken Norwegian Branch of Svenska Handelsbanken AB v Dandridge (The Alicia Glacial)* [2002] 2 Lloyd’s Rep 421 at para.48 which referred to causes being “*nearly equal in their efficiency*”.) {J/84}

<sup>220</sup> Lord Clarke at para 70 {J/115}

<sup>221</sup> *Colinvaux* para 5-096 {J/147}

damage.<sup>222</sup> If one of the rival causes was the effective and dominant cause, there are not concurrent proximate causes but rather a single proximate cause and a lesser non-proximate cause. In that situation, the law would deem there to be only one case (the proximate cause).

232. There are, however, certain qualifications to the above principles:

232.1. In some cases there will be two insured concurrent proximate causes. The claim can be made under either.<sup>223</sup>

232.2. In some cases there will be one single cause which amounts to a number of perils, some of which fall within the policy and some of which fall outside. The policy responds.<sup>224</sup>

232.3. In some cases there will be two causes each causing a discrete loss. In such cases no concurrent causation issues arise.<sup>225</sup>

232.4. If one of the concurrent causes, albeit contributing, was not of (broadly) equal efficiency with a second cause, then only the second cause is a proximate cause.<sup>226</sup>

#### The role of the 'but for' test in proximate causation

233. The 'but for' test in contract and tort law (which means a cause has to be a necessary or *sine qua non* cause of the loss/damage/injury) is a fundamental element of the common-sense factual causation principles. It sits behind the basic compensatory principle that puts the claimant in the position he or she would have been in but for the breach or tort. Its purpose, as summarised in *Clerk & Lindsell* is “to exclude from consideration irrelevant causes”.<sup>227</sup>

234. At the causal stage (the valuation question will be addressed separately below), the underlying causal question being determined, for which the 'but for' test is often used as a crude label, is whether that factor played a role in the production of an outcome, where that outcome was a positive change in the world (rather than an omission<sup>228</sup>).

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<sup>222</sup> *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Association* [1974] QB 57 at 67 **{J/58}**, *Miss Jay Jay* at 36 col 2, 40 col 1&2 and 41 col 1. See also *Svenska Handelsbanken AB v Dandridge* [2003] 1 Lloyd's Rep IR 10 at para 48 **{J/84}**.

<sup>223</sup> See e.g. *Leyland* per Lord Dunedin at 363 **{J/43}**.

<sup>224</sup> *Capel-Cure Myers v McCarthy* [1995] LRLR 498 (Potter J) at 503 col1 **{J/73}**.

<sup>225</sup> *Cultural Foundation v Beazley Furlonge Ltd* [2018] EWHC 1083 (Comm); [2018] Bus LR 2174 at paras 214-217 **{J/137}**.

<sup>226</sup> *Kastor Navigation Co Ltd v Axa Global Risks (UK) Ltd* (“*The Kastor Too*”) [2002] EWHC 2601 (Comm) **{J/85}**; [2003] 1 All ER (Comm) 277; [2003] 1 Lloyd's Rep 296 [per Tomlinson J at para 65. This para is unaffected by the appeal decision: [2004] EWCA Civ 277 **{J/92}**; [2005] 2 All ER (Comm) 720; [2004] 2 Lloyd's Rep 119

<sup>227</sup> *Clerk & Lindsell on Torts*, 22<sup>nd</sup> edn (2018, Sweet & Maxwell) para 2.09 **{J/146}**.

<sup>228</sup> As in *McWilliams v Sir William Arrol & Co Ltd* [1962] 1 WLR 295, HL **{J/53}**

235. However, as stated above, when applying causal nexus wordings in cover clauses (such as ‘resulting from’ and ‘caused by’; the valuation stage, and quantification/trends wordings, will be considered separately below) the search in insurance law, applying the policy wording, is for the proximate cause i.e. the legally relevant cause. The proximate (or effective) cause has been contrasted with a “*mere ‘but for’ cause which does no more than provide the occasion for some other [unrelated] factor....to operate*”: see *The Kos (ENE Kos v Petroleo Brasileiro)* [2012] UKSC 17; [2012] 2 Lloyd’s Rep 292<sup>229</sup> at paragraph 12 per Lord Sumption, with whom Lord Phillips and Lord Clarke agreed. As stated above, there may be more than one proximate cause.
236. It is correct that in most situations the ‘but for’ test will be a necessary part of the meaning of policy words such as ‘resulting from’. If the harmful event would have happened *at the same time in exactly the same way* even without the insured peril (e.g. the rainstorm did not in any way harm the building) then plainly the causal nexus provided for in the contract is not satisfied. But, that said, and at least for cover purposes, common sense usually does not require an investigation into the counterfactual where clearly the insured peril contributed to the occurrence of the harmful event as it happened. (For example, a Defendant cannot say that the interruption did not result from Government action ordering closure even where there might have been different interruption at a different time or on different terms but for the Government action: the Government closed the business or premises, and ‘resulting from’ is plainly, as a matter of common sense interpretation and understanding of causation, satisfied there.)
237. One way courts deal with this situation is to find that the insured peril was ‘inextricably linked’ with other concurrent causes and therefore for these purposes amounts to a single cause (see *The Silver Cloud* below). So in the present, case if the Court considers that the disease within and without the locality (see paragraph 215.2 above) and/or the emergency and public authority action (see paragraph 215.3 above) are inextricably linked, they would amount to a single cause and not separate concurrent causes.
238. Another way of approaching the issue is to acknowledge and give effect to the fact that principles recognise that there are situations where, in order to give effect to common sense, it is necessary to ask not merely what would have happened ‘but for’ the defendant’s wrongdoing (or here, the insured peril), but rather what would have happened ‘but for’ a set of events of which the defendant’s wrongdoing is one element. Providing the defendant’s

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<sup>229</sup> ¶/116}

wrongdoing was part of a set of events which common sense dictates can be combined, the necessary causal test is satisfied. The Defendants cannot simply assert in general terms that the ‘but for’ test is a necessary part of the proximate cause test as a matter of law; they must also identify decisions in which the ‘but for’ test was applied in the way they suggest to concurrent independent causes. In fact, in such situations the ‘but for’ test is usually disapplied, or differently applied. A classic example is where two people simultaneously but independently shoot a victim dead, each could contend that ‘but for’ their wrongdoing, the death would have occurred anyway.<sup>230</sup> Another classic example is where two persons independently search for the source of a gas leak with the aid of lighted candles. According to the simple ‘but for’ test, neither would be liable for damage caused by the resultant explosion. In this type of case, involving multiple wrongdoers, the court may treat wrongful conduct as having sufficient causal connection with the loss for the purpose of attracting responsibility even though the simple ‘but for’ test is not satisfied.<sup>231</sup>

239. For example, in *Greenwich Millennium Village Ltd v Essex Services Group plc* [2013] EWHC 3059 (TCC)<sup>232</sup>, one of the floods to a block of flats (the core 2 flood) was found caused by “two equally efficacious causes”, a closed isolation valve and the wrong positioning of the non-return valve, both of which prevented a water surge arrestor operating, and which were independent causes and each of which was a ‘but for’ cause (paras 190-193). The contractor was entitled to an indemnity for any loss or claim ‘such as shall arise by virtue’ of breach of contract. It was held the ‘but for’ test does not reach a sensible answer (as it would indicate that neither sub-contractor is liable) and must be departed from to the limited extent that each of the two matters were to be treated as causes for the purposes of the indemnity (paras 171-7 and 193).<sup>233</sup>
240. Christopher Clarke LJ has therefore observed in *Atlasnavios-Navegação, LDA (formerly Bnavios-Navegação LDA) v Navigators Insurance Co Ltd and others (“The B Atlantic”)* [2016] EWCA Civ 808, [2017] 1 WLR 1303<sup>234</sup> at para 26, expressly anticipating the disapplication of the but for test in an insurance context where there were concurrent independent causes:

“...both A and B may both be adjudged to be proximate causes. If so, it may be that in order for the event in question to have happened it was necessary for both A and B to occur. Or it may be that the event would have happened if either A or B had occurred but, on the facts, both of them can be said to have caused it. If there are two proximate causes one of which is

<sup>230</sup> See e.g. Lord Mance in *Durham v BAI (Run Off) Ltd* [2012] UKSC 14; [2012] 1 WLR 867 at 55 {J/113}.

<sup>231</sup> *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19; [2002] 2 AC 883 at [74] per L Nicholls {J/86}.

<sup>232</sup> {J/119}

<sup>233</sup> Appeal in relation to a point arising out of the contractor’s contributory negligence dismissed [2014] EWCA 960 [2014] 1 WLR 3517, noting at para 40(xi) without comment the finding of two equally efficacious independent causes.

<sup>234</sup> {J/130}

covered and one of which is within the exclusion, insurers are not liable, at any rate if, as here, both causes need to operate if the loss is to occur.”<sup>235</sup>

241. Another example of how this might arise in the present case is the vicinity clause, which engages what might be called the ‘jigsaw’ argument (introduced at paragraph 215.2 above). The Government responded to the fear/risk/danger/emergency/prevalence of COVID-19 all around the country and the incidence of the disease. Had there been no such fear/risk/danger/emergency/prevalence anywhere, it would not have acted. But had there been such fear etc in the entire country other than any one 25 mile radius (2,000 square mile) area, it would probably still have acted.<sup>236</sup> Does this mean that the fear etc in that 25 mile circle did not cause the Government action? Plainly not. All the areas of the country aggregated were concurrent causes, but no single area satisfies the ‘but for’ test. This is a ‘jigsaw’ cause that depends upon the totality of the pieces but no single piece is sufficient. It is unremarkable common sense. No single rioter is a ‘but for’ cause of a riot, but without rioters there is no riot. In an air raid by a squadron of bombers no single bomber is a ‘but for’ cause of the need to go into air raid bunkers, but without any bombers there would be no need. No single occurrence of a disease is a ‘but for’ cause of a pandemic, but without any occurrences there would be no pandemic. Common sense causation avoids the absurdity of the but for test’s conclusion by aggregating the causes (reflecting language and common sense) to ask what would have happened but for *all the jigsaw pieces*. They are either all treated as a single cause, alternatively, there are multiple concurrent causes of which each one contributes causatively to the whole.
242. This is not a theoretical problem. If every business in the UK had disease BI cover with a 1 mile limit, on the Defendants’ case, none could claim. Or if they could claim, then every business could claim windfall profits (based on how much it would have earned if it were in the only 2 mile-wide island of immunity with operating businesses), meaning the insurance pay-out was many times the total loss of all the businesses. Neither is sensible, because both depend upon a nonsensical view of causation and loss. Further, it is no answer to contend that none of the covers intend to cover a pandemic: the absurdity with which the Defendants have failed to grapple is that in Wales (say), the response was due to fears and prevalence of COVID-19 across all 8,000 square miles of the country, but the Defendants say that occurrence of the disease in each of the four quarters of that 8,000 miles (which comprises the area of four 25-mile radius circles) did not cause the Welsh Government’s response.

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<sup>235</sup> An appeal by the owners to the Supreme Court was dismissed [2019] AC 136.

<sup>236</sup> Although whether it would have acted nationally, or would have excluded the strangely immune from the Government action on the basis that it was not needed there and it was better to keep that economy going, is a further question.

243. The issue in relation to the but for test and disease or emergency within a vicinity or other distance limit is considered further above in section 6J.

#### The counterfactual in the ‘but for’ test

244. Further, the counterfactual to the ‘but for’ test is a matter for determination, not automatic. As set out further below (including in relation to *The Silver Cloud*, see paragraphs 282ff below) where the insured peril is “*premised*” on an underlying cause by the express words or implied contemplation of the policy, the appropriate conclusion will usually be (and this is a matter of construction) that it was intended that the policy responds even if but for the insured peril the harm or some of it would still have occurred. To put it another way, for the purposes of the but for test the insured peril is taken to include the contemplated underlying causes (terrorism risks in the case of *The Silver Cloud*). As in *The Silver Cloud*, public authority action is the ‘something extra’ that is required for there to be cover, but the disease is also part of the insured event and must be excluded when considering the counterfactual. To do otherwise, without clear language, would be dramatically to cut back the cover apparently provided, while imposing an unrealistic counterfactual and impractical modelling and quantification regime to boot.

245. As to realism of the counterfactual, the ‘but for’ test is about asking what would have happened had something not occurred i.e. it is identifying a hypothetical counterfactual. This does not (as the Defendants contend) mean merely removing the tort or breach of contract, or insured peril narrowly defined and seeing what is left, but rather requires substitution for it what would on the balance of probabilities likely have in fact happened instead. Asking what losses were caused by the wrong involves asking what the world would have looked like had the wrong not occurred. The law seeks to identify the realistic counterfactual—what would (and could) actually have happened, not the counterfactual that assumes the bare minimum from a defendant to answer the ‘but for the breach’ question, however unlikely. Thus, for example:

245.1. When applying and developing the well-known ‘minimum obligation’ rule of contract damages (by which in some situations the court will assume that had it not breached the defendant would have done the minimum it was obliged to do)<sup>237</sup> the court has been careful to inject a dose of realism. Thus, per Diplock LJ: “*one must not assume that [the defendant] will cut off his nose to spite his face and so control these events as to reduce his legal*

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<sup>237</sup> Especially from *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA) **{J/56}**.

*obligations to the plaintiff by incurring greater loss in other respects.*<sup>238</sup> And so if a defendant might only have been obliged to pay the claimant a pension for so long as the employee pension scheme continued, it cannot be assumed that the defendant would have stopped the pension scheme.<sup>239</sup>

245.2. If a defendant was negligent, the court will not award damages on the basis of what would have happened if the defendant had done the minimum possible not to be negligent, but rather on the basis that the defendant had carried out the *most likely* non-negligent performance of its duty out of all the non-negligent possibilities available. As summarised by Lord Hoffmann in the *SAAMCo* case (emphasis added):

once the valuer has been found to have been negligent, the loss for which he is responsible is that which has been caused by the valuation being wrong. For this purpose the court must form a view as to what a correct valuation would have been. This means the figure which it considers most likely that a reasonable valuer, using the information available at the relevant date, would have put forward as the amount which the property was most likely to fetch if sold upon the open market. While it is true that there would have been a range of figures which the reasonable valuer might have put forward, the figure most likely to have been put forward would have been the mean figure of that range. There is no basis for calculating damages upon the basis that it would have been a figure at one or other extreme of the range. Either of these would have been less likely than the mean.<sup>240</sup>

246. Relevant to construction is whether the Wording could have contemplated or intended the sort of exercise that the Defendants' counterfactual requires—not merely an accountancy exercise (for which the costs are often recoverable under the policy) but some sort of sophisticated modelling exercise that neither the SME policyholder nor the loss adjuster are equipped to conduct or could proportionately afford (remembering that these extensions generally have five- or low six-figure sub-limits). For public authority action wordings, this might involve seeking to model how people would have behaved without public authority action; and how the public authority would have behaved without its public authority action (. For vicinity wordings, it might involve modelling the public's actions had there been no disease or danger within an area. This might require experts on government responses to disease, experts on customer behaviour, economists etc. It is very similar to the exercise in *The Silver Cloud* (below) that was both expensive and unhelpful to the Court resoundingly failing (by the Court's assessment) to separate the different motivations acting on individuals' minds in response to a danger.

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<sup>238</sup> *Lavarack* at 294-6.

<sup>239</sup> *Bold v Brough, Nicholson & Hall Ltd* [1964] 1 WLR 201 (Phillimore J) **{J/54}**.

<sup>240</sup> *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL) at 221-2 **{J/76}**. Also *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260 (CA) per Dillon LJ at 1268-9 **{J/72}**; *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL) 240 (Lord Browne-Wilkinson) **{J/78}**; *Robbins v Bexley* [2013] EWCA Civ 1233 **{J/120}**.

247. The devil is in the detail of construing what the parties intended to count as encompassed by the insured peril for the purposes of any ‘but for’ test, but the Defendants’ position is demonstrably simplistic i.e. wrong. Where a Wording includes a requirement that the interruption or Government action lasted more than 24 hours, cover is not triggered for interruption or action lasting less than that. But if that period is passed, the but for test does not assume for causation or valuation purposes a world in which the interruption or action lasted only 24 hours and so the insured peril was not triggered—that would be to construe each of the *qualificatory requirements* (or preconditions) for cover as each being deductibles/retentions. Similarly, it is a requirement for cover that the disease was notifiable. If and until it was notifiable there is no cover. But if it is notifiable, the but for test does not assume for causation or valuation purposes a world in which the disease occurred exactly as before but was simply not added to the statutory list of notifiable diseases. The same is true of the qualificatory requirements of public authority action, or disease within 25 miles, etc—on the proper construction of these policies the ‘but for’ test is not to be applied as if there was still a disease but no public authority action, or a disease everywhere except within 25 miles.
248. These are questions on which the terms of the policy guide the way in which any applicable “but for” test is to be approached. However, the Defendants fail to accept that there is an issue of construction at all.

#### The burden of proof in relation to the ‘but for’ test

249. It is well established that the legal burden of proof in establishing that an insured peril caused a claimed loss is generally on the insured.<sup>241</sup>
250. The evidential burden starts with the insured also. This follows from the well-known general rule, “[s]o far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue.”<sup>242</sup> As Viscount Dunedin puts it in *Robins v National Trust Company Ltd* [1927] AC 515, 520<sup>243</sup> the “[o]nus is always on a person who asserts a proposition or fact which is not self-evident”.
251. Lord Maugham, in *Joseph Constantine Shipping Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154, 174<sup>244</sup> explained that the burden of proof depends on the circumstances in which the

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<sup>241</sup> See for example *MacGillivray on Insurance Law*, 14<sup>th</sup> Ed, para 21.006 {J/151}.

<sup>242</sup> *Phipson on Evidence*, 19<sup>th</sup> Ed, para 6-06 {J/153}

<sup>243</sup> {J/46}

<sup>244</sup> {J/50}

claim arises. In considering a cause of frustration following an explosion on board a ship, it was for the shipowners to establish that the explosion had frustrated the contract, but it was not for them to prove that the explosion was not a result of their neglect.<sup>245</sup>

252. These principles were applied in the context of the “but for” test in *BHP Billiton Petroleum Ltd v Dalmine SpA* [2003] EWCA Civ 170<sup>246</sup>. That case concerned the failure of a gas pipeline for which the defendant, Dalmine, had supplied the pipes. The pipes were not compliant with the applicable standards and the locations where the pipes were used were the only places where the pipeline had failed. Dalmine had fraudulently represented that the pipes were compliant and the claimant, which induced BHP to accept and use the pipes. Dalmine denied that the pipes caused the failure, alleging that the pipeline would have failed in any event.
253. BHP accepted that it bore the burden of proving that the incorporation of the non-compliant pipes had caused the pipeline to fail. However, the Court of Appeal accepted BHP’s submission that Dalmine bore the burden of proving that the pipeline would have failed even if it had been made entirely out of compliant pipes. BHP did not bear the negative burden of proving that ‘but for’ the matter complained of, the claimant would *not* have suffered the loss.
254. Rix LJ stated that the role of the “but for” test “*should not be exaggerated*”; the purpose of the test is to “*eliminate irrelevant causes*”.<sup>247</sup> However, this is not to say that, in pleading that something caused a loss, a claimant “*implicitly pleads that nothing else did*” and thereby, if the defendant raises some other operative cause, or that the loss would have happened in any event that “*he throws back on the claimant the underlying and inherent onus of disproving the negative in order to prove his positive case on causation*”.<sup>248</sup> To understand where the burden lies, the court held that it is necessary to consider the pleadings as a guide (although they cannot be definitive on the point).<sup>249</sup>
255. The court considered two scenarios, in the first the dispute between the parties was as to which of two or more possible causes were a/the cause of a loss. In the second, the plea was a hypothetical plea that the loss would have occurred with or without the identified problem. In the first scenario the burden would be on the claimant to show that it was one cause rather

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<sup>245</sup> By way of further illustration, Lord Maugham considered, in an action for negligence, that it is for the claimant to prove that there was negligence on the part of the defendant. However, it is for the defendant to prove, on the balance of probabilities that there was contributory negligence on the part of the claimant.

<sup>246</sup> ¶/89}

<sup>247</sup> *Dalmine*, para 26 quoting *Clerk & Lindsell on Torts*, 17<sup>th</sup> Ed (2000), at para 2-06. The test is found at para 2-09 (22<sup>nd</sup> Ed) ¶/146}.

<sup>248</sup> *Dalmine*, para 27

<sup>249</sup> *Dalmine*, para 28.

than another which caused the loss. However, in the second scenario, the burden rests with the party raising the hypothesis.<sup>250</sup>

“33. In the present case...the cause of the loss was pipe failure solely where non-compliant pipe was in place, and it was for Dalmine to show that the law and common sense should nevertheless regard the operative cause to be some other condition of the pipeline by proving that compliant pipes would have failed in any event; or that BHP’s losses otherwise properly recoverable on the rule of damages for deceit should be curtailed because the pipeline would therefore have had to have been replaced before the end of its natural life in any event.”

“36. ...in this case we think that causation is proved once BHP has shown that the reason why the pipeline failed when it did was because of the failure of non-compliant pipe which but for Dalmine’s deceit would have been rejected. BHP has shown that the pipeline failed only where one or both of the pipes was non-compliant and at no other welded joint. In such circumstances, if Dalmine wishes to show that a hypothetical pipeline made up only of compliant pipe...would have failed in any event, then it bears the burden of proving that on the balance of probabilities. For these purposes, a mere possibility of such failure would not be enough.

256. The parallel in the present Claim with this second type of case is clear. If, contrary to the FCA’s primary case, there is not for the purposes of these Wordings a single broad and/or indivisible cause that encompasses the underlying insured event (disease, emergency etc), then the FCA nevertheless asserts that the relevant element of the insured peril was the ‘but for’ cause of the next element (e.g. the interruption was a result of the authority action or inability to use the premises, the loss was a result of the interruption, etc)<sup>251</sup>. The FCA accepts that the burden is on the policyholder to prove that the insured peril was a ‘but for’ cause of the loss *as regards normal events*, i.e. as compared with pre-COVID-19 business performance.
257. However, the Defendants assert their own unusual ‘but for’ cases—that the loss was co-caused by disease-related causes such as other public authority action, public self-preservatory behaviour etc.<sup>252</sup> It is very far from ‘self-evident’ that the loss was so caused (to use Viscount Dunedin’s words, set out above), and the burden of proof must fall on the Defendants to prove their independent concurrent causes.
258. Another way of expressing the point is to ask whether an insured is to be treated as having sufficiently proved causation if the insured has proved the existence of an insured cause (e.g. the business is ordered to close by the Government following an emergency), proved that insured cause is capable of interrupting or interfering with the insured’s business, and proved that the insured’s business suffers from interruption or interference in the period after the

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<sup>250</sup> *Dalmine*, paras 30-31.

<sup>251</sup> PoC paras 61 to 79 {A/2/40-46}

<sup>252</sup> See for example, Arch Def para 7.16 {A/7/6}; Argenta Def para 28 {A/8/7}; Ecclesiastical/MSAmlin Def para 100 {A/9/35}; Hiscox Def para 23 {A/10/8}; QBE Def para 56.3 {A/11/16}; RSA Def para 17 {A/12/6}; Zurich Def para 52(3) {A/13/20}.

occurrence of the insured cause. The burden would then shift to the insurer to prove that “but for” the insured cause the interruption or interference would still have occurred either entirely or to some extent.

259. The Defendants’ approach is made explicit by Ecclesiastical and MS Amlin:

“the burden of proof...rests on the FCA (and the Insured in every case) to prove that the losses claimed were caused by the insured peril, including that such losses would not have occurred “but for” the insured peril”.<sup>253</sup>

260. For the reasons set out above (and as pleaded in Reply paragraph 61<sup>254</sup>) this is wrong, a matter that the Court is asked to confirm and which is crucial for insureds and the way in which the Defendants’ unrealistic counterfactuals would have to be tested if, contrary to the FCA’s case, those are the correct counterfactuals. In other words, it is the Defendants who have to prove how members of the public would act if not ordered to do something, how the Government would act if the disease was not present in a particular place, etc.

#### Valuation of loss for the purposes of claiming under indemnity cover

261. Valuation of the indemnity, once it has been proven on the balance of probabilities that the cover is triggered and a loss has been suffered, is not itself a strict matter of the balance of probabilities. As Eder J confirmed in *Ted Baker plc v Axa Insurance UK plc (No.2)* [2014] EWHC 3548 (Comm) at paras 135-140<sup>255</sup>

As it seems to me, the burden always remains on a claimant in an insurance claim to establish on a balance of probabilities a relevant event caused by one or more insured perils. Nothing less will do...Notwithstanding, in my view, the difficulty which a claimant may face in proving on a balance of probability that an event has in fact occurred as a result of an insured peril provides no justification for watering down the legal burden and standard of proof; and I do not read the cases relied upon by Mr Cogley as suggesting otherwise.

However, what I do accept and what is certainly supported by the cases relied upon by Mr Cogley is that there may be different ways of satisfying the legal burden and standard of proof other than by direct evidence. This will inevitably vary from case to case...

Proof of one or more events caused by an insured peril is, of course, only the first stage. Thereafter, once an actionable head of loss has been established, the Court will generally assess damages as best it can by reference to the materials available to it. In that context, I accept Mr Cogley's two-pronged submission that (i) the balance of probability test is not an appropriate yardstick to measure loss; and (ii) lack of precision as to the amount of quantum is not a bar to recovery...

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<sup>253</sup> Ecclesiastical/MSAmlin Def para 100 {A/9/35}

<sup>254</sup> {A/14/32}

<sup>255</sup> {J/125} There was an appeal on other grounds: [2017] EWCA Civ 4097; [2017] Lloyd’s Rep IR 682 where the Judge’s finding above (which was not itself in dispute) was referred to at paras 103-104.

262. This may be relevant if the Court were to find that there were concurrent causes and that it was difficult to disentangle them. For cover purposes, the only question is whether the relevant trigger was a *proximate cause* (unless the language indicates that a weaker causal test was intended) of the next item on the chain (interruption, loss etc), with any quantification to be dealt with later.
263. Tort law has also addressed the valuation question in the context of two distinct misfortunes. In *Jobling v Associated Dairies Ltd*<sup>256</sup>, there was no dispute that the defendants' breach was a cause of a spinal cord injury, a slipped disc, suffered by the claimant in 1973. This significantly reduced his earning capacity. The claim was heard in 1979, but in 1976 the claimant had begun to manifest an age-related disablement of the spinal cord, unrelated to the breach, which rendered him totally unfit for work by the end of that year. Though there was no dispute that the breach was a cause of the slipped disc injury and associated reduced earning capacity, the House of Lords held that the valuation of the negligence claim should not include anything for the reduced earning capacity after 1976 because the claimant would, in the absence of the tortious conduct, have suffered that injurious outcome anyway due to non-tortious factors, namely the 'vicissitudes of life', as *Clerk & Lindsell* explain.<sup>257</sup>
264. However, the law embraces a more articulated counterfactual benchmark principle for the valuation of a negligence claim where there is relevant commonality between the two misfortunes. This is illustrated by *Baker v Willoughby*<sup>258</sup> where the commonality was that tortious conduct was a cause of each distinct misfortune. In *Baker* certain effects of a first injury (in relation to which there was no dispute that the tort of a first tortfeasor bore a causal relation to the post-trial reduced earning capacity), had, before trial, been duplicated by a second injury (produced by a second tortfeasor) and the second injury was in no way connected with the first (i.e. the first was not a cause of the second). Yet in valuing the claim against the tortfeasor, the House of Lords refused to make any adjustment for the fact that by the date of trial it was known that the reduced earning capacity would have been produced by the second tortfeasor anyway. Though the stated reasoning in *Baker* appears to obscure the valuation point in issue with causal language, its result is widely regarded as sound.<sup>259</sup> The principle to be extracted from *Baker* is that, at the valuation stage, the law regards the appropriate counterfactual

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<sup>256</sup> [1982] AC 794 {J/63}

<sup>257</sup> Paras 2-103 to 106 {J/146}.

<sup>258</sup> [1970] AC 467 {J/57}

<sup>259</sup> See e.g. *Jobling* at 815 per Lord Keith of Kinkel "...in proceedings against the first tortfeasor alone, the occurrence of the second tort cannot be successfully relied on by the defendant as reducing the damages which he must pay" {J/63}; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576; [2004] 1 WLR 3002 at [66] per Dyson LJ {J/93}; *Penner v Mitchell* [1978] 5 WWR 328 at [25] per Prowse JA {J/60}.

landscape to be that characterised by an absence of all tortious conduct affecting the victim: would the victim, in the absence of any tortious conduct, have suffered the injurious outcome anyhow? As *Clerk & Lindsell* state, where there are concurrent (even if successive) torts, “[a] test which produces the conclusion that neither tortfeasor caused the harm cannot be of any assistance in a situation where simple common sense indicates that one or both of them should be responsible” (paragraph 2-102)<sup>260</sup>. The law has to deal with the non-satisfaction of the ‘but for’ test by either tortfeasor by adjusting its approach.

265. If loss is the inevitable result of a peril, the full extent of that kind of loss will be recoverable, if the extent, although not inevitable at the time of the peril was not unlikely to result, or, in other words, was a natural consequence of the circumstances: *Reischer v Bornick* [1894] 2 QB 548 (CA)<sup>261</sup>.
266. This arises in the present case because, providing the cover triggers are satisfied, there will in most cases be *some* loss caused by the insured peril even on the Defendants’ case as to what that peril is (i.e. drawing it narrowly) and even if there are concurrent independent causes as the Defendants say—e.g. without the disease or Government action in the vicinity can it really be said that the losses would have been *exactly* the same? Given that it cannot, the indemnity is triggered and the question is one of quantification.

### Pre-trigger losses

267. A related question of causation arises in such situations. The question arises if prior to the covered interruption (say, government closure) there was already non-triggered interruption or interference (say, voluntary closure or the impact of the stay-at-home order on the business, *if* on the particular Wording those are found not themselves to amount to the necessary interruption/prevention etc) that was caused by the same underlying event contemplated by the Wording—the disease. In that situation, once the trigger is engaged—in this example by the government closure—all loss relating to the underlying event is recoverable, and the fact that the business was already closed or had reduced revenue does not prevent or reduce recovery because the action that satisfies the trigger displaces or absorbs (for the purposes of causation) the earlier disease-related trigger. (Also, in practical terms, voluntary closure or downturn can be reversed but the mandatory closure cannot and puts an end to any option to open.) See further the discussion of *New World Harbourview* at paragraphs 312 to 313 below.

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<sup>260</sup> ¶/146}

<sup>261</sup> ¶/37}

## D. Trends clauses and quantification machinery

### Introduction to trends clauses

268. ‘Other circumstances’ or ‘trends’ clauses seek to allow for ‘trends’ or ‘circumstances’ which affect the business or would have affected the business (to take the typical wording of such clauses, in policies like those in this Claim that are focused on property damage with non-damage extensions not being the central case of cover) had the “Damage” not occurred, and often to make the adjusted figures ‘as near as possible, the results which would have been achieved during the same period had the Damage not occurred’ (or similar).
269. The FCA’s case on each trends clause comes down to the wording of the clause (and the uncommerciality of the Defendants’ interpretation of that wording), but the basic purpose of trends clauses is to allow for adjustments where there was a demonstrable business trend indicating that the turnover during the indemnity period would have been different to the turnover in the corresponding earlier year, i.e. to adjust the basic calculation provided for in the quantum machinery.
270. As *Riley on Business Interruption Insurance* (10<sup>th</sup> edn) summarises<sup>262</sup>:

It is rare that the turnover of a business stays the same one year after another. Thus it is unlikely that the standard turnover figures, if left unadjusted, will represent the turnover that would have been achieved. If the business was likely to have grown the insured will probably seek to invoke the provisions of the other circumstances clause. If, however, the business was likely to contract, or face challenging trading conditions such as in a recession, insurers can look to invoke the other circumstances clause. The analysis below illustrates how the adjustment of the standard turnover (i.e. that from the prior year) can be effected.

271. The trends clauses appear within this machinery. They refer to circumstances affecting or which would have affected the business; they do not refer to causes of interruption or loss. They go to valuation of the claim. The trends adjustments look at the performance and capacity of the business.<sup>263</sup> That is why frequently they are identified as being a “Trends Clause” and often refer explicitly to the “trend” of the business. Trends clauses often refer to “circumstances affecting the business” (whether with or without an explicit reference to the trend of the business) but such words need to be read in the context in which they are being used, i.e. in a trends clause, and having regard to the commercial purpose of such a clause. The purpose of such clauses, and the ‘but for’ test within them, is to avoid the provision of indemnity for what would have happened to the business anyway by virtue of the vicissitudes

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<sup>262</sup> H Roberts, *Riley on Business Interruption Insurance* (10<sup>th</sup> edn, Sweet & Maxwell, 2016) para 14.3. {J/154}

<sup>263</sup> See e.g. *Riley* para 14.3 at pp. 367-370

of (commercial) life (by analogy with *Jobling*); not to rerun a causation test bringing in by the back-door a remodelling exercise that excludes the underlying cause of the peril itself, all the more so where the underlying cause is contemplated by the insuring provision either explicitly or implicitly or is part of the overall insured event. Once one identifies that as being the purpose of such clauses, it is logical to exclude from the ordinary vicissitudes of commercial life the extraneous impact of the event or phenomenon which has resulted in cover under the policy being triggered. Thus, in a traditional damage case, the impact of a hurricane, storm or wildfire on property in addition to that of the insured is not an ordinary vicissitude of commercial life. It is the natural and probable (if not inevitable) result of the peril which has resulted in there being damage to the insured's property. The parties to the policy cannot have intended that the 'but for' test should proceed on the hypothetical premise that the peril which in fact caused damage to the insured property somehow miraculously left the property undamaged whilst devastating the surrounding area. Rather it is contemplating something extraneous to that which caused the damage to the property. The decision in *Orient Express* (which, as already identified, was an appeal on error of law from an arbitral tribunal in relation to a property damage BI insuring clause) falls to be revisited.

#### The applicability and non-applicability of trends clauses to the cover clauses in this case

272. The particular quantification machinery and trends clauses are dealt with below in the individual wording sections. However, and by way of introduction, before application of a trends or similar clause, there must be construction of the policy to determine whether the trends clause applies at all. On the proper construction of many of the relevant Wordings, the non-damage BI extension relied upon does not engage the quantification machinery (including the trends clauses) comprising the calculation of Standard Turnover etc, which are applicable only to the core property damage-related cover. On the proper construction of others, the quantification machinery does apply but the trends clause does not (typically because, again, it is expressed only to apply to property damage-related claims). Various Defendants argue that despite their careful use of defined terms such as 'Damage' referring to physical damage to property, these terms must be read to include non-damage-related interruption. There is no ambiguity here—the clauses are clear—but if there were this would be a matter for *contra proferentem*. The drafting is the Defendants' and if, which is not accepted, and unintended result has arisen, any ambiguity would have to be resolved in favour of the insured.
273. Further, in the case of Hiscox, the trends clause was optional and in one direction (upwards) only.

274. The trends clause wording is therefore only relevant to the extent that a particular trends clause is held to apply to the indemnity claim under the cover clause actually in issue. This is unsurprising in circumstances in which there is, often, a modest sub-limit and a time limit on the period of indemnity—the parties will often have been content with a simpler and cheaper quantification process.

#### The FCA's case

275. Losses prior to the policy trigger cannot be recovered. The indemnity period starts when cover is triggered and not before. But that does not mean that the continuation of loss after the policy trigger is not caused by the insured event as a whole (as explained below) and to the extent that the trends clause requires a counterfactual, it is aiming to seek the position the business would have been in without the contemplated underlying insured event on which cover is premised, as set out elsewhere. To reach this result, if a prior standard turnover (as the estimated income) is being compared with actual turnover, the standard turnover must have removed from it any COVID-19-related losses. The recoverable losses should not be discounted by reference to the fact that some loss was already being suffered as a result of the insured event, prior to the date when the 'something extra' required to trigger cover was satisfied. (Thus, in *The Silver Cloud*, addressed below, if there was already itinerary disruption due to the terrorist attacks prior to the date of the Government warnings, that does not reduce the amount of the indemnity, which must be the amount to put the insured, *for the indemnity period following the date of the warnings*, in the position it would have been in had there been no terrorist attacks or government warnings). See further the discussion of *New World Harbourview* at paragraph 313 below.<sup>264</sup>

276. By way of illustration:

276.1. If, in a public authority clause, the trigger public authority action is preceded by downturn or closure (e.g. due to voluntary behaviour, or government advice where a particular Wording is found to be triggered only by a legally imposed 'closure'), the Government action (i) is the sole cause of any additional interference, interruption or loss not suffered prior to the action, but in any case (ii) takes over or

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<sup>264</sup> Similarly, and this is a question of causation not quantum, if prior to the covered interruption (say, government closure) there was already non-triggered closure (say, voluntary closure, if not covered by a particular trigger) caused by the same underlying event, once the trigger is engaged all loss relating to the underlying event is recoverable, and the fact that the business was already closed does not prevent or reduce recovery because the mandatory closure that satisfies the trigger displaces (for the purposes of causation) the earlier disease-related trigger. Also, in practical terms, voluntary closure can be reversed but the mandatory closure cannot and is the end of any option to open.

encompasses/absorbs (as an interlinked and so not truly concurrent cause) the prior disease-related causes as the sole proximate and ‘but for’ cause of interference, interruption or loss.

276.2. If, in a disease clause with a vicinity limit, there is downturn or closure prior to the disease/danger etc spreading into the vicinity limit and triggering cover, then the disease within the vicinity or the continuation, renewal, or imposition of further national Government measures (i) is the sole cause of any additional interference, interruption or loss not suffered prior to the action, but in any case (ii) takes over or encompasses/absorbs (as an interlinked and so not truly concurrent cause) the prior disease-related causes as the sole proximate and ‘but for’ cause of interference, interruption or loss.

276.3. If a clause requires interruption but prior to the interruption there was an interfering effect falling short of that, the interruption (i) is the sole cause of any additional loss not suffered prior to the interruption, but in any case (ii) takes over or encompasses/absorbs (as an interlinked and so not truly concurrent cause) the prior disease-related interfering effects as the sole proximate and ‘but for’ cause of loss.

#### **E. Key business interruption case law on causation and trends clauses**

277. Of the following cases, most are relevant to the issue of how the policy treats an underlying insured event (terrorism, hurricane, disease) and a more narrowly defined trigger (property damage, State warnings, Government action) for causation purposes. Generally, they support the FCA’s approach not that of the Defendants.

*Prudential LMI Commercial Ins Co v Colleton Enterprises Inc* 976 F2d 727 (4<sup>th</sup> Circuit, 1992)<sup>265</sup>

278. This US case (cited in *Orient Express*) involved a policy covering property damage and property damage-triggered BI. A South Carolina motel was damaged by Hurricane Hugo. There was no dispute on the property damage claim, only in relation to the BI claim. A quantum clause sought to identify ‘earnings... had no loss occurred’.<sup>266</sup> The motel sought to apply a counterfactual in which the hurricane still occurred and damaged the surrounding area, sparing the motel itself, in which case the motel would have benefited from an ‘influx of repair persons and

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<sup>265</sup> ¶/69}

<sup>266</sup> See para 27.

construction workers in the Charleston area during the months after the hurricane'. So it was effectively seeking to claim a 'windfall profit' and arguing the opposite outcome to that of the insured in *Orient Express*.

279. The majority of the Fourth Circuit Court of Appeal found that the policy was designed to return the holder to the 'position it would have occupied had the hurricane not occurred',<sup>267</sup> the hurricane being the 'interrupting peril'<sup>268</sup>, and explained:

Merely to state the claim is to confirm its intuitively-sensed logical flaw and its unreasonableness as a reflection of what the contracting parties rightly could have expected respecting policy coverage. It would allow the insured to have it both ways-by failing to carry the premise of the interrupting peril's non-occurrence all the way through proof of "what the business would have done" in the circumstance. This simply will not do. For had the hurricane not occurred (the policy's built-in premise for assessing profit expectancies during a business interruption), neither would the specifically claimed earnings source have come into being. To allow the claim therefore would be to confer a windfall upon the insured rather than merely to put it in the earnings position it would have been in had the insured peril not occurred. Business interruption insurance of the type in issue here is not intended to provide such windfall coverage.<sup>269</sup>

280. The key elements of this reasoning are therefore: (i) for the purposes of the trends clause the non-occurrence of the insured damage and of the cause of the damage must be assumed; (ii) the windfall profit result that would arise from assuming only the non-occurrence of the insured damage is absurd and not what the parties could have intended, therefore it must have been intended that the cause of the insured damage (the hurricane) is included together with the insured damage it caused for the purposes of the trends clause; and, implicitly (iii) the only realistic scenario 'had no loss occurred' is one without the hurricane which caused the loss.

281. The dissenting judge, Circuit Judge Hall, whose view was preferred by Hamblen J in *Orient-Express*<sup>270</sup>, advanced the counterfactual in which the hurricane still hit but did not touch the motel i.e. accepted the case advanced by the motel and that the windfall profit should be paid.

*IF P&C Insurance Ltd (Publ) v Silversea Cruises Ltd, The Silver Cloud* [2004] EWCA Civ 76, [2004] Lloyd's Rep 696 CA<sup>271</sup>

282. A luxury cruise operator claimed under a BI policy after the 9/11 terrorist attacks under section Aii which indemnified against "*Loss resulting from a State Department Advisory or similar warning by competent authority regarding acts of war, armed conflict... terrorist activities, whether actual or threatened*"

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<sup>267</sup> Para 16.

<sup>268</sup> Para 23.

<sup>269</sup> Para 22 per Judge Phillips.

<sup>270</sup> Para 50, also 17 quoting para 21 of the tribunal Award {J/106}.

<sup>271</sup> {J/91}

that impact future customer bookings or necessitate changes to the itinerary of future cruises attached to the policy.<sup>272</sup> The claim arose out of US State Department warnings issued on 12 September and onwards<sup>273</sup>. The Aii cover had a \$5m limit.<sup>274</sup>

283. It was obvious and found that as a result of the attacks “*and the warnings which followed*”, many of the insured’s actual/potential customers (principally but not exclusively wealthy American citizens) would be inhibited from taking cruises.<sup>275</sup> It was common ground that the 9/11 attacks and the warnings were concurrent causes of the downturn in bookings<sup>276</sup>, but the insurers sought to argue, with expert support (from an MIT professor of management science) using empirical evidence (although not from actual experiments), that 80-90% of the causal effect was attributable to the terrorist attacks, and only the remainder to the State Department warnings.<sup>277</sup> The trial Judge (Tomlinson J as he then was) rejected that argument because, as summarised at para 99 of the CA judgment, “*It is simply impossible to divorce anxiety derived from the attacks themselves from anxiety derived from the stark warnings issued in the immediate aftermath*”, identifying as inextricably linked the attacks, media coverage of the attacks, post-attack Government warnings, and media dissemination of those warnings.<sup>278</sup> As Rix LJ observed, “*It would seem therefore that he found that the deterioration in Silversea’s market was inextricably caused directly both by the warnings and by the events themselves.*”<sup>279</sup> This was not challenged on appeal.<sup>280</sup> Further, Tomlinson J held that as there were concurrent causes, and none of them were excluded (the *Miss Jay Jay/Wayne Tank* point), a claim under the policy must lie.<sup>281</sup>

284. On appeal, the insurers sought to rely on an exclusion of relevant losses ‘unless as a direct result of an insured event’,<sup>282</sup> contending that the loss was not directly caused by the warnings.<sup>283</sup>

285. Rix LJ resolved this in the insured’s favour at para 104 (emphasis added):

“In my judgment Silversea are right about this. Cover Aii is **premised on** acts of war, armed conflict or terrorist activities, actual or threatened, **provided**, however, that they generate the relevant warnings about them. **If they do, and those warnings cause loss of income as their direct result, there is cover. The underlying causes of the warnings are not**

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<sup>272</sup> Quoted in CA judgment para 12.

<sup>273</sup> As summarises in para 37-8.

<sup>274</sup> The insured argued that the limit was \$5m per vessel but this was rejected: para 86.

<sup>275</sup> 1<sup>st</sup> instance [2004] Lloyd’s Rep IR 217 para 9 {J/90}.

<sup>276</sup> 1<sup>st</sup> instance para 69

<sup>277</sup> CA para 98, 1<sup>st</sup> instance paras 67-8.

<sup>278</sup> 1<sup>st</sup> instance para 68

<sup>279</sup> CA para 99.

<sup>280</sup> CA para 100.

<sup>281</sup> 1<sup>st</sup> instance para 69, CA para 100.

<sup>282</sup> Quoted in CA para 27. Can be seen in situ at 1<sup>st</sup> instance 223.

<sup>283</sup> CA para 101. The argument had not been raised below: see CA para 28.

excluded perils, it is simply that they are not covered under cover Aii as perils in themselves.<sup>284</sup> Something extra is required. However, they are “an insured event” for the purpose of the contract as a whole. There is no intention under this policy to exclude loss directly caused by a warning concerning terrorist activities just because it can also be said that the loss was also directly and concurrently caused by the underlying terrorist activities themselves.”

286. This is an important and binding authority in the present case, for the following reasons:

286.1. The Court confirmed that the attacks and the warnings were concurrent proximate causes that could not realistically be separated for any apportionment purposes.

286.2. The Court confirmed that the underlying causes of the warnings are an ‘insured event for the purposes of the policy as a whole’. This is significant and of general import. As RSA pleads, “*the essence of a contract of indemnity insurance... is to put the insured in the position in which it would have been if the insured event had not occurred but no better position*”.<sup>285</sup> The Defendants’ case is that COVID-19 is not part of the ‘insured event’ (a term two of them use as well as ‘insured peril’).<sup>286</sup>

286.3. The reason for the Court’s findings above was that the policy give cover for public authority action responding to, therefore “*premised on*” and contemplating an “*underlying cause*” (here, war or terrorism).<sup>287</sup> The underlying causes are not covered as a perils “*in themselves*?” as the policy required the public authority action in the form of warnings as an extra requirement (“*something extra*”) beyond the underlying cause in order to trigger cover.

286.4. In those circumstances, the “*intention under this policy*” is that

- (a) Although the sole cause of loss prior to the warnings and a concurrent direct cause after them, the contemplated/premised underlying cause of terrorist attacks cannot be the sole proximate cause such as could prevent the loss being said to ‘result from’ the warnings (the causal connector in this policy) or ‘directly result from’ the warnings (the additional causal connector in the exclusion).

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<sup>284</sup> Terrorism was not itself an insured peril under cover Aii, although it was under a separate section, ‘A’, in relation to loss of income as a consequence of terrorist interference with particular voyages of particular vessels causing loss of time: see CA paras 74-5 and 77 and 110-111. The limited possibility of overlap is discussed at CA para 113.

<sup>285</sup> RSA Def para 60 {A/12/23}

<sup>286</sup> QBE Def paras 4 {A/11/2} and 14 {A/11/5}, RSA Def paras 60 {A/12/23}, 83(a) {A/12/28} and 90(a) {A/12/30}

<sup>287</sup> Hiscox is forced to deny the obvious, stating that its own public authority with disease trigger clause is not premised on disease: Hiscox Def para 96 {A/10/27}

- (b) For the purposes of any causation test, including the ‘but for’ test (either for the purposes of “ordinary” causation or for the purposes of any trends clause had there been one), the insured event excised in the counterfactual must include the underlying cause, not merely the ‘something extra’ needed to trigger cover. The Defendants may seek to argue that this was a decision only on the meaning of ‘insured event’ in the exclusion clause in this policy (which excluded “*any loss arising from...Deterioration of market and/or lack of support for any scheduled cruise unless as a direct result of an insured event*”), but the general reasoning (and finding that the causes were inextricably linked) goes much further. The Court of Appeal correctly found that the underlying cause is *something that is insured* even if it is not sufficient in itself to trigger cover, from which it follows that loss is not intended to be irrecoverable merely because it results from that event. The Court distinguished between qualifying conditions required to trigger cover, and what the policy is insuring against. Whilst there was no specific discussion of the ‘but for’ test either at first instance or on appeal, it was effectively undisputed and indisputable that but for the warnings some (and possibly the majority) of the loss would have been suffered anyway given that the events of 9/11 had an impact on travellers’ willingness to travel on cruises, i.e. the terrorist attacks on their own would have had a substantial adverse effect on Silversea’s business.<sup>288</sup> Nevertheless, that did not provide a bar to cover in respect of those losses that would have occurred irrespective of the warnings. It is plainly unrealistic to suggest that the result of *The Silver Cloud* would have been any different if there had been a trends clause with an express ‘but for’ test.

*Midland Mainline Ltd v Eagle Star Insurance Co Ltd* [2004] EWCA Civ 1042, [2004] 2 Lloyd’s 604<sup>289</sup>

287. In this case, discussed at paragraph 109 above, wear and tear on train lines caused a broken rail which caused the Hatfield rail disaster. That led to the imposition of emergency speed restrictions (ESRs) over specific parts of the track with the wear and tear for specific periods<sup>290</sup>, disrupting the timetables of rail operators including the insured, who sought an indemnity under a denial of access BI extension. The BI extension covered loss ‘resulting from interruption of or interference with the Business... in consequence of prevention or

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<sup>288</sup> 1st instance para 9 {J/88}

<sup>289</sup> {J/94}

<sup>290</sup> 1st instance para 97, CA para 1.

hindrance of use or access to a station depot or track ‘caused by’ action of a competent authority for reasons of public safety.<sup>291</sup>

288. Allowing the appeal, the insurer was entitled to rely on a wear and tear exclusion, given that the wear and tear was not (as the judge had held) merely the ‘underlying state of affairs’ but rather was the sole proximate cause, alternatively a concurrent proximate cause with the ESRs which the wear and tear caused to be imposed, but even on the latter approach as wear and tear was an excluded concurrent proximate cause the policy would not respond (following *Wayne Tank*).<sup>292</sup>
289. This is an unsurprising result. The underlying cause in that case was not expressly or impliedly intended to be part of the insured event or treated as inextricably linked with it: it was not a stated part of the trigger (the cover trigger was not ‘action of a competent authority for reasons of public safety resulting from wear and tear’), or even an implied part, but rather wear and tear was expressly excluded.

*Catlin Syndicate Ltd v Imperial Palace of Mississippi Inc* 600 F.3d 511 (5<sup>th</sup> Circuit, 2010)<sup>293</sup>

290. Hurricane Katrina damaged the Imperial Palace casino in Mississippi, which made a BI claim. The policy include a trends clause providing ‘*In determining the amount of the... loss., due consideration shall be given to experience of the business before the loss and the probable experience thereafter had no loss occurred.*’
291. The Fifth Circuit Court of Appeal (citing the *Colleton* decision with approval) held that the true counterfactual prescribed by the policy was that in which the Hurricane did not hit:
- “While we agree with Imperial Palace that the loss is distinct from the occurrence—at least in theory—we also believe that the two are inextricably intertwined under the language of the business-interruption provision. Without language in the policy instructing us to do so, we decline to interpret the business-interruption provision in such a way that the loss caused by Hurricane Katrina can be distinguished from the occurrence of Hurricane Katrina itself.”
292. Accordingly, the insured was not entitled to the windfall profits it would have made had it been the only casino around (its preferred hypothetical being ‘Hurricane Katrina struck but did not damage Imperial Palace’s facilities’) and moreover, the strong focus of the trends clause was on the pre-Hurricane figures as the measure of loss.

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<sup>291</sup> Quoted in para 15.

<sup>292</sup> Sir Martin Nourse at para 12.

<sup>293</sup> ¶/108}

293. This was a decision of Hamblen J, as he then was, on a s69 Arbitration Act 1996 appeal from an arbitral tribunal on which to succeed, it was necessary for the appellant to show an error of law.<sup>295</sup> A luxury hotel chain with a hotel in New Orleans submitted a BI claim following Hurricanes Katrina and Rita in which the hotel, like much of New Orleans and the area beyond the city, suffered significant property damage necessitating its closure during September and October 2005.

294. The policy included:

294.1. A damage clause covering 'loss due to interruption or interference with the Business directly arising from [physical] Damage', the insuring clause providing for 'loss resulting from such Interruption in accordance with the provisions contained herein' (para 12).

294.2. A non-damage PoA extension covering loss 'arising out of' Damage to property in the vicinity, or closure (in whole or in part) or deeming unusable of property in the vicinity by a competent local authority, preventing or hindering use of the premises (para 14).

294.3. A non-damage loss of attraction extension covering loss 'resulting directly' from loss destruction or damage to property in the vicinity of the premises (para 15).

294.4. A trends clause (apparently applicable to all three of the above) as follows (para 12), emphasis added:

"In respect of definitions under 3, 4, 5 and 6 above for Gross Revenue and Standard Revenue adjustments shall be made as necessary to provide for the trend of the Business and for variations in or special circumstances affecting the Business either before or after the Damage or which would have affected the Business had the Damage not occurred so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Damage would have been obtained during the relative period after the Damage."

295. The fundamental dispute (recorded in the two questions of law at para 2 and the summary at paras 7-11) was whether, as the insurer contended, the 'but for' test applied to the wide area damage dictated that there was no recoverable loss because an 'undamaged Hotel in an otherwise damaged City' would have done no additional business beyond its actual business

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<sup>294</sup> **J/106**

<sup>295</sup> Before a strong panel of Sir Gordon Langley, George Leggatt QC, and John O'Neill, as they then were, although the full arbitral award is not available.

(almost zero) because New Orleans was itself closed off around the hotel and so the hotel did not have the staff or customers. As the Judge summarised: “*no one could visit the Hotel because it was damaged; but no one could visit the Hotel because New Orleans was effectively closed off.*”<sup>296</sup> The insured contended that it was entitled to recover even if its loss was concurrently caused by damage to the wider area by the same hurricanes, and/or that the correct counterfactual was to assume no hurricanes at all, not that the hurricanes still hit but left the hotel miraculously untouched.

296. During the arbitration:

296.1. The tribunal found for the insurer on this question, holding that loss must be assessed “*on the hypothesis that the Hotel was undamaged but the City of New Orleans was devastated as in fact it was*”. This conclusion was based almost entirely on the words of the trends clause, which specified a ‘but for the Damage’ test, with ‘Damage’ being the physical damage to the premises only (see the reasoning summarised in para 17).

296.2. However, the insurer had accepted cover under the PoA and LoA clauses, which had significantly lower limits than the damage clause (para 16).

297. Hamblen J dismissed the appeal. In summary, his reasoning was as follows:

297.1. In exceptional circumstances the ‘but for’ test may be disapplied (such as two independently sufficient causes, neither of which would have caused the loss under that test) (paras 21-28), and there was ‘considerable force’ in the insured’s submissions that the ‘but for’ test should not be applied (para 33). However, the ‘but for’ test would only be disapplied where fairness required (para 33) and this was an issue for the tribunal of fact and was not addressed by them because it had not been argued before them. Accordingly, the insured failed to show an error of law by the tribunal (paras 36-7). (This is an important point of distinction from the present case.) Further, the express words of the policy provided for the ‘but for’ test and so it could not be an error of law for the tribunal to have not disapplied it (paras 34-5). (That reasoning would not, however, apply where there is no ‘but for’ test in the policy or a trends clause containing a ‘but for’ test does not apply.) And finally, the Judge was not convinced that the ‘but for’ test was unfair, including because alternatives (such as an undamaged hotel in an undamaged city) would not work or would over-indemnify by compensating the claimant for all BI losses howsoever caused (para 38).

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<sup>296</sup> A team of television news reporters did stay there: see para 8.

- 297.2. *The Miss Jay Jay* and *The Silver Cloud* were held to be of no real assistance as they did not consider concurrent independent causes or the ‘but for’ test (paras 29-32).
- 297.3. The *Colleton* case from the US was of no real assistance as it turned on the words of that policy, but to the extent it mattered, Hamblen J preferred the dissenting judgment (paras 21 and 50).
- 297.4. The insured was wrong to contend that the insurer’s logic prevented recovery under both the damage clause (which was disputed in this case) and non-damage clauses (under which the insurer had accepted cover) (paras 28 and 39, also 60), for the following reasons:
- “Further, it is not the case that the application of the “but for” test means that there can be no recovery under either the main Insuring Clause or the POA or LOA. If, for the purpose of resisting the claim under the main Insuring Clause, Generali asserts that the loss has not been caused by the Damage to the Hotel because it would in any event have resulted from the damage to the vicinity or its consequences, it has to accept the causal effect of that damage for the POA or LOA, as indeed it has done. It cannot have it both ways. The “but for” test does not therefore have the consequence that there is no cause and no recoverable loss, but rather a different (albeit, on the facts, more limited) recoverable loss.”
- 297.5. The purpose of the trends clause was stated to be “*to allow for an appropriate adjustment to be made to the components of the standard formula so as to give effect to the requirement that the insured be indemnified in respect of the loss caused by the insured damage, not more and not less*” (para 45). The counterfactual ‘had the Damage not occurred’ and ‘but for the Damage’ in the trends clause only required an assumption that the Damage had not occurred, rejecting the insured’s argument that without the Damage the hurricane underlying events would not have occurred either (paras. 46 and 57). The clause was looking to trends, variations and circumstances independent of the Damage and hurricanes outside the premises were “*were independent of the insured Damage, albeit not independent of the cause of that Damage*” (para 48). The wording was held to be unambiguous (para 54).
- 297.6. The Judge accepted but was not apparently concerned by the consequence that the trends clause would, on his construction, permit recovery of windfall profits, i.e. in some circumstances of wide area damage where people could still access the premises, it would be necessary to ask what profits it would have earned as the sole undamaged monopoly hotel in a wider area of damage (para 50).
- 297.7. The Judge accepted, but was not apparently concerned by, the consequence that the wider the impact of the peril causing damage to the premises the less would be the response of the policy (para 51).

298. The FCA's submissions in relation to this decision are as follows:
299. *Orient Express* was undoubtedly addressing very different points to those arising in the present claim (and is distinguishable) in a number of respects:
- 299.1. *Orient Express* is a case of all risks cover triggered by physical damage to the premises themselves. The Wordings here cover very different risks and often have a number of qualifying ingredients.
- 299.2. In *Orient Express*, it was conceded that the extensions which did not require physical damage to the insured premises (the loss of attraction and prevention of access clauses) responded to cover the loss and the Court endorsed that concession as rightly made.
- 299.3. Even in relation to Wordings where the trigger peril is e.g. confined to 25 miles or even one mile, the peril is nevertheless necessarily a wide area peril, i.e. the parties have expressly contemplated a trigger event that is outside the premises and could be geographically wide and/or physically distant from the premises (such as a 2,000 square mile epidemic- a 25 mile radius). This contrasts with the more confined trigger of physical damage to the premises themselves in *Orient Express*.
- 299.4. The decision has no application to policies that do not have an explicit 'but for' test in an applicable trends or similar clause.
- 299.5. Indeed, the decision ultimately turns on the construction and application of words in a particular trends clause to a particular insured peril that is not relevant to this case.
- 299.6. The appeal was dependent on showing an error of law in circumstances where the appellant was advancing new arguments on appeal that had not been argued before the tribunal and which involved issues of fact and necessitated findings of fact. No such restriction applies to this Court in this case.
300. In some Wordings in the instant case the peril is drawn so widely (e.g. disease or emergency anywhere) that there is in reality no second concurrent cause that can be identified.
301. The exclusion in the counterfactual of only the aspects of the insured peril that are defined in the trigger clause lacks common sense and is not applied to its logical conclusion here or elsewhere. The Judge's (and insurer's) logic (see paragraph 297.4 above), with respect, falls apart in relation to the POA and LOA clauses, which the insurer accepted applied to cover

the claim. Application of the ‘but for’ test is not a matter of election by or discretion of the insurer, but of logic. The very issue with concurrent independent causes is that the narrowly applied ‘but for’ test does allow the insurer to “*have it both ways*” as neither potential cause (the Damage to the property, and the damage to property in the vicinity) did in fact cause the loss on a “but for” basis. Thus the logical result would be that there could be no cover under either clause. This would, of course, be absurd, as the insurer recognised by accepting cover, and the Judge implicitly recognised by baulking at the necessary conclusion. The reason it would be absurd is that it would be contrary to common sense and the apparent intention of the parties to conclude that there was no cause of the loss, and no cover even where the two concurrent causes were both covered.<sup>297</sup>

302. This shows that the ‘but for’ test was, with respect, being operated in a fundamentally incorrect way. The problem necessarily follows from treating the damage to the property and underlying cause as distinct competing causes even though the property damage could not have occurred without the hurricane and the situation of the miraculously preserved hotel in a devastated region is not a position that ever could have happened and so not one the parties would ever have intended the indemnity to restore the insured to. Insurance is to protect against departures from what would otherwise have happened, not to provide an indemnity based on what could never have happened.
303. Further, the Judge erred in dismissing *The Silver Cloud* as not being relevant because it did not address the ‘but for’ test (para 32). Whilst it may not have done so in terms, it was obvious and accepted in *The Silver Cloud* that but for the warnings there still would have been substantial loss due to travellers staying away as a result of the 9/11 attacks. Further, the causes were independent in that some or most of the loss would have occurred as a result of the 9/11 attacks even without the warnings. Tomlinson J and the Court of Appeal dealt with this by finding that the two causes (terrorism and government warnings) were inextricably linked and so could be treated as a single cause. Further, in the *Silver Cloud*, Rix LJ made clear that although the defined peril was warnings resulting from terrorism, “*the underlying causes of the warnings*” while “*not covered... as perils in themselves*” under section Aii were not intended to be excluded and so did not prevent recovery for losses following the warnings. This approach of enlarging

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<sup>297</sup> The illogicality probably goes further. If (as insurers contend in the instant case) the POA and LOA clauses only cover loss resulting from damage (etc) to property ‘in the vicinity’ of the premises and not outside the vicinity, then there was probably a third uninsured concurrent cause: as well as damage to the property, and damage to property in the vicinity, there was damage to property outside the vicinity. (It appeared to be accepted here that ‘vicinity’ included the entire 900 km<sup>2</sup> city of New Orleans plus the surrounding area—paras 5 and 7—but it is a matter of record that the hurricanes extended further to other parts of Louisiana and some of Mississippi and Florida).

out from the defined peril to include its underlying cause and then considering whether or not the latter was intended to be an excluded cause when identifying recoverable loss was simply not considered by the learned Judge in *Orient Express*.

304. Hamblen J was concerned (para 38) with the question of what the applicable counterfactual would be. But that is not a difficulty. The true and common sense position is that (given the nature of the hurricane that caused the damage) if one asks what the ‘but for’ world would have looked like if there had been no Damage, that inevitably would involve there being no hurricanes because that is the most likely (and probably only) possible outcome in the real world had there been no hurricane Damage to the hotel.
305. The Judge himself accepted that there was a real prospect that he was wrong by granting permission to appeal,<sup>298</sup> that appeal then not proceeding as a result of settlement that was, the FCA’s legal representatives understand, very shortly before the Court of Appeal hearing.
306. The *Orient Express* approach has not been revisited until the present case. It has been cited five times but only in relation to its summaries of general legal principles,<sup>299</sup> not its decision or outcome. It is a decision that has met with criticism. Colinvaux describes it as a “curious outcome that, the greater the damage to the vicinity and thus of the risk of depopulation, the less prospect there is of any recovery by the assured”.<sup>300</sup> *Riley on Business Interruption* notes that “there must be doubt over whether it is actually a satisfactory outcome for either insurers or policyholders”.<sup>301</sup> He also adds that when Main Street in Cockermouth, Cumbria, flooded in 2009, insurers did not seek to argue that none of the businesses could recover much because but for the flooding of their business the rest of the street would have been closed and effectively a building site for approaching six months, anyway.<sup>302</sup> Nor, it should be noted, was it suggested that each business should have been entitled to indemnity calculated on the windfall basis that it would be the only business open in the town.

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<sup>298</sup> R Merkin, ‘The Christchurch Earthquakes Insurance and Reinsurance Issues’ (2012) 18 Canterbury LRev 119 at 139 **{J/157}**.

<sup>299</sup> In *The Kos* at para 74 **{J/115}** as support for the *Miss Jay Jay* principle; in *Greenwich Millennium Village* at para 174 **{J/119}**, *Impact Funding Solutions Ltd* (first instance) [2015] EWHC 4005 (QB) at para 43 **{J/122}** and *Cultural Foundation v Beazley Furlonge Ltd* [2018] EWHC 1083 (Comm) **{J/137}** at para 173 as to the deficiencies of the ‘but for’ test; and in *Ted Baker* at para 160 as to the general purpose of trends clauses.

<sup>300</sup> Para 24-107.

<sup>301</sup> Para 15.21.

<sup>302</sup> Paras 15.21-22.

*New World Harbourview Hotel Co Ltd & ors v ACE Insurance Ltd & ors* [2011] Lloyd's Rep IR 230, Court of First Instance of Hong Kong<sup>303</sup>, affirmed [2012] Lloyd's Rep IR 537<sup>304</sup>

307. This case involved a claim by claimants who ran convention centres, hotels, car parks and other businesses in Hong Kong. The BI policy responded to disease at the premises, and notifiable diseases occurring within 25 miles. It had a 180 day (of trading after the disease hit<sup>305</sup>) maximum loss period.
308. SARS broke out in Guangdong in China in late 2002/early 2003, with clear reports on around 10 February 2003, and the first Hong Kong case on 21 February 2003. SARS coronavirus only became notifiable (following scientific identification) in Hong Kong on 27 March 2003, and the epidemic was declared over in June 2003. The insurers conceded that, HK being a small territory, the 25-mile condition was met once SARS occurred anywhere within Hong Kong. The insured claimed losses dating from 9 March 2003.
309. The Hong Kong Court of First Instance, upheld by the Court of Appeal, applying Hong Kong law ruled that 'notifiable' required formal designation as such, and also that the policy only responded from the date on which the disease became notifiable (both points conceded by the FCA, save in relation to RSA4 where it is not disputed that the Wording expressly backdates the trigger date to the pre-notifiable date of the outbreak). The policy sought to indemnify for loss caused by a notifiable disease, not a disease on some uncertain date prior to its becoming notifiable.<sup>306</sup>
310. The first instance decision, although the issues did not arise on appeal, also considered the Standard Revenue clause (issue 4 at first instance). Standard Revenue was defined as "*the Revenue realized during the twelve months immediately preceding the date of the Damage appropriately adjusted where the loss period exceeds twelve months.*" The insured wanted an earlier date to exclude from the Standard Revenue the decrease in revenue prior to SARS becoming notifiable and the policy being triggered. The relevant question for the court was:

“Should the calculation of Standard Revenue under the Insurance Policies: (1) include; or, (2) exclude, the effect which SARS had on the revenue of each Plaintiff before 27 March 2003 when, on the Defendants’ case, it became a ‘notifiable human infectious or contagious disease occurring within 25 miles of [Hong Kong]’?”

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<sup>303</sup> ¶/110}

<sup>304</sup> ¶/114}

<sup>305</sup> 1<sup>st</sup> instance para 70

<sup>306</sup> CA para 45, 1<sup>st</sup> instance para 52

311. In that case, the definition of “Damage” included “loss of use” and so it is perhaps unsurprising that the point that this machinery may not apply at all (because it relates only to Damage) was not taken. The court construed the trigger date for Standard Revenue as the date on which the disease became notifiable on the basis that the policy contemplated that a disease may well exist before becoming notifiable, but given that cover was only to start when the disease became notifiable, it stood to reason that Standard Revenue must run up to that date too.<sup>307</sup>
312. That this was the key point reflects the way BI quantification machinery works—it contemplates a rebuttable presumption that the prior year’s figures (Standard Revenue under the *New World Harbourview* machinery) are applied, with the possibility of further adjustment under the trends clause. The argument focused on that first step. Although the trends clause was quoted<sup>308</sup> it was not considered and was irrelevant to the question for the Court (which turned solely on the definition of Standard Revenue and therefore the pre-notifiable disease period).
313. Had the point arisen, the FCA contends that the insured would have been entitled to rely on the trends clause to allow adjustment to give rise to a counterfactual in which there was no disease at all—given that the underlying cause of non-notifiable disease preceding the notifiable disease is contemplated by the wording, and that although notifiability was a trigger the pre-notifiability loss associated with the disease, whilst not itself being recoverable, should not ultimately reduce the recovery for the period during which the disease was notifiable. See further paragraph 267 above.
314. Further, even the Defendants do not (although it would be the logical result of their approach) contend that because the cover only responds to notifiable disease, it does not cover non-notifiable disease, and so the counterfactual should be (in a *New World Harbourview* type case of a 25 mile disease clause) a world in which COVID-19 still existed within the 25 mile radius *but was just not notifiable*. Instead, they choose a different qualifying condition—the presence within 25 miles—and seek to excise that, but that is no more logical than arguing that the notifiability of the disease has to cause the loss and it did not because even if not technically made notifiable all the loss would have resulted anyway.

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<sup>307</sup> 1<sup>st</sup> instance para 79

<sup>308</sup> 1<sup>st</sup> instance para 76

315. It should also be noted that there was no suggestion in the case that the ‘but for’ test in the trends clause prevented recovery of losses resulting from the occurrence of SARS beyond 25 miles and in the wider region, even though it was clear that the business suffered as a result of the loss of business from customers outside Hong Kong.<sup>309</sup>

*Australian Pipe & Tube Pty Ltd v QBE Insurance (Australia) Limited (No 2)* [2018] FCA 1450<sup>310</sup>

316. This was an Australian BI claim arising out of damage to a steel mill by the physical damage to mill machinery by reason of defectively uneven/moving concrete slabs under the mill (paras 6-8 and 88). There was a dispute as to the quantification of the indemnity for loss of gross profits, and the production levels ‘but for’ the misalignment. The case has only limited implications for the current Claim but it is worth noting two points.

317. First, the basis of settlement clause (para 105) provided for the Reduction in Turnover “*during the Indemnity Period... in consequence of the Damage*” (para 105) (‘Damage’ was defined as physical “loss, destruction or damage” to property: para 103). The ‘but for’ test applied by the Federal Court of Australia (para 8(a)) asked what would have happened but for the “*movement of the slab(s) and the resulting misalignment issues with the mill’s production*”, not what would have happened but for the misalignment issues (the damage to the machinery) but with the defective concrete slabs remaining as they were (and still requiring rectification etc).

318. Second, the ‘trend, variations or other circumstances clause’ (quoted at para 112) was discussed in the following terms:

114. The adjustment subclause is designed to give purpose to the principle of indemnity under the policy. As stated in Roberts H, Riley on Business Interruption Insurance (10th ed, Thomson Reuters, 2016) at 48:

Without this clause 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, albeit within a restricted period, i.e. the maximum indemnity period and also limited to the sum insured...

The other circumstances clause seeks to accommodate all such influences on the business that would have occurred but for the incident itself. This may seem like an enormous, if not insurmountable challenge, but to ignore all these factors and merely rely on the previous year’s trading would lead to a lottery in which the insured was either over or under indemnified.

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<sup>309</sup> Para 38.

<sup>310</sup> ¶/138}

115. Further, as was stated in Honour WB and Hickmott GJR, Honour and Hickmott's Principles and Practice of Interruption Insurance (4th ed, Butterworths, 1970) at 444:

It is essential to ascertain as accurately as practicable the hypothetical results which the business itself would have produced apart from the fire or other peril happening, as to determine what adjustments to the rate of gross profit, the annual turnover and the standard turnover figures would be equitable.

116. The relevant adjustments contemplated by the adjustment subclause are trend, variation and other circumstances. These adjustments have been described by Honour WB and Hickmott GJR, Honour and Hickmott's Principles and Practice of Interruption Insurance (4th ed, Butterworths, 1970) at 293 in the following terms:

(a) "Trend" means the general tendency of the business in the expansion or contraction of trading or operating activity;

(b) "Variations" embraces:

all developments, extensions, modifications or alterations in the organisation, production or trading arrangements of the business, subject however to their being within the scope of the business and premises as insured by the policy ... so as to approximate the results that might have been reasonably expected to have accrued from such factors as the projected or actual installation of new plant or equipment, the opening up of new agencies, the close-down of unprofitable sections or departments, the introduction of new methods and processes and the like.

(c) "Special Circumstances" means circumstances of a somewhat exceptional nature not generally occurring within or without the business.

319. This is of some assistance, although 'special/other circumstances' is intended to include external events such as a new competitor entering the market during the interruption period, a strike, or a key employee leaving, it is not intended to include events that underlie the insured peril itself. Thus the Judge was not here contemplating that the defective slabs would still have had effects on the business falling short of physical Damage, and made no adjustment in that regard.

*Café Chameleon CC v Guardrisk Insurance Company Ltd*<sup>311</sup> (26 June 2020, High Court of South Africa)<sup>312</sup>

320. The High Court of South African Western Cape Division, on an expedited application, found that the insurer respondent was liable to indemnify a claimant under the BI section of its policy for any loss suffered since 27 March 2020 as a result of the COVID-19 outbreak in South Africa, which resulted in the promulgation and enforcement of regulations made by the Minister of Cooperative Government and Traditional Affairs under South Africa's Disaster Management Act 2002 (para. 81). The policy required "notifiable Disease occurring within a radius of 50 kilometres of the Premises" with "Notifiable Disease" defined to mean "*illness*

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<sup>311</sup> **J/144**;

<sup>312</sup> The other COVID-19 BI case to bring to the Court's attention is the French case of *SAS Maison Rostang v AXA France LARD SA* (22 May 2020) addressed at paragraph 152 above and elsewhere **J/143**.

*sustained by any person resulting from any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them, but excluding Human Immune Virus (HIV), Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition*". Le Grange J held that the notification requirement in the Notifiable Disease Extension under consideration was to ensure that cover thereunder would be triggered only by outbreaks of the most serious diseases. (para.62)

321. The insured had to prove that the interruption was 'due to' the occurrence of COVID-19 within 50km (para 68). There was a clear nexus between the COVID-19 outbreak and the regulatory regime that caused the interruption to the insured's business such that causation was established. The insurer's argument that the business was interrupted due to the regulatory regime/imposition of the lockdown rather than the COVID-19 outbreak within a 50km radius of the premises was rejected (paras. 69-71, 74). (The decision on legal causation, although in favour of the insured, is less relevant to the present Claim because South African law differs from English contract law and is based on policy considerations (paras.69, 75-76, 81). However, it is noteworthy that the counterfactual considered assumed that there was no COVID-19, not merely no COVID-19 within 50km: para 74)

**F. Causal language: the meaning of 'followed', 'resulting from', 'due to' etc**

322. The policies include a large range of causal connecting language between the various links in the chain from the peril to the loss, typically using different linking words within the same clause. The words include 'followed', 'following', 'arose from', 'because of', 'a result of', 'resulted from', 'resulting', 'directly resulted from', 'resulted solely and directly from', 'in consequence of', 'caused by', 'whereby', 'due to' and 'for'.

323. For example, Hiscox<sup>313</sup> covers loss that (emphasis added)

“result[ed] solely and directly from an interruption to the insured's activities caused by its inability to use the insured premises due to restrictions imposed by a public authority following an occurrence of any human infectious or contagious disease, an outbreak of which must be notified to the local authority”

There are four different connectors here.

324. As discussed further below, none of these links entails an enquiry into a technical counterfactual containing some of the elements of the COVID-19 pandemic and Government

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<sup>313</sup> {B/6/1}

interventions.<sup>314</sup> A technical and unrealistic ‘but for’ enquiry of that nature must be clearly stipulated by the quantification machinery or trends clause, if at all.

325. The case law supports the view that many of these terms are often intended to import a proximate cause test. The authorities on individual forms of wording are fairly limited in number and not always consistent (as might be expected because ultimately their interpretation depends upon their contractual context).<sup>315</sup> Potter LJ (as he then was) explained that the doctrine of proximate cause is to be “*applied with good sense, so as to give effect to and not to defeat the intention of the parties. It does not depend on nice distinctions between the particular varieties of phrase used in particular policies to express the causation of the loss.*”<sup>316</sup> But in general terms, and at least where the relevant links are between the loss itself and what caused it:

325.1. ‘Directly’ is probably a synonym for proximate cause (which, after all, is a test of how *direct* and dominant a cause is).<sup>317</sup> It is used in contrast to “indirectly”. Similarly, ‘due to’, ‘caused by’, or ‘resulting from’ probably merely refer to the ordinary proximate cause test (although the context may indicate a contrary intent).<sup>318</sup>

325.2. Wording stipulating a loss is covered only if it results ‘solely and directly’ from the stated peril could but usually would not narrow the scope, as *Colinvaux* summarises: “*Attempts have been made to limit the proximate cause doctrine by stipulating that a loss is covered only if it results, for example, solely, exclusively or directly from a stated peril. The courts have not demonstrated a willingness to see the proximate cause doctrine ousted by this method.*”<sup>319</sup> It should be noted that in the Hiscox covers, the “solely and directly” language only applies to the “interruption” and the cause of the interruption is subject to different causation language. This phrasing, unique to Hiscox and MSAmIn2, is considered below in relation to their specific Wordings.

325.3. The choice of the term ‘following’, ‘arising out of’ and ‘in consequence of’ will often be intended to loosen the causal nexus from the proximate cause test.<sup>320</sup> The natural

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<sup>314</sup> PoC para 59 {A/2/39}

<sup>315</sup> *Colinvaux* at paras 5-075ff {J/147}

<sup>316</sup> *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co plc* [2002] Lloyd’s Rep. I.R. 113 (CA) at para.42 {J/87}.

<sup>317</sup> *Colinvaux* para 5-078 to 079. ‘Directly’ was present in the *Miss Jay Jay* and *Silversea* wordings and the ordinary proximate cause rule was applied (including permitting causation where the insured peril was one of a number of concurrent clauses).

<sup>318</sup> *Colinvaux* para 5-077, 081 and 085, *MacGillivray* para 21-004 {J/151}, *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co plc* at para 42 as to ‘resulting from’.

<sup>319</sup> *Colinvaux* at paras 5-078, 5-082-5 to 083, 5-087 to 5-088.

<sup>320</sup> *Colinvaux* at 5-075-6, 084. Whether weaker linkages such as “following”, “relating to” and “arising out of” require proximate causation or some weaker causal link is determined by the context and purpose for which they are used - see *Beazley Underwriting v The Travelers Companies* [2012] Lloyd’s Rep IR 78 at 128, per Christopher Clarke J {J/117}: “arising out

meaning is merely that the event is part of the factual background and along with other events led to the result indicated. The HIGA interveners advance the same point in relation to the words ‘arising from’, which the FCA adopts.

### **G. The interaction between cover and causation**

326. The following sections proceed to consider the questions of cover and causation in relation to each Wording. The interaction is not limited to the fact that causation issues only arise if the underlying triggers (disease, advice of government, prevention of access etc) are present. At least on the Defendants’ approach to causation, the breadth or narrowness of those triggers (e.g. whether the triggering prevention or hindrance of access is restricted to closure orders or extends to stay-at-home advice) affects the outcome on causation. To put it simply, the Defendants seek to draw the insured peril narrowly and identify all other COVID-19 consequences as competing causes. The broader the insured peril ends up being by reference to those questions of ‘what amounts to Government action’ and ‘what amounts to prevention of access or use’ the fewer factors that may have affected the insured’s business there are left to be presented by the Defendants as competing causes.

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of...does not dictate a proximate cause test, and... a somewhat weaker causal connection is allowed.” See also *AMI Insurance v LEGG* [2018] Lloyd’s Rep IR 1 (NZCA) – “the phrase ‘in connection with’ plainly requires a nexus between one thing and another, but the nature and closeness of the required connection always depends on context and purpose. But also see *MacGillivray* para 21-004 (as to ‘in consequence of’) **{J/151}**. As to ‘following’ see PoC para 60 **{A/2/40}**.”

9) **SPECIFIC WORDINGS 1: PUBLIC AUTHORITY DENIAL OF ACCESS CLAUSES**

327. This section considers the proper construction of the triggers of insurance coverage provided by each Wording (issues of causation are considered in Section 9 (Causation) below).
328. If, contrary to the FCA’s primary arguments set out below, the Court finds the meaning of the terms used in any of the policies are ambiguous, such ambiguities should be resolved against insurer on grounds of commercial sense or alternatively contra proferentem, applying the analysis set out in paragraphs 92-99 above.

A. **Hiscox 1-4 hybrid public authority/disease wording, no vicinity provision/1 mile provision**

Introduction to Hiscox Wordings

329. Hiscox policies have been divided in Hiscox1-4 for convenience. Within those types there are a total of 39 wordings with minor variations, although there is more similarity than difference within each one of the four types. The Hiscox1-4 lead wordings are at {B/6-9}.
330. Between the four types, the working assumption is that all the Categories are represented. The names of the policies themselves indicate the range of businesses covered (e.g. ‘Professions’, ‘Retail’, ‘Venues’, ‘Not for profit’, ‘Trades’, ‘Salon’, ‘Office’, ‘Booksellers’, ‘Clinic and Surgery’, ‘Masonic halls’, ‘Electrical contractors’, ‘Media and entertainment’, ‘Cricket Club’). The example schedules indicate possible insured trades of bike repairer, gunsmith and retailer.
331. There are three main types of clauses within each sharing a common stem:
- 331.1. Public authority/disease hybrid clauses in Hiscox1-3. These typically cover losses caused by “*your inability to use the insured premises due to restrictions imposed by a public authority...following... an occurrence of a **notifiable human disease***”. There are minor variations between clauses – for instance replacing ‘insured premises’ with ‘office’, or the replacement of the defined disease term with its full definition – but these are not material. They therefore require the following elements for coverage: (i) “*your inability to use the premises*” (ii) “*due to restrictions imposed by a public authority*” (iii) “*following an occurrence of a notifiable human disease*”. There is no vicinity requirement.

- 331.2. 1-mile public authority/disease hybrid clauses in Hiscox4. These typically cover loss caused by “*your inability to use the insured premises due to restrictions imposed by a public authority...following... an occurrence of a **notifiable human disease** within one mile of the business premises*”. Again, there are immaterial variations. These clauses are as above in the previous type but now require the restrictions to be “*following an occurrence of a notifiable human disease within one mile of the business premises*”.
- 331.3. Non-damage denial of access clauses in Hiscox 1 (and some of the non-lead wordings in) Hiscox2 and 4. There are two slight variants. The main clause (again with immaterial variations) covers losses caused by “*an incident within a 1-mile radius of the insured premises which results in a denial of access or hindrance in access to the insured premises, imposed by a civil or statutory authority or by order of the government or any public authority, for more than 24 consecutive hours*”. A second (rarer) formulation covers losses caused by “*an incident during the period of insurance within the vicinity of the business premises which results in a denial of or hindrance in access to the business premises imposed by the police or other statutory authority*”. These clauses therefore require: (i) ‘an incident’, (ii) ‘within a 1-mile radius’ or ‘within the vicinity of the insured premises’, (iii) ‘which results in a denial of or hindrance in access to the insured premises’ (iv) which was either (1) ‘imposed by a civil or statutory authority or by order of the government or any public authority’ or (2) ‘imposed by the police or other statutory authority’.
332. The common stem provides cover for the insured’s financial losses “*resulting solely and directly from an interruption to your [business/activities] caused by*” the perils above.
333. A notable feature of Hiscox policies is their language. It is notably simpler and plainer than the other policies in issue. Hiscox make a virtue of this, stating in a typical policy introduction: “*We hope that the language and layout of this policy wording are clear because we want you to understand the insurance we provide as well as the responsibilities we have to each other.*”
334. One example will suffice. RSA2.1 defines “business” as “*Activities directly connected with the Business shown in the Schedule and no other for the purposes of this Policy including a) the ownership maintenance repair of the Premises b) the provision and management of canteen sports social and welfare organisations for the benefit of Employees and fire security first aid medical and ambulance services c) private work undertaken with Your prior consent by the Employees for any of Your directors or senior officials d)*

*participation in trade shows or exhibitions”.*<sup>321</sup> By contrast, Hiscox1 defines business as “*Your business or profession as shown in the schedule*”.<sup>322</sup>

335. This is more than a point of impression. Faced with such open and uncluttered language, Hiscox is now struggling to reformulate its clauses, arguing they ‘impliedly’ contain a large number of unexpressed restrictions which (it so happens) renders the events at issue uninsured. In an attempt to elucidate the effect of these arguments, it will help to see how the clauses read when unpacked. Applying Hiscox’s language to just two of them gives the following comparison:

Public authority clause: “*your inability to use the insured premises due to restrictions imposed by a public authority following an occurrence of a **notifiable human disease***”

Hiscox formulation<sup>323</sup>: “*your physical or legal inability to use the insured premises for the purpose of its business activities (advice, guidance or anything non-mandatory being insufficient) due to restrictions having the force of law imposed by a public authority following a medically-verified and local occurrence (being a small-scale event which related to, was local to and/ or was specific to the insured, its business, its business activities or the premises) of a **notifiable human disease***”

336. Similarly:

Non-damage denial of access clause: “*an incident during the period of insurance within the vicinity of the business premises which results in a denial of or hindrance in access to the business premises imposed by the police or other statutory authority*”.

Hiscox formulation: “*a specific, small-scale, identifiable physical event of short temporal duration and limited geographical extent within (and not only incidentally within, and not entirely or preponderantly outside) the vicinity of the business premises which results in a denial of access or hindrance in access having the force of law to the business premises imposed by the police or other statutory authority*”.

337. These speak for themselves. Self-evidently, a reasonable person would not construe the clauses as their ‘unpacked’ form. Hiscox deliberately chose open and uncluttered language, omitting the intricate caveats and limitations it now says should be imposed. They should not be implied through the back door, especially in SME-facing standard-form wordings.

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<sup>321</sup> {B/17/9}

<sup>322</sup> {B/6/17}

<sup>323</sup> Aggregated from the various positions it outlines in its Defence.

338. The FCA's case in short is that:

338.1. The public authority/disease hybrid clauses were satisfied from:

- (a) 16 March 2020 for all businesses, when owners, employees and customers could not use the business premises for their intended purpose due to restrictions imposed by the UK Government as to non-essential travel or contact, social-distancing, and so on, which followed an occurrence (indeed numerous occurrences) of COVID-19; and, in any case,
- (b) Between 20 and 26 March 2020, for businesses in Categories 1, 2, 4, 6 and 7 from the relevant date in March when they were required to close (in whole or in part) by the Regulations or other Government announcements, when, again, owners, employees and customers could not use those business premises due to those restrictions.

338.2. The 1-mile public authority/disease hybrid clauses were satisfied from the same dates and in the same circumstances as above, provided an insured can establish the presence of COVID-19 within 1-mile of their premises preceding the relevant authority action.<sup>324</sup>

338.3. The non-damage denial of access clauses were also satisfied in the same circumstances as the public authority clauses, because there was from 3 March 2020 or 12 March 2020 an 'incident' (being the dangerous outbreak in the UK marked by that stage by the publication of the UK Government action plan, or the elevation of the risk level to high) everywhere in the UK, which was necessarily within the vicinity and 1-mile of the insured premises. That incident resulted in the denial of or hindrance in access to the premises imposed by the relevant authority with the clause. Alternatively, the clauses were satisfied provided an insured can establish the occurrence of COVID-19 within the vicinity of or 1-mile of their premises and which preceded the relevant authority action.

339. The cover issues are addressed first, then the causal connectors and the stem, and finally the remaining causation issues.

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<sup>324</sup> See paras 356 and following above as how the presence of COVID-19 is to be proven.

## Cover

340. As set out above, the public authority/disease wording in Hiscox 1-2 requires the following elements for coverage (with causation discussed below): (i) (loss resulting solely and directly from) interruption (ii) (due to) your inability to use the premises (iii) (due to) restrictions imposed by a public authority (iv) (following) an occurrence of a notifiable human disease as follows:

<b>What is covered</b>	<b>We will insure you for your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to your activities caused by:</b>
Public authority	13. <b>your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following:</b> <ul style="list-style-type: none"><li>a. a murder or suicide;</li><li>b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority;</li><li>c. injury or illness of any person traceable to food or drink consumed on the <b>insured premises</b>;</li><li>d. defects in the drains or other sanitary arrangements;</li><li>e. vermin or pests at the <b>insured premises</b>;</li></ul>

341. The Hiscox 3 clause has a one mile provision, so (iv) above becomes: (following) an occurrence of a notifiable human disease within one mile of the business premises.

342. The Hiscox1-4 lead wordings are at **{B/6-9}**.

*Hiscox1-3: “[following an] occurrence of a notifiable human disease”*

343. It is common ground that COVID-19 became a notifiable human disease from 5 March 2020 in England and 6 March 2020 in Wales.<sup>325</sup>

344. The FCA’s case is that under Hiscox1-3, which has no vicinity requirement, there was an ‘occurrence’ of COVID-19 on 5/6 March 2020 given that COVID-19 by then was present in the UK (indeed, it had been since 31 January 2020, but was not an occurrence of a notifiable disease until it became notifiable on 5/6 March 2020). There had been an outbreak of COVID-19, and so it had ‘occurred’.<sup>326</sup> There being no vicinity requirement, there is no need to show contraction of COVID-19 within any particular locale of the premises.

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<sup>325</sup> Hiscox Def 73-4 **{A/10/18}**

<sup>326</sup> PoC 38 **{A/2/25}**

345. Hiscox argues that an “*occurrence*” within Hiscox1-3 only takes place where there is a “*a small-scale event which must be local and/or specific to the insured, its business, activities or premises*”.<sup>327</sup> In other words, it is implied that the ‘occurrence’ must be in the vicinity. This is framed as being Hiscox’s meaning of the word ‘occurrence’, in an attempt to disguise its true character as a weak attempt to imply a term (that the ‘occurrence’ must be ‘small-scale and local and/or specific to the insured...’) and to avoid engaging with the legal tests for implication of terms. It is desperate and must fail whether as a matter of interpretation or implication.
346. First, the word ‘occurrence’ simply means a ‘happening’. The thing that must happen is the ‘disease’ COVID-19. (Some Wordings refer to the illness resulting from the named disease, but Hiscox Wordings only refer to the disease itself.) Thus in *Schiffshypothekenbank Zu Luebeck A.G. v Norman Philip Compton, ‘The Alexion Hope’* [1988] 1 Lloyd’s Rep. 311<sup>328</sup>, the Court of Appeal (at 315, also 316) agreed with a submission made that “*occurrence*” “*should be given its ordinary meaning, as an event or happening*”.<sup>329</sup> For a disease, a ‘happening’ is when someone contracts the disease.
347. The context here is that the Wordings are considering the occurrence of a notifiable disease, stipulated as one for which “*an outbreak*” must be notified. COVID-19 plainly presented as an “*outbreak*” (although the Wordings do not require that there was an outbreak, only that if there was it would be notifiable, i.e. they contemplate an outbreak). The *Shorter Oxford Dictionary of English* defines “*outbreak*” as “*a sudden **occurrence**; an eruption; an outburst (of emotion, action, energy, disease)*” and the word “*outbreak*” has been repeatedly utilised in relation to COVID-19 to describe what was happening. For example, the Coronavirus Act 2020 Explanatory Notes use “*outbreak*” 28 times and state (as just one instance): “*The Act is part of a concerted effort across the whole of the UK to tackle the COVID-19 outbreak.*”<sup>330</sup> In the context of COVID-19, it was an outbreak, and an outbreak is an occurrence in ordinary usage (per the OED). The choice of the word ‘occurrence’ rather than ‘outbreak’ in the public authority clause must reflect an intention to use a broader term—avoiding disputes about what amounts to an outbreak. But

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<sup>327</sup> Hiscox Def 75.5 {A/10/29}, and similarly 14.3 {A/10/6}

<sup>328</sup> ¶/67}

<sup>329</sup> The *Shorter Oxford Dictionary of English* (6 edn, 2007) defines “*occurrence*” as: “*a thing that occurs, happens, or is met with; **an event, an incident**” or “*the **action or an instance of occurring**, being met with, or **happening**. Also the rate of measure of occurring, incidence.*” The definition is broad-ranging, as per “*an event, an incident*”, or “*happening*”. The definition centres on a “*happening*”, and does not limit only to a specific place/time. Similarly, Brian Garner (ed), *Black’s Law Dictionary* (11<sup>th</sup> edn, 2019) defines “*occurrence*” as: “*Something that happens or take place; specif., an accident, event or continuing condition that results in personal injury or property damage that is neither expected nor intended from the standpoint of an insured party. This specific sense is the standard definition of the term under most liability policies*” (p 1299).*

<sup>330</sup> ¶/12}

this makes clear that there is nothing in the word ‘occurrence’, any more than in the word ‘outbreak’, to suggest a small scale.

348. Hiscox intended there to have to be a ‘local occurrence’ it would have said so.
349. Second, this implied limitation would amount to both a vicinity limit and a pandemic exclusion, for which there is no warrant (express or implied) in the policy. This sub-clause has no vicinity limit, and indeed it is difficult to see how the policy could have expressed a lack of vicinity limit any more neutrally: the word “occurrence” simply denotes that something has occurred. (Thus the ‘[damage to] Money in transit’ cover applies anywhere in the ‘geographical limits’ (as scheduled) and has an exclusion for “*any incident occurring whilst you are not in compliance with this conditions*”. Presumably Hiscox does not claim that the natural meaning of ‘occurring’ in that clause requires some locale, but there is no more reason for implying one into the public authority clause than there.)
350. By contrast, the other sub-clauses within the public authority clause require “*vermin or pests at the insured premise*.” or an illness traceable to “*food or drink consumed on the premises*”<sup>331</sup>. Further, each of Hiscox1-3 have vicinity limits in other clauses: for instance, expressly requiring there to be “*insured damage in the vicinity of the insured premises*”, or mandating an incident be “*within a one mile radius of the insured premises*”.<sup>332</sup> The express use of these geographical limitations establishes a clear intention not to apply such a limitation in the public authority clause. If the parties had intended one, they would have included one (as, indeed, they did in Hiscox4).
351. Hiscox’s reliance on the “Cyber Attack” cover clause in this regard<sup>333</sup> is difficult to understand. As Hiscox pleads, that clause provides cover if a third party “*specifically targets you alone*”.<sup>334</sup> Far from showing that all the extensions must similarly intend to target the insured, the insured’s business or the insured’s property itself, the fact that these words were used there but not in the public authority clause show that there is no requirement that the disease occur at the premises or in their vicinity.
352. More support can be found in the cancellation and abandonment coverage in Hiscox1 (and Hiscox4, which is relevant to the next section): this provides cover for cancelled events but excludes (among others) “*any action taken by any national or international body or agency directly or*

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<sup>331</sup> {B/6/42}

<sup>332</sup> {B/6/41}

<sup>333</sup> Hiscox Def 75.2 {A/10/18}

<sup>334</sup> {A/10/18}

*indirectly to control, prevent or suppress any infectious disease*".<sup>335</sup> The relevance of this pandemic exclusion is obvious: Hiscox1-3 provide cover which obviously could be triggered by pandemic or other wide-area disease (as it relates to infectious human diseases that are sufficiently dangerous and widespread to be notifiable). Had loss resulting from pandemics been intended to be excluded, then the reasonable person would anticipate that it would have been excluded by clear words, as indeed it was done with the cancellation cover; that demonstrates a positive decision not to exclude losses from pandemics within the public authority clause.<sup>336</sup>

353. Third, Hiscox concedes that the 'public authority' in this clause includes the Government. It is very difficult to see why or when the Government would place restrictions on a premises following "*a small-scale event which must be local and/or specific to the insured, its business, activities or premises*". It may be possible, but it is certainly an unlikely way in which a notifiable disease would lead to Government restrictions.

354. Fourth, it is significant that the name of this clause is 'public authority'. The burden of the clause is authority action affecting the premises, not a disease occurring within a specified distance. The nexus between the trigger and the premises is provided by the inability to use the premises being due to the public authority action.

355. Fifth, Hiscox argues that the fact that the BI insurance is an adjunct to property cover necessarily implies that it covers events which "*relate to and are specific to the insured, the insured business or the insured property itself*".<sup>337</sup> This phrase is (i) evidently reverse-engineered, with no foundation in the policy; (ii) irrelevant, because the Government restrictions do relate to and are specific to every insured; and (iii) in any event, wrong, because the Hiscox policies cover wide area damage: Hiscox1-2 (and Hiscox4, which is relevant to the next section) each contain a pre-condition requiring the insured to report quickly "*any **damage** arising from... riot or civil commotion*".<sup>338</sup>

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<sup>335</sup> Hiscox1 {B/6/43}, Hiscox4 {B/9/37}

<sup>336</sup> Reply 43 {A/14/22}. Thus, responding to Hiscox Def 70.2 {A/10/18}, the absence of the exclusion is relevant because the public authority clause could otherwise be regarded as covering that situation.

<sup>337</sup> Hiscox Def para 75.1 {A/10/18}

<sup>338</sup> Hiscox1 {B/6/26}, Hiscox2 {B/7/17}, Hiscox4 {B/9/27}

*Hiscox4: “[following an] occurrence of a notifiable human disease within one mile of the business premises”*

356. The Hiscox4 1-mile public authority clauses (by contrast with those addressed above) do require an occurrence of COVID-19 within a mile of the business premises. The methods for proving the occurrence of COVID-19 within that vicinity are addressed in section 7.
357. There is a dispute as what it means for COVID-19 to ‘occur’ within one mile. The FCA’s case is that there was an “occurrence” of COVID-19 whenever and wherever a person had contracted COVID-19 (after it had become notifiable) such that it was a diagnosable.<sup>339</sup> This is a case that Argenta admits (in the context of cover requiring ‘occurrence of a notifiable human disease within a radius of 25 miles of the premises’—see below paragraph 918).
358. Hiscox contends that the term requires the disease to be medically verified.<sup>340</sup> This is relevant to how an insured can prove the occurrence within one mile. Hiscox is wrong. There is nothing in the clause which requires the disease to be medically verified. Hiscox says that “*This is another example of the FCA proposing unorthodox methods of proof, which have no support in Hiscox 1-4 and which only serve further to show that they were not objectively intended to cover the present pandemic.*”<sup>341</sup> Apart from being shrill, that is not understood. The question is one as to the meaning of ‘occurrence’. It is unreal to suggest that diseases do not ‘occur’ unless they are medically verified; it is like suggesting trees only ‘fall’ if seen to do so. This gloss elevates the proof required by an insured without warrant. A policyholder can prove (on the balance of probabilities) that there has been an occurrence of COVID-19 by many types of evidence, including PHE data, death data, reports from hospitals or newspapers, statistical inference, or otherwise, and not merely or even primarily by medical verification of the same. Hiscox could have specified how the disease occurrence was to be proven. Insurers are used to specifying what evidence they will accept of something, and for example, cancellation or abandonment cover requires that the insured’s agreement for the event was “*evidenced in writing*”.<sup>342</sup> There was no specification in Hiscox4 as to how an occurrence of a disease must be proven.
359. This is of some real importance in the present case given that the express governmental instruction was *not to* get medical testing,<sup>343</sup> and there was huge undercounting/reporting in large part as a consequence of that.

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<sup>339</sup> PoC 41 {A/2/26}

<sup>340</sup> Hiscox Def 77.1 {A/10/19}

<sup>341</sup> Hiscox Def 77.1 {A/10/19}

<sup>342</sup> Final page of Hiscox4 lead Wording {B/9/38}

<sup>343</sup> Agreed Facts 3 para 10. Note: Agreed Facts 3 not yet fully agreed at the date of this skeleton. {C/5} and {C/6}

*Hiscox1-4: “your inability to use the insured premises”*

360. The meaning of ‘your inability to use’ is clear. It means, in this context, the inability to utilise or employ the premises for or with its intended aim or purpose, *i.e.* for the insured’s business activities. That is the ‘use’ that is being referred to, because it is the insured’s business (the interruption of which) that is being insured. The inability may be partial or total.
361. Hiscox appears to accept that there was (or at least in principle could be) an inability of use for Category 1, 2 and 7 businesses closed or ceased by the 21 March Regulations, and Category 1, 2, 4, 6 and 7 businesses closed or ceased by the 26 March Regulations, and by their equivalent Regulations in Wales.<sup>344</sup> It says that nothing less than an order to close the premises or cease the business carried on therefrom provides the necessary “*legal or physical obstacle*”.<sup>345</sup>
362. Hiscox does not argue that the permitting of exceptions within the Regulations (e.g. performing a mail order business, giving accommodation to those who are moving house, or broadcasting) disqualifies the Regulations from rendering a business ‘unable’ to use its premises.<sup>346</sup> This is presumably because, there is no absolutist test as to whether the premises can be used at all, but rather a test of whether they can be used “*for its business activities*”.<sup>347</sup> However, Hiscox is clear that its position is that any laws, guidance or anything else (such as social distancing, “stay at home” orders etc) that prohibit or prevent customers accessing or using the premises cannot suffice.<sup>348</sup> The FCA disputes this last point.
363. Hiscox is correct that, under its Wordings, the inability of use must be that of the insured itself (“*your inability...*”). Hiscox rightly accepts that the question is not one in the abstract – can the insured use the premises for any activities whatsoever? – but whether it can use the premises for “*its business activities*”.<sup>349</sup>
364. But it then asserts that ‘prevention’ of use by the insureds’ customers is irrelevant.<sup>350</sup> This is a *non sequitur*. The question is of inability to use for business purposes. Self-evidently a restaurant is unable use its premises as a restaurant if no-one can eat there, for example if all customers are forbidden to eat there. Businesses activities may require customers to attend premises; if

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<sup>344</sup> Hiscox Def 14.2 {A/10/5}, 83.4 (fn 6) {A/10/22}, 85.4 {A/10/23}, 102.5 {A/10/31}

<sup>345</sup> Hiscox Def 14.1 {A/10/5}

<sup>346</sup> Hiscox Def 14.2 {A/10/5}, which accepts that the Regulations satisfy the test despite their closure or cessation having “*limited exceptions*”.

<sup>347</sup> Hiscox Def 14.1 {A/10/5}

<sup>348</sup> Hiscox Def 85.4 {A/10/23}

<sup>349</sup> Hiscox Def 14.1: “The question is simply: can the insured use the premises for its business activities or not?” {A/10/5}

<sup>350</sup> Hiscox Def 14.1 {A/10/5}

so, a business cannot use its premises for business activities without them. The policy indemnity is against business interruption, for loss from an interruption of “*your activities*”, i.e. the activities that the insured was carrying on at the premises (typically stated in the policy schedule).

365. If the business (or part of the business) relies on it being able to invite customers into the premises and it is unable to do so without acting in contravention of Government advice (and thereby exposing staff and the public to unnecessary risk of injury), or without their customers breaking the law, it is unable to use the premises for the purpose of the clause. That is sufficient to trigger indemnity. The contrary would be a triumph of form over substance: if the Government prohibits a non-food shop from carrying on its business then there is inability to use. If the Government phrases its prohibition as one on all citizens from entering or buying from non-food shops then there is no inability to use. But the two are the same (and in fact both were imposed).
366. Hiscox’s argument would mean that there would be no inability to use a school if teachers (but not students) could hold assembly, or even if neither teachers nor students could attend but the school premises were theoretically (*and it would be entirely theoretical*) permitted to be used. This shows the unreality of the argument:
- 366.1. Premises cannot be used without people. It is not only a matter of customers. The owner herself or himself, or the business’s employees, could not legally attend work. They were ordered to “stay at home” (save for certain businesses). Without employees it is physically impossible to use the premises for the business. And this is not indirect and unrelated to use of the premises. They have not all been killed or sent away. The reason is that the employees *are not permitted to come to the premises*. Therefore, the business is unable to use the premises (and so ceases business).
- 366.2. Further, the need to avoid unnecessary travel, self-isolate if at risk, stay 2m apart and to be vigilant (by instruction of the Government) made it impractical for many businesses to operate. This was a physical or legal obstacle. The business could not safely (given the space available) or legally (given the occupier and employer’s duties of care) use the premises, and many employees could not staff them. Indeed, the Hiscox policies included a reasonable precautions condition precedent in their General

Terms and Conditions which required policyholders to “*take reasonable steps to prevent accident or injury and to protect property against loss and damage...*”<sup>351</sup>

367. In this context, it should be noted that the policy requires ‘inability to use’ not ‘inability to access’ (as in the ‘Bomb threat’ insuring provision in Hiscox1—the former is far more functional and related to whether the activities can be conducted). Also, it refers to ‘inability’ not ‘total inability’. The same ‘Bomb threat’ insuring provision in Hiscox1 applies only where there is a “*total inability*” to access the insured premises, and only for “*the actual period that total access is denied*”. If a total inability (effectively, Hiscox’s test) is what was intended, the policy would have said that.
368. Further, whilst the Wordings refers to ‘your inability’ they do not require that they are ‘due to restrictions imposed *on you*’. The restrictions can be imposed on anyone, and that must colour the reading of ‘your inability to use’.
369. Moreover, in Hiscox1-4, the uninsured working expenses including Rent which are to be deducted from Gross Profit includes rent “*for the business premises that you must legally pay whilst the business premises or any part are unusable as a result of insured damage, insured failure or restriction*” (emphasis added)<sup>352</sup>. If the inability to use were not triggered by a partial inability to use (as a result of a restriction or other cause) then this would make no sense.
370. Further, the policies require the insured to take “*every reasonable effort to minimise any loss, damage or liability*”, and provide cover for the additional costs and expenses reasonably incurred “*in order to continue **your activities** or minimise your loss of income / loss of gross profit*”.<sup>353</sup> If a restaurant which was dine-in only decided to start a takeaway service to minimise its losses, it would be perverse to argue that its ability and willingness to do so shows that there was an ability to use its premises. This would not encourage, but punish actions taken by a policyholder – which may well be very disruptive – to minimise its losses. This is business interruption cover and if the insured cannot use the premises for a substantial part of its business then it is unable to use the premises.

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<sup>351</sup> General Condition 5 in Hiscox 1-4 {B/6/18}, {B/7/11}, {B/8/15}, {B/9/13}

<sup>352</sup> The wording varies slightly but is materially the same for all four types.

<sup>353</sup> This language is used in Hiscox1 {B/6/40}, Hiscox2 {B/7/24} and Hiscox4 {B/9/34}. Hiscox3 uses similar language in its ‘Loss of gross profit’ definition, saying it will pay “*The sum produced by applying the rate of gross profit to any reduction in income during the indemnity period plus increased costs of working necessarily and reasonably incurred by you for the sole purpose of minimising the reduction in income to your business during the indemnity period but not exceeding the amount of income saved less any business expenses or charges which cease or are reduced*” {B/8/30}

371. As to whether an inability of use in a given case may be a question of fact<sup>354</sup>, it is correct that it is a question of fact (or, more likely, a mixed question of fact and law) but the facts of COVID-19 and the Government response are not disputed, and the declarations sought allow for other facts (such as the premise that the business was continuing at the time of the relevant Government action).

*(due to) “restrictions imposed by a public authority”*

372. Much is common ground here. Hiscox admits that the UK Government is a public authority,<sup>355</sup> that mandatory restrictions are enough,<sup>356</sup> and that the 21 March and/or 26 March Regulations which closed or ceased businesses in Categories 1, 2, 4, 6 and 7 businesses were “*capable of amounting to*” ‘restrictions imposed by a public authority’.<sup>357</sup>

373. However, Hiscox denies that the UK Governments actions or advice that do not have the force of law are sufficient to meet the requirement that the restrictions be “imposed” by the relevant authorities (“... *restrictions must be mandatory. Advice and guidance are insufficient*”<sup>358</sup> and “*the word “imposed” connotes something mandatory, in the sense of something which has force of law, and compliance with which is compulsory.*”<sup>359</sup>).

374. The breadth of this argument in practice depends upon the Court’s conclusions as to ‘inability to use’. If all customers staying at home is sufficient for ‘inability to use’, then the mandatory Regulations 6 and 7 of the 26 March Regulations will satisfy in relation to prohibitions on inessential individual movement, and so on.

375. More generally as to Hiscox’s argument, it is accepted that ‘imposition’ involves an authority promulgating something that it requires or expects to be followed. But that does not require force of law. A teacher can ‘impose’ homework on her students, while parents try not to ‘impose’ themselves on their children before school exams. And the Government is a greater authority than those. As set out above in paragraphs 123 it is clear from the terms of the Government’s statements and instructions that they were mandatory. It is common ground that all the schools were closed on the say-so of the Government, without force of law.<sup>360</sup> Similarly, accommodation and other businesses closed upon being told to do so, prior to the

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<sup>354</sup> Hiscox Def para 85.8 {A/10/24}

<sup>355</sup> Not in terms, but necessarily given the acceptances in the following text.

<sup>356</sup> Hiscox Def 14.2 {A/10/5}, 78 {A/10/20}

<sup>357</sup> Hiscox Def 85.4 {A/10/23}

<sup>358</sup> Hiscox Def, para 14.1-2 {A/10/5}

<sup>359</sup> Hiscox Def 13.3 {A/10/4} and 14.2 {A/10/5}, and 97.2 {A/10/28}

<sup>360</sup> As to schools, see para 517 below.

legislation mandating it. Likewise, the “stay at home” orders and other instructions were just that—instructions—even though at times the words ‘advise’ or similar were used.

376. The stay-at-home instruction given on 16 March 2020 amounted to the imposition of restrictions inability of use. The Government expressly instructed customers not to go to pubs, restaurants, cinemas and so on because they were not essential trips: those businesses’ premises could not be used for their activities after their customers had been instructed not to attend. It used the word ‘advice’ but also explained repeatedly what the Government was “*asking*” people to do and explained what they “*should*” do and what the Government would “*no longer be supporting*”.<sup>361</sup>
377. These statements were received by the populace as instructions and acted on as instructions. They were restrictions imposed. They were not voluntary (the opposite of imposed).

*“Interruption to your activities”*

378. Hiscox says that ‘Interruption’ requires a cessation or stop; it is not sufficient that an insured’s business activities have become more inconvenient, or burdensome, or subjected to external limitations.<sup>362</sup> A “*constriction in flow*” is not an interruption.<sup>363</sup>
379. The meaning of ‘interruption’ has been addressed at paragraphs 158ff above. Whilst the FCA accepts that ‘interruption’ (unlike the word ‘interference’ which is not used here, although it is not used anywhere else in the Hiscox BI sections either) requires *some* element of cessation, that requirement cannot be interpreted so restrictively as to amount in effect to an exclusion for all situations when an insured is able to continue any measure of operations (however limited). The policies provide an indemnity for ‘increased costs of working’, covering costs incurred by the insured in minimising the reduction in income during the indemnity period. But if the policy only paid out when the business had ceased entirely, that indemnity would be futile: on Hiscox’s argument, if the business is ‘working’ at all (however minimally), then there is no interruption (so the cover would not be engaged).
380. Moreover, this must be viewed in terms of the operational requirements of the business. As noted above, the policies require the insured to take “*every reasonable effort to minimise any loss, damage or liability*”, and provide cover for the additional costs and expenses reasonably incurred

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<sup>361</sup> Reply para 11 {A/14/7}

<sup>362</sup> Hiscox Def 15 {A/10/6}

<sup>363</sup> Hiscox Def paras 15 {A/10/6} and 85.6 {A/10/24}

“in order to continue **your activities** or minimise your loss of income / loss of gross profit”.<sup>364</sup> Construing “interruption” to require a full cessation would punish actions taken by a policyholder to minimise its losses. Income received forms part of the indemnity calculation.

381. The Court can give some general guidance here. There will be an interruption to the insured’s activities if access to the premises is material to trading and access has been prevented or hindered;<sup>365</sup> and similarly for inability of use under the public authority clauses, where prevention of use of the premises is material. Hiscox raises the argument that if work could reasonably be done at home then the insured’s business or business activities did not sustain an interruption within the meaning of Hiscox1-4.<sup>366</sup> This is wrong. The fact that an insured may be able to restart some of its activities from another location does not mean that its normal business or business activities have not been interrupted: it simply means that the insured has taken efforts to minimise losses, as required by the policies (and if it has increased cost of working cover, such increased costs will be recoverable). Once there has been an interruption, there is an indemnity for the period during which the business is affected. Any small contributions made by home working to gross profit will of course be taken into account in a quantum calculation.

#### The causal connectors

382. The public authority clause requires loss *resulting solely and directly from* an interruption to activities *caused by* inability to use the premises *due to* restrictions imposed by a public authority *following* an occurrence of a notifiable human infectious or contagious disease.

383. Hiscox’s case is that:

383.1. The words “*resulting solely and directly from*” require the single proximate cause of the losses to be the insured peril: here, interruption caused by an inability to use the premises due to restrictions imposed by the Government.<sup>367</sup> Much of the losses did not result ‘solely and directly’ from the insured peril but, instead, “*the pandemic of COVID-19, including the impact which COVID-19 had on economic activity and public*

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<sup>364</sup> This language is used in Hiscox1 {B/6/19}, Hiscox2 {B/7/12} and Hiscox4 {B/9/15}. Hiscox3 uses similar language in its ‘Loss of gross profit’ definition, saying it will pay “*The sum produced by applying the rate of gross profit to any reduction in income during the indemnity period plus increased costs of working necessarily and reasonably incurred by you for the sole purpose of minimising the reduction in income to your business during the indemnity period but not exceeding the amount of income saved less any business expenses or charges which cease or are reduced*” {B/8/30}

<sup>365</sup> PoC 46.8 {A/2/31}, denied Hiscox Def 85.2 {A/10/23}

<sup>366</sup> Hiscox Def 85.7.2 {A/10/24}

<sup>367</sup> Hiscox Def 17 {A/10/7}, 19 {A/10/8}

*confidence*”. Accordingly, “*As to at least the great majority of the losses claimed, the causes are the pandemic of COVID-19 including the impact which it had on economic activity and public confidence, together with those government measures taken in response which did not form part of the insured peril*”.<sup>368</sup>

383.2. An insured may be able to prove that part of the loss which it has sustained was caused by an insured peril, but it bears the burden of proof of doing so and the loss will have been minimal.<sup>369</sup>

383.3. The loss was not suffered ‘but for’ the insured peril because the counterfactual is:

“broadly, losses caused by COVID-19 and its impact on the economy and public confidence and government measures, but subtracting the insured peril(s), i.e. the mandatory government regulations or orders causing an interruption because of denial of or hindrance in access and/or inability to use. Those losses would have been suffered in any event, and are therefore not recoverable.”<sup>370</sup>

383.4. Alternatively, “*if and to the extent Hiscox is wrong in any of its submissions about the ambit of the insured peril(s), that which is subtracted for the purposes of the counterfactual is enlarged accordingly and to that extent*”.<sup>371</sup>

383.5. This is said to follow from general principles of causation, the nature of indemnity insurance, the absence of a better alternative test, and the loss of income and trends clauses in Hiscox1-4.<sup>372</sup>

384. Hiscox does not obviously advance any case as to the meaning of the words “caused by” and “due to”. It seems to argue that the words “caused by” add nothing to the requirement that the interruption be the proximate cause of the loss in question, because “*the words ‘resulting solely and directly from’... make clear that the ‘interruption caused by’ the relevant matter has to be the sole, not concurrent in any sense, cause of the loss*”.<sup>373</sup>

385. By an amendment to its Defence, Hiscox now admits the FCA’s case that the word “*following*” in the public authority clause connotes an event which is part of the factual background and represents a looser causal connection than ‘resulting from’ and similar, i.e. looser than a proximate cause test.<sup>374</sup> This looser connection still requires a causal connection with the

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<sup>368</sup> Hiscox Def 16.2 {A/10/6}

<sup>369</sup> Hiscox Def 16.3-16.4 {A/10/7}

<sup>370</sup> Hiscox Def 23 {A/10/8}

<sup>371</sup> Hiscox Def para 118 {A/10/37}

<sup>372</sup> Hiscox Def para 113.1 {A/10/35}

<sup>373</sup> Hiscox Def para 19 {A/10/8}

<sup>374</sup> PoC para 60 {A/2/40} admitted in Hiscox ADef para 101 {A/10/31}

underlying event encompassed by what is being insured against, but is easily satisfied in the present case.

386. The focus of Hiscox's Defence is therefore on the 'solely and directly' wording and on the counterfactual. There does not appear to be any dispute (or point taken) that if the FCA is correct on its case as to restrictions and inability of use, then the inability of use was 'due to' the restrictions imposed by the UK government. Accordingly, these links are not addressed here and it is assumed that if the FCA's case above is accepted, then the inability to use the premises was 'due to' restrictions (*viz.* the government actions and announcements) which were a response to and so 'following' the occurrence of COVID-19. The premises could not be used because of what the Government did and said. This caused the interruption.

*'solely and directly'*

387. Hiscox seeks to make a lot of the 'solely and directly' wording because Hiscox's cover wording is very wide indeed. The key, although not only, flaw in Hiscox's argument is that it does not address its own Wording as to what has to be solely and directly caused by what.

388. It prays those words in aid of the contention that "*the single proximate cause of the losses must be the insured peril*" being broadly "*an interruption caused by... inability to use insured premises... due to mandatory restrictions imposed by the authorities*".<sup>375</sup>

389. The true position is that words 'solely and directly' make no difference to causation (imposing merely the proximate cause test) save where there are two [equally] proximate causes, in which case they have the effect of altering the position from *Miss Jay Jay* such that a concurrent proximate cause that is not an insured peril prevents recovery even if it is not an excluded peril.<sup>376</sup> It appears that Hiscox agrees.<sup>377</sup> But this must be applied sensibly and by reference to the parties' intention.

390. But more than that, Hiscox is not taking care to address the actual wording used.

391. The relevant causal link which requires 'solely and directly' is between loss and the interruption to activities, not the other links between interruption and the elements of the insured peril. This must be taken to be deliberate. In *224981 Ontario Inc v Intact Insurance Company* 2016 ONSC

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<sup>375</sup> Hiscox Def 17 {A/10/7}

<sup>376</sup> *MacGillivray* at para 27-042 {J/151}; *The Miss Jay Jay* [1985] 1 Lloyd's Rep 264 at 273 per Mustill J (holding that "solely" meant "*without the intervention of any peril*", albeit in an exclusion), affirmed [1987] 1 Lloyd's Rep 32 {J/66}

<sup>377</sup> Hiscox Def 99.2 {A/10/30}

642<sup>378</sup> at paras 32-4, the Ontario Superior Court of Justice considered a landlord’s BI claim where the cover responded if the loss of rent ‘resulted from’ from an interruption to the business activities which was ‘caused solely by direct physical loss... or damage’ (here fire). MD Faeta J observed at para 32:

Zurich submits that the loss of rent claimed by the Owner must have been solely caused by the fire. I disagree. The policy states that the interruption, not the loss, must be “caused solely by direct physical loss of or damage to covered property...caused by a covered cause of loss”. As noted above, I have found that the interruption was caused solely by the destruction of the building which was caused by the fire.

392. The solely and directly wording here relates to the nexus between the loss and the interruption to activities (unlike in 224981 Ontario Inc). We return to that nexus below at paragraph 394.

393. The clear implication is that *Miss Jay Jay* applies to its full extent, and a concurrent proximate cause *of the interruption* (concurrent with the inability to use the premises due to public authority restrictions) is not an obstacle—i.e. the wording shows that there is no need for the interruption to be solely (proximately) caused by the public authority restrictions. This is inconsistent with Hiscox’s position on the cover, but also its position on the trends clause. Given that the wording is clear that there is no need for a sole proximate cause of interruption, the trends clause cannot be intended to reintroduce inexplicitly (the wording to be construed against Hiscox) the need that loss be solely caused not only by the interruption but also by the public authority restrictions, especially where the competing cause is part of the expressed underlying chain in the insured peril (i.e. disease, COVID-19).

394. As to the application of the solely and directly test to loss being caused by ‘interruption to activities’, which is the place in the chain that it does apply:

394.1. This requires one to address merely the interruption that occurred, that interruption having qualified by virtue of being caused by inability to use the premises, which qualifies by being due to restrictions, following a disease. Did losses result solely and directly from the interruption? In general terms, of course they did.

394.2. The FCA’s primary position is that, as compared with interruption to activities, there is no equally proximate cause. Any other candidates advanced by the FCA are too inextricably linked with the interruption due to public authority restrictions following disease to amount to distinct competing proximate causes (see *The Silver Cloud*). Disease is an expressed underlying cause that led to the interruption in the clause. It would

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<sup>378</sup> ¶/131}

render the cover illusory if the interruption that was caused by the public authority restrictions that followed disease had to compete with the disease itself (or its consequences) in a bid to be the sole proximate cause. Widespread diseases that lead to public authority restrictions interrupting activities will always or usually lead to caution, staying away etc. They cannot be intended to suffice as equal proximate causes with the interruption (cf *The Silver Cloud*) even if (contrary to the FCA's case) they would otherwise.

394.3. Further or alternatively, the other contenders for causes, if separate, are *when compared with the interruption*, not sufficiently important to amount to competing (i.e. equal) proximate causes, i.e. the interruption is the only proximate cause. Proximate cause is about what actually happened. The interruption (the scope of which is to be determined by the Court but at least includes cessation of business on any view, for those that ceased) actually stopped the business, causing the loss. It occurred after the disease and so was proximate in time to the loss. What is left if one takes away the interruption to the business (not the cause of the interruption; the interruption itself)? The answer is, nothing or very little. Hiscox says that there was still caution in the public and similar, but they did not operate because the business was interrupted. There was no business to stay away from. They did not cause loss of revenue because they could operate. And the 'fall in economic activity' is not a separate cause—it was caused by the interruption in activities to the business, and was more remote a cause of loss to this business than *the interruption to this business itself*. Even if that is wrong, they were, relatively speaking, subservient to the interruption and not proximate causes of equal efficiency (and so not proximate causes at all).

394.4. For example, in *Mardorf v Accident Insurance Co* [1903] 1 KB 584<sup>379</sup>, where a leg scratch wounded a leg and introduced bacteria, the resulting septic diseases which killed the subject did not prevent the injury being the 'direct and sole' cause of death. And in *Smith v Cornhill Insurance Co Ltd* [1938] 3 All ER 145<sup>380</sup>, death did result 'solely' from a car accident injury despite the death also resulting from the subsequent cause of the victim wandering into a river due to concussion and dying as a result of the shock sustained when coming into contact with the water.

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<sup>379</sup> ¶/38}

<sup>380</sup> ¶/48}

- 394.5. Similarly, English law does not find that deliberate action in response to an event is a competing cause with the underlying event. This typically arises with perilous events and attempts to respond to them. Thus in *Canada Rice Mills, Ltd. v. Union Marine & General Insurance Co.* [1940] Ll L Rep 549, 558 Col 2<sup>381</sup>, overheating of rice was caused by perils of the sea where the overheating was due to lack of ventilation, and the ventilators had been closed to weather a storm.<sup>382</sup>
- 394.6. The solely and directly clause therefore does not prevent cover, and the quantification machinery, discussed below, is engaged.
- 394.7. And finally, in the alternative, this is a question of degree in relation to quantification. The provision provides that the only loss recoverable is that solely and directly caused by the interruption, not other loss. Even on Hiscox’s case, at least some of the loss in the present Claim (the increment that would not have occurred without the interruption of activities) must have solely and directly resulted from the interruption and so be recoverable. This is a quantum point to be debated with the individual policyholder but would not provide an excuse for denial of any indemnity whatsoever. Even where there are two discrete losses, if the policyholder can show loss attributable to the insured peril, it can recover that loss from the relevant insurer.<sup>383</sup>

*The Hiscox4 1-mile public authority clause*

395. The one mile public authority clause in Hiscox4 requires loss *resulting solely and directly from* an interruption to activities *caused by* inability to use the premises *due to* restrictions imposed by a public authority *following* an occurrence of a notifiable human infectious or contagious disease within one mile. The only variation from Hiscox1-3 is the requirement that the disease is within one mile. The position is therefore the same as above in relation to the public authority clause (see paragraphs 382-394 above) save that there is a one mile vicinity limit.
396. Hiscox does not dispute that restrictions imposed by a public authority were ‘following’ an occurrence of a notifiable disease within 1 mile - see paragraph 385 above. It does not make the argument advanced by other insurers (with different causal connectors, largely) that the

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<sup>381</sup> ¶/49}

<sup>382</sup> See also the following statement approved in *Symington & Co v Union Ins Sy of Canton Ltd* (1928) 139 LT 386 (CA) ¶/47: “Any loss resulting from an apparently necessary and bona fide effort to put out a fire, whether it be by spoiling the goods by water, or throwing articles of furniture out of a window, or even the destroying of a neighbouring house by an explosion for the purposes of checking the progress of the flames, in a word, every loss that clearly and proximately results, whether directly or indirectly from the fire, is within the policy.”

<sup>383</sup> *Cultural Foundation v Beazley Furlonge Ltd* [2018] EWHC 1083 (Comm) ¶/137; [2018] Bus LR 2174 at paras 214-217.

disease or danger etc within the vicinity was not a cause of national public authority action leading to interruption, etc.

397. Accordingly, the one mile clause does not introduce any further disputes as to causal connectors, although it does affect the counterfactual argument, considered below at paragraphs 414ff. If the FCA is wrong about that, then its approach to the application of trends clauses (which do not licence the sort of counterfactual exercise Hiscox contends for) is as set out in the immediately following section.

#### The quantification machinery and trends clauses

398. Hiscox policies are not structured as main insuring clauses followed by extensions, but contain all their insuring clauses under the single heading “What is covered”. The basis of settlement language is placed after all these insuring clauses, after the heading “How much we will pay”, which heading also includes the trends clauses. Accordingly, the FCA does not dispute that the quantification machinery is intended to apply to the relevant cover clauses relied on in this Claim.

399. That machinery provides for payment for the indemnity period of a particular basis of settlement, e.g. loss of gross profit or loss of income. For example, the expression used for loss of income in Hiscox1-2 is the difference between actual income and “*the income it is estimated you would have earned during*” the indemnity period.<sup>384</sup> This leaves the counterfactual (would have earned in what circumstances?) at large, and that is discussed below at paragraphs 414ff.

400. Hiscox policies contain broadly three types of trends clauses: those which apply to damage only; those which are upwards-only and/or optional at the election of the insured on payment of an additional premium; and those which are potentially applicable. None has any effect on the counterfactual test for the reasons given below.

#### *First type of trends clause ('damage')*<sup>385</sup>

401. In the first type of trends clause and for loss of income and loss of gross profit, the Hiscox indemnity is expressed to be the loss during the “indemnity period”. Taking the example of

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<sup>384</sup> Hiscox1 {B/6/44} and Hiscox2 {B/7/25}.

<sup>385</sup> This includes all Hiscox1 policies except 8671 Recruitment BI and 8671 BI – OM (Jelf) {B/40}; Hiscox2 policies 15779 {B/46/3}, 9102 {B/59/3}, 7103 WD-CCP-UK-PVB(2) {B/49/3}; Hiscox3 policies 8006 {B/8/30} and 10272 {B/68/2}; Hiscox4 policy 20155 {B/71/4}; see PoC 75.3 {A/2/44}.

the lead Hiscox3 policy,<sup>386</sup> that period is defined by reference to the insured damage or the restriction (*i.e.* the public authority restrictions covered by the perils clause):

The period beginning at the date of the **insured damage**, or the date the restriction is imposed, and lasting for the period during which **your gross profit** is affected as a result of such **insured damage** or restriction, but for no longer than the number of months shown in the schedule.

402. Importantly, the drafter of this definition, unlike the basis of settlement language in many wordings, has not merely referred to property damage but also allowed for the insured peril of restrictions (by public authorities).

403. In contrast, the “Business trends” section of this policy states (emphasis added):

The amount **we** pay for loss of **gross profit** will be amended to reflect any special circumstances or business trends affecting **your business**, either before or after the loss, in order that the amount paid reflects as near as possible, the result that would have been achieved if the **damage** had not occurred.

404. Significantly, the trends clause (by contrast with the basis of settlements clause) only refers the position that would have been the case had the insured *damage* not occurred, omitting any reference to the date of the restriction. This absence of the word ‘restriction’ from the trends clause by contrast with its inclusion in the indemnity period clause is true of all policies with this first type of trends clause.

405. That must be construed as a deliberate omission since those terms are all referred to in the indemnity period (and indeed in the insuring clauses). The trends clause therefore only adjusts payments in respect of insured damage (as defined), and not in respect of cover under the disease or denial of access clauses.<sup>387</sup> (If this is wrong, then the operation of the clause is as discussed below at paragraphs 410ff.)

*Second type of trends clause (upwards only and/ or optional)*

406. All Hiscox1 and one Hiscox4 policy contain trends clauses which are upwards only and/or optional at the election of the insured.<sup>388</sup>

407. Thus the trends clause in the lead Hiscox1 policy (16105<sup>389</sup>) provides:

Provided that **you** advise **us** of **your** estimated annual **income**, or estimated annual **gross profit** if applicable, at the beginning of each **period of insurance**, the **amount insured** will automatically be increased to reflect any special circumstances or trends affecting **your**

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<sup>386</sup> 8006 {B/8/29}.

<sup>387</sup> Contrary to Hiscox’s Def para 114.2 and 114.4. {A/10/36}

<sup>388</sup> PoC 75.4, denied at Hiscox Def 114.3-4 {A/10/36}. The Hiscox4 policy is 20155. {B/71}

<sup>389</sup> {B/6/44}

**activities**, either before or after the loss. The amount that **we** will pay will reflect as near as possible the result that would have been achieved if the **insured damage** had not occurred.

**Your** schedule will show if Business trends cover applies and the additional percentage amount.

408. The first and third sentences of this clause makes clear that it acts upwards only: it is an optional extension to cover for the benefit of the policyholder, and can only “increase” the amount insured. Evidently if the clause is not taken up by the policyholder then no trends adjustment can take place at all. The second sentence only refers to the word “insured damage”, showing that this trends clause also has the features of the first type of trends clause (*i.e.* it only applies to insured damage); further, the second sentence cannot be plucked out and applied on its own, being an integral part of this optional trends clause.
409. If the trends clause is thought to affect the cover, the Court may need to make declarations for policies that have included the optional trends clause and those that have not. But the FCA’s case is that the trends clause is not intended to overlay an additional causation hurdle that did not exist before, or to drive a coach and horses through the quantification machinery—that makes no sense of its optionality, its purpose clearly being to allow for an *upward only* adjustment to the amount insured.

*Third type of trends clause (includes ‘restriction’ etc)*<sup>390</sup>

410. For some other Hiscox Wordings, the trends clause is applicable, because, like the definition of indemnity period in the quantification machinery more generally, the trends clause expressly covers non-damage BI triggers. For example, the trends clause in the lead Hiscox2 policy (18680<sup>391</sup>) provides: (emphasis added)

The amount **we** pay for loss of **income** or loss of **gross profit** will be amended to reflect any special circumstances or business trends affecting **your business**, either before or after the loss, in order that the amount paid reflects as near as possible the result that would have been achieved if the **insured damage** or restriction had not occurred.

411. While the cover clauses refer to the loss having to result ‘solely and directly’ from the *interruption*, and the interruption having to be *caused* by inability due to public authority restrictions (disease clause) or denial or hindrance of access imposed by a public authority (DoA clause), the trends clause refers to the result if the *restriction* had not occurred.

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<sup>390</sup> Hiscox1 – 8671 Recruitment BI {B/40/5} and 8617 BI – OM (Jelf) {B/40/5}; Hiscox2 – all except 15779 {B/46}, 9102 {B/59}, 7103 WD-CCP-UK-PVB(2) {B/49}; Hiscox3 – 8358 {B/65/2}, 14174 {B/66/4} and 9519 {B/67/3}; Hiscox4- all except 20155 {B/71}.

<sup>391</sup> {B/7/26}

412. There is no reason to think that this is a deliberate selection of ‘restriction’ rather than ‘interruption’ or anything else, or is intended to alter in any way the ‘caused by’ test already applicable for cover purposes to results of the restriction. The better view is that this clause refers to the need to make ordinary business adjustments to allow for the general state of the business and how it would have been performed without the insured peril in its broad sense—here without COVID-19 affecting the business. The word ‘restriction’ was used as a way of encompassing the Public authority clause, far more concise than *‘the result that would have been achieved if the damage, murder or suicide, disease, injury or illness, defect in the drains, vermin or pests, failure or cyber attack had not occurred’*.
413. To take an example outside disease: if there had been a murder at the premises, with public authority restrictions following it, the trends clause does not require the insurer, loss adjuster and court to ask: *‘what would the business have earned if there had still been a murder but no public authority restrictions—just a body to remove, police investigation, but perhaps visitors with morbid curiosity, and a flock of journalists’*. Instead, the trends clause asks: what revenue would the business have turning over had there been no murder?

#### Counterfactual

414. Whether in order to quantify loss, or alternatively (contrary to the FCA’s case) by virtue of a trends clause, the FCA’s general case as to the counterfactual is introduced in sections 8A and 8C above and the discussion of case law in section 8E.
415. The proper counterfactual is the situation in which there was no COVID-19 in the UK and no Government advice, orders, laws or other measures in relation to COVID-19, or alternatively in which such of these events as the Court adjudges to be interlinked had not occurred.<sup>392</sup>
416. Hiscox argues that the counterfactual is:<sup>393</sup>

“broadly, losses caused by COVID-19 and its impact on the economy and public confidence and government measures, but subtracting the insured peril(s), i.e. the mandatory government regulations or orders causing an interruption because of denial of or hindrance in access and/or inability to use. Those losses would have been suffered in any event, and are therefore not recoverable.”

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<sup>392</sup> PoC para 77. {A/2/45}

<sup>393</sup> Hiscox Def para 23. {A/10/8}

417. Hiscox argues that the counterfactual is one which assumes the existence of COVID-19, its impact on the economy and public confidence, and government measures, but subtracting only “*the mandatory restrictions resulting in the inability to use or denial of or hindrance in access causing interruption*”.<sup>394</sup> (And Hiscox advances the same case in relation to the one mile disease clause in Hiscox4—the geographical limit is not relevant to the causation arguments for Hiscox4, although it is for the Hiscox 1, 2 and 4 non-damage DoA clauses considered in the next section.)

418. This narrow approach to the counterfactual has several flaws. In particular:

419. Following *The Silver Cloud*<sup>395</sup>, the underlying cause (the emergency, here accepted to be the national pandemic) is expressly required as part of the trigger. The public authority action responds to the notifiable disease—that is why notifiable diseases are notifiable—and is the ‘something extra’ required. It is the insured event in any common sense interpretation of the policy even if not the ‘insured peril’ in the sense of it not being sufficient (although it is necessary) to trigger cover. It cannot have been intended that any other things caused by the same emergency are competing causes that can prevent the ‘resulting from’ test being satisfied—the parties would not understand the insurance, merely by the word ‘resulting from’, to have given with the hand of providing emergency cover but then taken away with the other hand. To paraphrase Rix LJ’s quotation in paragraph 285 above in *The Silver Cloud*<sup>396</sup>(adjustments italicised):

“Cover... is premised on [*human contagious disease*]... provided, however, that they generate the relevant [*public authority imposed restrictions*] about them. If they do, and those [*restrictions*] cause loss of income as their direct result, there is cover. The underlying causes of the [*restrictions*] are not excluded perils, it is simply that they are not covered under cover... as perils in themselves. Something extra is required. However, they are “an insured event” for the purpose of the contract as a whole. There is no intention under this policy to exclude loss directly caused by [*restrictions*] concerning [*human contagious disease*] just because it can also be said that the loss was also directly and concurrently caused by the underlying [*human contagious disease*] themselves.”

420. In other words, the cover is “premiered” on the notifiable disease and underlying cause provided that it generates the relevant public authority action. All occurrences of disease on the (short) list of notifiable infectious diseases that are sufficient to cause public authority restrictions leading to inability to use the premises would likely have effects on the business other than through public authority action. These will include human behaviours of self-

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<sup>394</sup> Hiscox Def para 117. {A/10/37}

<sup>395</sup> {J/91}

<sup>396</sup> {J/91}

preservation (of their life and property) of customers and staff, government and local authority action that fall short of restrictions leading to inability to use, also the voluntary action that the insured would have taken to deal with the outbreak even without any government intervention.

421. Similarly, any vermin or pests at the premises where the insured is unable to use the premises through restrictions imposed by a public authority (Hiscox 1, clause 13(e)<sup>397</sup>) would likely have had reduced turnover even without that authority, since even without being ordered or advised most business owners would voluntarily restrict their business to protect their staff and customers. The same is true for murder or suicide at the premises where the insured is unable to use the premises through restrictions imposed by a public authority (Hiscox 1, clause 13(a)<sup>398</sup>). The cover is for the effects of murder or suicide, but only where there is public authority intervention—that is the ‘something extra’. Hiscox does not dodge this example. It says that the “*restriction rather than the outbreak or murder itself*” will “*likely*” be the sole and direct cause of the loss, but to the extent that “*insofar as the outbreak or murder itself causes people to stay away, such losses are not and should not be covered under the Public Authority clause, because that clause (as its title suggest) insures against interruption to the business caused by the requisite type of mandatory government action*”.<sup>399</sup> This does capture the core dispute in the case. The FCA fundamentally disagrees that the parties would understand that the indemnity could be reduced, or removed completely, because the murder or outbreak was a proximate cause (which therefore on Hiscox’s case, because of the ‘solely and directly’ wording, prevents any recovery for the concurrent proximate cause of public authority restrictions), or in any case a but for cause of some loss. Hiscox’s case is that not only must there be public authority action to trigger the clause, but (i) the cover is only for the incremental amount by which the action increased loss beyond the loss that would have resulted from the expressly contemplated cause of the action (murder, vermin etc) but without that action, and (ii) the insured must model the world with the underlying perilous event but without the government action. Is a salon closed for two days because of a murder to seek to prove what the footfall would have been as a result of the murder without the police closure?

422. Any reasonable person would understand the public authority clause to be protecting against the losses that are suffered as against normal business activity where the business is interfered with by public authority order or advice, *not merely the incremental amount by which those losses exceed the amount that would have been suffered had the insured had to take matters into his or her own hands*. The

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<sup>397</sup> {B/6/42}

<sup>398</sup> {B/6/42}

<sup>399</sup> Hiscox Def para 111.3 {A/10/34}

insured would not understand the cover to be greater for reckless insureds who can show they would have carried on serving pizzas with rats in their kitchen, than for careful insureds who accept they would have shut their kitchen down anyway. The trigger of restriction of use through public authority order or advice ensures that claims are only made whether there is a vermin infestation of suitable seriousness, and provides an easy way of proving that trigger (because the public authority order or advice will be easy to prove). But it is not merely an insurance of the top slice of loss due to the incremental addition of that public authority advice; it is not intended to entail an investigation into a counterfactual of other responses to vermin; it is intended to cover vermin as the insured event.

423. Further, even if Hiscox is correct that the only thing subtracted is the insured peril, its interpretation of what that peril is far too narrow and illogical. There are many links in the chain between loss and the disease. Why remove the restrictions imposed by a public authority? Why mark that of all the links out as the insured peril? The answer is that it suits Hiscox.

423.1. It prefers not to remove only the interruption or inability to use the premises (i.e. the final effects that led to loss), because it realises that that would likely lead to a substantial indemnity. Indeed, it would lead to a windfall recovery, with the premises being the only premises still open and operating, with a monopoly. The only bicycle repair shop in the country. The only legal pub, restaurant etc.<sup>400</sup>

423.2. It prefers not to remove the ultimate peril, the disease, which is also a part of the trigger (the public authority restrictions must follow the disease) because that (the FCA's case) also leads to a substantial indemnity.

423.3. So instead, Hiscox settles on something in the middle of the chain, the imposition of public authority restrictions, so that it can argue that loss would have been suffered anyway as a result of the disease. This may favour Hiscox, but at the expense of logic.

423.4. And then there is inconsistency piled on inconsistency. Hiscox suggests that one subtracts the mandatory restrictions resulting in the inability to use.<sup>401</sup> But it appears to define the insured peril as the government restrictions *nationwide*, not merely to the individual premises. In other words, it tacitly accepts the indivisibility argument or the reality argument: one cannot assume that the Government had passed the 26 March

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<sup>400</sup> Hiscox attempts to but fails to meet this argument in its Def para 123. {A/10/39}

<sup>401</sup> Hiscox Def 117 {A/10/37}

Regulations but included a carve out only for the insured's premises. One instead has to assume that the Government had not passed those regulations. This is clear from Hiscox's explanation of its counterfactual as being realistic because it was what happened in Sweden, or during prior flu pandemics, and will likely happen after mandatory restrictions are lifted, and its point that "*It was not inevitable that the UK government would take the mandatory steps which it did, and there were and are powerful voices urging the government to do no such thing*".<sup>402</sup> But once one has accepted that a dose of realism and conceptual indivisibility applies to determine what is subtracted—the nationwide government measures, not merely those applied to the insured's premises—presumably on the basis of common sense and what the parties must have intended, one is driven to apply the point to its fullest extent: the government action was due to disease as is contemplated and indeed required by the clause. The government action and other steps are 'something extra' required for cover, but the insured event that is contemplated and covered is (in those circumstances) the disease, for the purposes of the 'but for' test.

424. Moreover, on its own terms the 'but for' test that Hiscox proposes simply makes no practical sense. See Defence paragraph 119.5<sup>403</sup>, which reads relevantly "*Hiscox does not seek to prove in the Test Case that any particular number of businesses in Sweden suffered such losses, or the amount of any losses, or there was in fact a reduction in economic activity of any actual amount in Sweden, but rather that there may have been a reduction of some amount, and that businesses may have suffered such losses*" in the absence of mandatory measures. Hiscox's case results in the following absurd position: as well as proving pre-interruption income, and providing business figures (for which the Wordings cover reasonable accountant's charges for producing such information<sup>404</sup>), the insured must prove what custom there would have been for the business had there been the same disease but not government restrictions. It would presumably need an expert retail behaviour analyst, an expert in the effects on the economy of disease, and possibly other experts. It would be impossible for an SME to bring this sort of evidence to bear even if it would prove the point, completely disproportionate to any claim limit (the Hiscox example schedules have limits of £100,000-120,000<sup>405</sup>), and not contemplated by the policy—which does not cover the reasonable charges of such necessary experts (unlike the accountant).

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<sup>402</sup> Hiscox Def paras 119. {A/10/37}

<sup>403</sup> {A/10/38}

<sup>404</sup> {B/6/44}, {B,7/26}, {B/8/29}, {B/9/37}

<sup>405</sup> Save for Gunsmiths which is £500,000 for Loss of Gross Profit. {B/8/4}

425. This point is only slightly diminished by the fact that the burden of proof falls on Hiscox to show that there was an independent concurrent cause, as set out above in paragraphs 249ff. That does not make the task any more realistic or proportionate, or prevent the insured having to incur similar expense if it wishes to dispute or test the insurer's arguments.

## **B. Arch1 government action or advice emergency wording, no vicinity provision**

### Introduction

426. Within Arch1's (optional) BI section, its Wording provides an indemnity against the following extension (on p35) {B/2/36}:

#### **(7) Government or Local Authority Action**

Prevention of access to The Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property.

We will not indemnify You in respect of

- (1) any incident lasting less than 12 hours
- (2) any period other than the actual period when the access to The Premises was prevented
- (3) a Notifiable Human Infectious or Contagious Disease as defined in the current relevant legislation occurring at The Premises

The maximum We will pay under this Clause is £25,000, or the Business Interruption Sum Insured or limit shown in the Schedule, whichever is the lower, in respect of the total of all losses occurring during the Period of Insurance.

The provisions of the Automatic Reinstatement Clause do not apply in respect of this Clause.

427. As set out above, the cover includes an exclusion for incidents of less than 12 hours, and a £25,000 (or lower figure in Business Interruption Sum Insured or a Schedule) sub-limit.
428. Arch is the only insurer who has introduced (now agreed) evidence as to the categories of business who wrote policies on Arch1. As Agreed Facts 9 paragraph 1 helpfully recites, the three Arch1 wordings were, between them, taken out by insureds in every one of the 7 Categories in PoC paragraph 19 other than Category 6 (hotels and accommodation), although with a low uptake in Categories 1 (hospitality) and 7 (education). In summary, \*OGI Commercial Combined is mostly written for Category 2 (leisure) and Category 5 (services) insureds, OGI Retailers is mostly written by Categories 3 and 4 (essential and non-essential retail) insureds, and Powerplace (Offices & Surgeries) was written for those retail categories but also and mostly Category 5 (service businesses, presumably including medical surgeries) insureds.

## Cover

*“emergency which is likely to endanger life or property”*

429. Arch has rightly admitted that there was an emergency likely to endanger life from at least 3 March 2020<sup>406</sup>, consistently with the FCA’s pleaded case at paragraph 43 of the PoC.
430. It has not, for example, taken the approach of Zurich and argued that the disease clause is intended to be the clause responding to diseases and that disease is impliedly excluded from the ‘emergency’ definition, even though the prevention of access clause includes an exclusion for a notifiable disease at the premises. (In other words, if there is a notifiable disease at the premises, only the disease clause can respond, but if there is a disease outside the premises Arch accepts that the public authority clause can respond.<sup>407</sup>)

*“actions or advice of a government or local authority”*

431. Arch admits that the relevant events relied upon by the FCA (those pleaded in paragraphs 18.9, 18.14, 18.15(b), 18.16-24 and 18.26 of the PoC) were ‘actions or advice of a government.’<sup>408</sup>

*“Prevention of Access”*

432. Prevention of access was not a defined term in Arch1. The policy includes provision that a *“particular word or phrase which is not defined will have its ordinary meaning.”*<sup>409</sup>
433. Arch’s case on this phrase is contradictory:
- 433.1. Arch has admitted that there was prevention of access for those ordered to close by the Government’s instructions (or “*advice*” as Arch call it<sup>410</sup>) on 20 March 2020 (Categories 1 and 2) and 23 March 2020 (Categories 2, 4 and 7).<sup>411</sup>
- 433.2. Arch has admitted that there was prevention of access for those policyholders that were “*required to close the premises*” by the 21 March Regulations or 26 March

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<sup>406</sup> Arch Def, para 63 {A/7/20}

<sup>407</sup> See further para 446 below

<sup>408</sup> Arch Def 37-8 {A/7/13}

<sup>409</sup> {B/2/64}

<sup>410</sup> Arch Def para 7.9 {A/7/4}

<sup>411</sup> Arch Def para 7.9 {A/7/4}

Regulations.<sup>412</sup> In other words, Arch is not taking the unrealistic approach that prevention of access requires physical impossibility. But Arch does not make clear what it means by this. It obviously includes businesses which were required to close their premises by the Regulations (Categories 1, 4 and 7), but it does not appear to accept that prevention arose where an insured was required to cease its business (e.g., Categories 2 and 6 under the Regulations), even completely, because it says that action or advice that “(b) requires the policyholder not to carry on certain business activities at the Premises” is not enough.<sup>413</sup> Arch says that ‘prevention of access’ only arises when the premises are ordered to close.<sup>414</sup>

433.3. Further, Arch does not accept that action or advice which “requires the policyholder to close part only of the Premises” suffices.<sup>415</sup>

433.4. Further, Arch contends that “actions or advice on social distancing, working from home, lockdown, etc. did not prevent access to insured Premises, even if they resulted in less use (or, in some cases, no use) being made of insured premises”.<sup>416</sup>

434. The general requirement for prevention of access, section 6F above is repeated. In particular, access to the relevant “Premises” was prevented from 16 March 2020 (see PoC, paragraph 43 and Schedule 1 at paragraph (2) for businesses in Categories 1, 2, 4, 6 and 7 only, and for all policies set out above available to those businesses, from 20, 21, 23, 24 and/or 26 March 2020, by reason of the Regulations.

435. For the reasons set out above, requiring closure, rather than a business ceasing, is an unduly narrow approach not reflecting the common sense meaning of the words, appearing as they do in a BI extension. It produces arbitrary results that cannot have been intended. For example: Arch accepts that there was prevention of access by the 20 March instructions by the Prime Minister,<sup>417</sup> the operative part of which stated:

we are collectively telling, telling cafes, pubs, bars, restaurants to close tonight as soon as they reasonably can, and not to open tomorrow. Though to be clear, they can continue to provide take-out services. We’re also telling nightclubs, theatres, cinemas, gyms and leisure centres to close on the same timescale.

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<sup>412</sup> Arch Def paras 7.8, 7.9, 43 {A/7/4} {A/7/4} {A/7/14}

<sup>413</sup> Arch Def para 7.7 {A/7/4}

<sup>414</sup> Arch Def paras 7.4, 43 {A/7/4} {A/7/14}

<sup>415</sup> Arch Def para 7.7 {A/7/4}

<sup>416</sup> Arch Def paras 7.10, 41 {A/7/4}{A/7/14}

<sup>417</sup> Arch Def para 7.9 {A/7/4}

436. Thus Arch accepts that there was prevention of access for Category 1 (restaurants, bars) and Category 2 (nightclubs, theatres, cinemas etc) businesses on 20 March 2020. However, by this approach there was no prevention of access for Category 2 businesses by the Regulations, which under the heading “*Requirement to close premises and businesses during the emergency*”<sup>418</sup> state (in relation to Category 2) “*A person responsible for carrying on a business listed in [relevant part of the Schedule] must cease to carry on that business during the relevant period.*”<sup>419</sup> (This contrasts with other categories within the Regulations, such as Category 1, for which there is a requirement to close the premises unless selling food or drink for off-site consumption.)
437. The cover deliberately extends to ‘advice’ preventing access, which is, taken literally, a contradiction in terms as ‘advice’ is not mandatory but a recommendation. A recommendation only *prevents* access in the sense that if the recommendation is followed there will not be access to the premises. Advising closure is prevention of access, but it is no more prevention of access than mandating that the business cease to operate. And in case Arch takes the unrealistic point that if the business ceases to operate people can still access the premises for other purposes (cleaning, doing the accounts etc) so access has not been prevented, *the same is true for advised or ordered closure*. The Regulations would not prevent the owner attending the premises merely because he or she is ordered ‘to close the premises’. However, in both cases access to the premises for the purposes of conducting the insured business is prevented.
438. Further, there is no specification as to for *whom* access to the premises was prevented. It being expressly provided that Government advice or instruction (falling short of law) can amount to ‘prevention’, the stay-at-home and related instructions clearly did prevent access for the customers, the main body of people upon whose access the business depends. The Prime Minister’s statement of 16 March 2020 stated that everyone should “*not go out even to buy food or essentials, other than for exercise*”; “*stop all unnecessary travel*”; “*we need people to start working from home where they possibly can*”; “*And you should avoid pubs, clubs, theatres and other such social venues*” and “*avoid... confined spaces such as pubs and restaurants*”. Taking as an example a business such as a pub or club, therefore, from 16 March 2020, that business’s customers were prevented by government advice from accessing the relevant Premises. Customers were required to “*avoid*” pubs. Further, the millions of customers who were vulnerable (anyone with underlying health conditions, aged 70 or older, or pregnant) and those with COVID-19 symptoms (a high temperature or a new and continuous cough) were also advised to work from home and not

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<sup>418</sup> Reg 2 of the 21 March Regulations {J/15} and reg 4 of the 26 March Regulations {J/16}

<sup>419</sup> Reg 2(4) of the 21 March Regulations and reg 4(4) of the 26 March Regulations.

to go out etc. Further, it was Government instruction not law that, when followed, meant no one (other than children of key workers) could go to schools.

439. Arch's position comes down to an assertion there was no 'prevention' because there was nothing to stop people disregarding the Government's advice. This is an unduly restrictive reading of the meaning of 'prevention' having regard to the inclusion of 'advice' as being a cause of the prevention of access and the commercial purpose of the policy, and especially given the insured's obligation to take reasonable precautions to prevent injury to people<sup>420</sup> (such as employees and customers).
440. This also applies to partial closure or partial cessation of business. A restaurant that is permitted to sell take-aways has had its access prevented for its business purposes. Its door may be physically open, but customers are not permitted to enter or, more importantly, to enter and sit down and have a meal—the core business of a restaurant. This is exactly the sort of situation the reasonable reader would understand this cover to respond to: a restaurant that cannot admit diners. Is a bar that sells food to be taken off the premises to be denied cover whereas a bar that does not have such a side-business, or decides it is uneconomic given the furlough scheme or too dangerous for employees, to be granted cover? Any Turnover actually made by the business at the premises (or elsewhere<sup>421</sup>) will reduce the loss (which covers the full period for which the "*Business results are affected*"<sup>422</sup>), and indeed it is in Arch's interests for the insured to seek to mitigate its losses in this way, which the insured is in fact obliged to do by way of a condition precedent no less<sup>423</sup>.
441. The FCA accepts that there are broader formulations than 'prevention of access' elsewhere in the Wording: the damage prevention of access clause (extension (1)) is engaged where there is property damage which "*binders or prevents access*" and the disease clause (extension (3)) is engaged where "*use is... restricted*". But this is not a case of restrictions or hindrances just making it more difficult; the legislation or advice requires that the customer simply not attend.

#### The causal connectors and counterfactual

442. The PoA clause in Arch1 (the only cover clause relied on by the FCA) requires loss *resulting from* prevention of access *due to* government or local authority actions or advice *due to* an

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<sup>420</sup> Condition 13(b)(ii) on p64 **{B/2/65}**

<sup>421</sup> See the Alternative Premises clause, Condition (2) on p36 **{B/2/37}**.

<sup>422</sup> Indemnity Period definition on p32 **{B/2/33}**

<sup>423</sup> Conditions Precedent (1) Claims Procedure on p37 "*You will... take any action reasonably practicable to minimise any interruption of or interference with the Business or to avoid or diminish the loss*" **{B/2/38}**.

emergency likely to endanger life. Arch's case that these terms denote proximate causation<sup>424</sup> is accepted, subject to the FCA's case that this must be subject to the intentions of the parties.

443. In addition to damage-based BI, the policy provides a range of non-damage Revenue Protection covers. This includes up to £50,000 for loss resulting from murder at the Premises, poisoning by food at the Premises (without the need for government action), or a disease within a 25 mile radius; failure of electricity supply or telecommunications; up to £50,000 for damage to property in the vicinity of the Premises causing loss of attraction; and up to £25,000 for the government action prevention of access clause we are concerned with but excluding a disease at the premises.
444. These covers deliberately overlap. The Disease, Infestation or Defective Sanitation clause covers loss resulting from the occurrence of disease within 25 miles (or murder, vermin, food poisoning or drainage accident 'at the premises'), providing for a proximity requirement. But the PoA clause which depends upon an emergency likely to endanger life, with no such proximate requirement, also covers government action or advice triggered by disease.
445. This is not a Wording whose insurer seeks to argue that the disease clause is intended to be the only avenue for BI resulting from disease, because the application of the PoA clause to an underlying disease event is expressly contemplated by the PoA clause which includes an express exclusion for disease, although only at the premises (hence Arch does not rely on it in its Defence and has not relied on it to refuse COVID-19 claims<sup>425</sup>). As noted above, Arch admits that COVID-19 was an 'emergency likely to endanger life' from 3 March 2020.<sup>426</sup>
446. Further, given that the PoA clause has no vicinity qualification, the disease clause has a 25 mile qualification, and the PoA disease exclusion has an 'at the premises' qualification, it is intended that (i) disease within the definition of Notifiable Human Infectious or Contagious Disease at the premises can trigger the disease clause but not the PoA clause, (ii) disease within that definition not at the premises but within 25 miles can trigger both<sup>427</sup>, (iii) disease within that definition beyond 25 miles will not trigger the disease clause but will, if it is due to government action or advice, still trigger the PoA clause, (iv) disease not within the definition will not trigger the disease clause but will, if it is an emergency and results in government action or advice, still trigger the PoA clause.

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<sup>424</sup> Arch Def para 51 {A/7/18}.

<sup>425</sup> Arch Def para 31 {A/7/12}.

<sup>426</sup> Arch Def paras 7.2, 24.1 and 36 {A/7/3} {A/7/11} {A/7/13}.

<sup>427</sup> There are other overlaps, such as where the government or local authority responds to food poisoning (overlap with the disease clause), or an emergency causing loss of electricity supply (overlap with the Public Utilities clause).

447. This is the cover scheme deliberately set up by the parties. The disease clause is more demanding (it has a proximity limit, and it has a stricter definition of disease) but has a larger limit. The PoA clause, by the omission of a proximity limit, deliberately extends to wide area or distant emergencies providing they lead to government or local authority action.
448. Arch does not dispute this. It accepts that the PoA is triggered by an emergency likely to endanger life *anywhere* that causes (‘due to’) government or local authority action, and therefore COVID-19 qualifies from 3 March 2020 when the government published its action plan after the first UK death (in York). Thus it accepts that that element of cover was triggered for the entire UK on 3 March 2020. It accepts that there was a ‘single national pandemic’ that the Government was responding to.<sup>428</sup> Further, Arch accepts that there was prevention of access due government or local authority action due to the COVID-19 emergency for at least those businesses *anywhere in England* that were ordered to close by the 21 March or 26 March 2020 regulations. (The true meaning of ‘prevention of access’ is broader as set out above—paragraphs 432ff—but for the purposes of this causation issue Arch’s concession is sufficient starting point.)
449. Thus Arch accepts that the cover was intended to and did respond to closure of businesses anywhere in England due to the national government response to the COVID-19 disease anywhere else in the UK. This is pandemic cover, and Arch does not (unlike the other Defendants) deny that.<sup>429</sup>
450. The only complete defence advanced by Arch is causation. It does not dispute that there was prevention of access *due to* government or local authority actions or advice *due to* an emergency likely to endanger life. It only disputes that there was loss *resulting from* the prevention of access.
451. Its reasoning is:
- 451.1. The loss did not ‘result from’ the prevention of access due to government or local authority action because it was not a ‘but for’ cause. The insured peril to be excised for the counterfactual is not the health emergency.<sup>430</sup> Arch seems unclear as to what it says

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<sup>428</sup> Arch Def para 47 {A/7/15}.

<sup>429</sup> Similarly, in relation to wide-area or remote physical damage, extensions 9 and 12 provide cover for loss resulting from Damage to customers’ or suppliers’ premises anywhere in England, Wales, Scotland, Northern Ireland, the Republic of Ireland, the Channel Islands or the Isle of Man.

<sup>430</sup> Arch Def para 59 {A/7/19}.

the insured peril is, but its two contenders are: the prevention of access,<sup>431</sup> or government or local authority action or advice preventing access.<sup>432</sup>

451.2. However, the ‘but for’ test is not satisfied because loss also resulted from (i) COVID-19 (and its effects on consumer behaviour, economic activity etc), (ii) Government and other official advice and regulations on social distancing, lockdown etc that did not amount to ‘prevention of access’.<sup>433</sup>

451.3. Although in some circumstances the ‘but for’ test should be disapplied, this is not one of those circumstances.<sup>434</sup>

451.4. It remains unclear whether Arch advances a case that the insured peril was not (apart from the ‘but for’ test) a proximate cause of the loss, although it seems to.<sup>435</sup>

452. This approach to the Wording is clearly absurd.

453. By way of preliminary point, it is important to note that the way this argument operates depends on the Court’s findings in relation to prevention of access. If, as the FCA contends, staying at home, working from home, minimising travel amounted to prevention of access alongside instructions, advice or orders that the premises close (or, on the FCA’s case, the business cease), then that increases how much is inside Arch’s proposed insured peril.

454. But, setting that point aside and dealing with the question as a matter of principle, first, an underlying emergency (say an earthquake) might lead to prevention of access by government order (extension 7, the PoA clause) but also Damage to the premises (the primary BI cover), Damage to property in the vicinity of the premises that deters potential customers (extension 8), failure of Public Utilities and Telecommunications supplies (extensions 4-5). On Arch’s approach, the customer with such an embarrassment of riches of triggered perils recovers nothing. But for the ‘prevention of access’ by the Government there would still have been damage to the property; but for the damage to the property the phones and electricity would still have been down; but for either of those things the neighbouring properties would still have been damaged reducing attraction. This (the problem that arose and was inadequately dealt with in *Orient Express*: see above paragraph 299ff) demonstrates that the ‘but for’ test

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<sup>431</sup> Arch Def paras 7.12 and 50 and 59 and declaration (3) {A/7/5} {A/7/18} {A/7/19} {A/7/21}.

<sup>432</sup> Arch Def paras 7.13 and 50 and declaration (2) {A/7/5} {A/7/18} {A/7/21}.

<sup>433</sup> Arch Def paras 7.12-16, 46, 49-50 and 55 {A/7/5:6} {A/7/15} {A/7/15:18} {A/7/19}.

<sup>434</sup> Arch Def para 57 {A/7/19}.

<sup>435</sup> The proximate cause test is mentioned in passing in paras 50-1 and 62.3 but there is no positive plea relating to directness, or a different cause being the proximate cause.

cannot be a necessary component of the requirement that loss *results from* the prevention of access, where there are a number of independent concurrent causes with the prevention that are expressly covered by the Wording.

455. The same issue arises with the overlap between the disease clause and the PoA clauses for emergencies which are diseases within the definition in the disease clause, within 25 miles but not at the premises. But for the ‘restriction of use’ (disease clause) the ‘prevention of access’ (PoA clause) would have caused the loss, and vice versa, thus neither caused the loss on Arch’s ‘but for’ approach. This was the insuperable problem in *Orient Express* (avoided there by the insurers nevertheless conceding that the peril with the lower limit was engaged, and Hamblen J failing properly to engage with the point: see above paragraphs 301 to 302).
456. Second, and in accordance with the general conclusion as to what is intended to be covered from *The Miss Jay Jay* (although that was an interdependent not independent cause case), even if some of the independent concurrent causes are not insured perils, providing they are not excluded, cover must still respond if one such cause is an insured peril.
457. Third and further, following *The Silver Cloud*, the underlying cause (the emergency, here accepted to be the national pandemic) is expressly required as part of the trigger. It is the insured event in any common sense interpretation of the policy even if not the ‘insured peril’ in the sense of it not being sufficient (although it is necessary) to trigger cover. It cannot have been intended that any other things caused by the same emergency are competing causes that can prevent the ‘resulting from’ test being satisfied—the parties would not understand the insurance, merely by the word ‘resulting from’, to have given with the hand of providing emergency cover but then taken away with the other hand.
458. All emergencies likely to endanger life or property will likely have effects on the business other than through government and local authority action preventing access. These will include human behaviours of self-preservation (of their life and property) of customers and staff, government and local authority action that prevent or hinder use (in addition to the prevention of access), sometimes property damage (to premises, telecommunications etc) too, also the voluntary action that the insured would have taken to deal with the emergency even without any government intervention.
459. Similarly, any vermin or pests at the premises where use of the premises is restricted by the order or advice of a competent authority (extension 3(d)) would likely have had reduced turnover even without that authority, since even without being ordered or advised most

business owners would voluntarily restrict their business to protect their staff and customers. The same is true for murder or suicide at the premises where use of the premises is restricted by the order or advice of a competent authority (extension 3(a)). The cover is for the effects of murder or suicide, but only where there is public authority intervention.

460. Any reasonable person would understand extension 3 to be protecting against the losses that are suffered as against normal business activity where the business is interfered with by public authority order or advice, *not merely the incremental amount by which those losses exceed the amount that would have been suffered had the insured had to take matters into his or her own hands*. The insured would not understand the cover to be greater for reckless insureds who can show they would have carried on serving pizzas with rats in their kitchen, than for careful insureds who accept they would have shut their kitchen down anyway. The trigger of restriction of use through public authority order or advice ensures that claims are only made whether there is a vermin infestation of suitable seriousness, and provides an easy way of proving that trigger (because the public authority order or advice will be easy to prove). But it is not merely an insurance of the top slice of loss due to the incremental addition of that public authority advice; it is not intended to entail an investigation into a counterfactual of other responses to vermin; it is intended to cover vermin as the insured event.

461. The same applies to the PoA clause. In Arch's words, the PoA clause provides an "*indemnity for all of the policyholders' business interruption losses caused by the emergency*"<sup>436</sup>, although only where the emergency is one that triggered public authority intervention. No reasonable person would understand that the insurer can escape liability by showing that:

461.1. as well as/but for government action preventing access, there was also/would have been government action falling short of preventing access (e.g. hindering access) or government action preventing use. (Thus, the more belt and braces the government action, the less cover there is: the cover purchased is only for the situation where the government action and advice is *only* to prevent access and it otherwise is silent.) Indeed, as touched on above at paragraph 436, Arch's position seems to be that the Government statement to close Category 2 businesses was prevention of access on 20 March, but the Regulations on 26 March were not and so the only loss resulting from prevention of access must have been from 20 to 26 March.

461.2. had the government not acted to prevent access:

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<sup>436</sup> Arch Def para 7.2 {A/7/3}.

- (a) the owner would have responded to the emergency to close the premises or reduce the business. (Thus, the more cautious and public-spirited the owner, the less the cover.)
- (b) customers, suppliers or employees would have stayed away, fearful of the emergency

462. The word ‘resulting’ is being asked to do too much here, in achieving bizarrely constricted results and a near impossible calculation of the alternative world (is evidence required from the government as to what its response would have been if it had stopped short of preventing access? From the insured and employees as to what it would have done? From customer behaviour analysts and psychologists as to their likely behaviour?) It would be possible to draft the highly artificial and focused insurance cover Arch contends for. Providing recovery only for loss where there is no “*other cause or event contributing concurrently or in any other sequence to the loss*”—words Arch actually uses in its terrorism exclusion (pages 11 and 26)—might well do the trick.<sup>437</sup>

463. Fourth, there is a further difficulty with Arch’s argument. The ‘resulting’ wording is dealing with cover not quantification. Providing that ‘but for’ the prevention of access *some element of the loss* would not have arisen, then the cover must respond. The prima facie case having been raised, the Defendants would have to prove that but for the prevention of access the loss would have been *exactly the same*. Arch does not contend that it is—i.e. that the Government action did not prevent or deter at least some customers, employees etc—instead apparently contending that cover does not respond at all unless the insured can show that *all* of its claimed losses would not have been suffered without the prevention of access.<sup>438</sup> And as a matter of English language and what reasonable people would understand, where (say) the premises were closed by the Government action or people were ordered not to come to the premises then the loss resulted from the prevention of access. It was open before/people could come. It was closed after/people could not come. The Government did it. It may be, however, that Arch accepts that there is cover in the present case and merely seeks directions as to quantification.

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<sup>437</sup> Reg 2(4) of the 21 March Regulations {J/15} and reg 4(4) of the 26 March Regulations {J/16}

<sup>438</sup> Arch Def para 50 {A/7/18}.

The quantification machinery: Arch1 (Commercial Combined)

464. The quantification machinery is for Arch 1 (Commercial Combined) set out in the Basis of Settlement clause (p33)<sup>439</sup> which calculates the Rate of Gross Profit in the year prior to the ‘Damage’ and applies it to the difference between the Turnover during the Indemnity Period and the Standard Turnover during the same period in the prior year. That machinery is referred to (and so incorporated into the extensions) in the opening words of the extensions (p34) “*We will also indemnify You in respect of reduction in Turnover and increase in cost of working as insured under the Section resulting from...*” It is because this wording refers to “*Turnover and cost of working as insured under this section*” that the FCA accepts that the quantification machinery and trends clause applies despite the use of the word ‘Damage’ which refers to physical loss in the quantification machinery in the quantification machinery (for example, in the definition of the Indemnity Period and Standard Turnover, and in the trends clause). The parties must have intended that the quantification machinery wording be adapted to the non-Damage situation arising under this and similar non-Damage BI extensions.<sup>440</sup>
465. The approach here (which is typical) is crucial. The emphasis is on comparing periods. The causal test here is that, once prevention (from government action, for an emergency) is proven, the policy responds in relation to “*The period during which The Business results are affected due to the Damage, starting from the date of the Damage and lasting no longer than the Maximum Indemnity Period*” (the definition of Indemnity Period on p32). I.e. the starting point is that all losses as against the prior year for any period affected (and ‘affected’ is clearly a loose connection) due to the peril are recoverable. This is by arithmetic comparison of actual turnover with turnover in the previous year (to which the previous year’s rate of gross profit is to be applied). The policy imposes a simple calculation which is intended to be practical and to cover all losses during a period during which the business is affected *without requiring a consideration of exactly what would have happened absent the period during that period*. The comparator is the prior year not any counterfactual during the actual Indemnity Period.
466. Indeed, the choice of the Indemnity Period as the full period during which results are ‘affected’ is deliberately broad, so as to allow for inclusion of any period during which the business results are *improved* by the peril, rather than allowing the insured to claim for any period during which losses occurred and leave out of account a subsequent period of increased business.

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<sup>439</sup> {B/2/35}

<sup>440</sup> PoC para 75.5 {A/2/45}, although this should refer to all three Arch1 policies not only Commercial Combined. See Reply para 62.2 {A/14/33}.

467. Arch1 (Commercial Combined) contains a ‘trends or circumstances’ clause (within the definition of Standard Turnover (p32)<sup>441</sup>) which provides that the figures for Standard turnover and Rate of Gross Profit (i.e. the counterfactual)

“may be adjusted to reflect any trends or circumstances which

(i) affect The Business before or after the Damage

(ii) would have affected The Business had the Damage not occurred.

The adjusted figures will represent, as near as possible, the results which would have been achieved during the same period had the Damage not occurred.”

468. The counterfactual—what must be removed to calculate the comparator position up to which the indemnity operates—is defined by the word ‘Damage’. ‘Damage’ is defined as “*Accidental loss or destruction of or damage to property used by You at the Premises for the purpose of The Business*”. That definition, clearly drafted with property damage in mind, does not apply here and must be adapted.

469. Whilst the trends clause does, unlike the causal connector ‘resulting’ in the cover clause, explicitly include a ‘but for’ test, the FCA agrees with Arch that the trends clause makes no difference to the causal test.<sup>442</sup>

470. The short reason is that this language is also insufficient to dictate the absurd and impractical results Arch contends for, undermining the very cover (for losses due to emergencies) that reasonable people would understand the policy to provide. See paragraphs 451ff above.

471. That dictates a sensible counterfactual. As set out in paragraph 451 above, Arch proposes two possible counterfactuals. Whether they make a practical difference depends upon whether there was any prevention of access resulting other than from government action or advice. But Arch’s core point is that when the government action/advice-induced prevention of access is removed in the counterfactual, “*all other factors operating on the business should be taken into account*”<sup>443</sup> and “*all other factors remain unchanged*”<sup>444</sup>). On this basis social distancing and self-isolation guidance from the government itself, and general fear and economic depression caused by COVID-19 (and, presumably, prevention of access to other businesses), are still taken into account.

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<sup>441</sup> {B/2/33}

<sup>442</sup> Arch Def para 58 {A/7/19}.

<sup>443</sup> Arch Def para 50 {A/7/18}.

<sup>444</sup> Arch Def declaration (2) {A/7/21}.

472. So, for a restaurant, this must assume that the government enacted legislation preventing access to all restaurants other than the insured's, leaving that restaurant as the only legally permitted restaurant in the country (and, it must follow, with a massive number of employees from other businesses furloughed and free to dine out at the insured's premises). This is Arch's case: "*The appropriate counterfactual is that there was no governmental or local authority action or advice preventing access to the Premises but all other factors remain unchanged.*"<sup>445</sup> This obviously provides an unintended windfall profit to all or most insureds, but is the necessary result of Arch's argument.<sup>446</sup> It may even mean Arch pays out more than on the FCA's approach to the policies. (Arch says that there is nothing 'artificial or otherworldly' about this counterfactual but that is simply not understood.<sup>447</sup>)
473. But it cannot be intended for all the reasons set out above at paragraphs 450ff.
474. For those reasons, whilst the FCA accepts that the quantum machinery must be made to work here, that does not mean that 'Damage' can be replaced by something overly narrow, as Arch suggests. The insured peril is the action or advice of a government due to an emergency (anywhere) likely to endanger life (anywhere), but it cannot be intended that the counterfactual should include the 'prevention of access' but without the emergency likely to endanger life or the other consequences of it (such as other government measures, or self-preservation activity).
475. This is primarily on the basis that the emergency is expressly contemplated and that the cover must have anticipated other such causes that are inextricably linked to the emergency and does not intend that loss that would have resulted from the emergency even without the 'something extra' of the government action or advice be irrecoverable (Rix LJ in *The Silver Cloud*) and/or the underlying case is inextricably linked (Rix LJ in *The Silver Cloud*). Their commonality (driven by the parties' contemplation and also by their real world connection) means that all should be excised for the 'but for' test counterfactual.
476. Further, in support of this approach, the government action or advice is in any event one indivisible programme of action (cf *Midland Mainline*). It is not workable or common sense to excise one element of that programme because it is the part that prevents access, but leave the

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<sup>445</sup> Arch Def declaration (2) {A/7/21}.

<sup>446</sup> PoC para 79 {A/2/46} does not explicitly advance the windfall case in relation to non-vicinity clauses, hence Arch's Def para 61 {A/7/20} does not plead to it, but it remains a necessary part of the legal argument because Arch's case involves a vicinity argument to the extent that it says the peril is only the prevention of access to *the Premises*. Arch has not yet set out its view as to the consequences of its proposed approach on which it seeks its own declarations.

<sup>447</sup> Arch Def para 57 {A/7/19}.

other elements that fall short of preventing access (to the extent that any do—a matter of dispute see paragraphs 432ff above).

477. Further, the limit here is important. This is a cover for SMEs with a fixed £25,000 limited. There is also, where provided in the schedule, a fixed period of indemnity (the Maximum Indemnity Period). Crude though it may be, the parties have provided for a simple calculation focusing on the indemnity period turnover versus the prior year which, subject to accounting adjustments based on business figures and trends, gives rise to a (relatively modest) sum to be paid for loss arising out of the emergency. It simply cannot have been intended (in a cover clause with a limit of £25,000) to require a loss adjustment/arbitration that goes beyond manipulation of business figures into a world of predicting human behaviour based on statistics, psychology and other expertise ('management science' in *Silver Cloud*) that even then and after hundreds of thousands of pounds of expert and other investigation probably could not produce a reliable answer (cf *Silver Cloud*). Such a process is not "possible" or contemplated within the terms of the trends clause.
478. In any case, the Trends clauses only requires account to be taken of 'trends or circumstances' affecting the business. The Court needs to construe what those words mean. Arch argues that they are extremely broad, and that there is no limit to the type of event which can fall within them.<sup>448</sup> But giving 'circumstances' an endless meaning ignores the (deliberately) narrow 'trend' and the context, which is the making of adjustments where the basic measure is set up as a comparison with the earnings in the prior period, likely mostly before the emergency. The focus is on the period of affected earnings.<sup>449</sup>
479. 'Circumstance' here does not mean every conceivable event but – given its co-location with 'trends' and the impossibility of constructing a counterfactual exercise (set out above) – means the ordinary business vicissitudes (see above paragraph 268ff).
480. This is not a claim under a Damage cover (as *Orient Express*) is. But the policy did provide Damage-induced BI and Arch's argument can be tested against that cover. For example, the Asset Protection section includes damage to the premises caused by "falling trees" (OGI Commercial) or "falling trees, radio or TV aerials" (the other two Arch1 Wordings). If a huge tree falls onto a property's roof, crushing it and damaging the walls, and also blocking the road and entrance, is the loss adjuster in this situation to try to model what revenue would have been

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<sup>448</sup> Arch Def para 59 {A/7/19}.

<sup>449</sup> See the definition of Indemnity Period {B/2/33}, and the second exclusion to the PoA clause {B/2/36}: "We will not indemnify You in respect of.. (b) any period other than the actual period when the access to The Premises was prevented".

earned if the tree had fallen against the property's roof without damaging it and stayed there, propped up, but blocking the way? Or if the tree had fallen and its atoms passed through the property to lie half in and half out of the premises, undamaged, but filling the premises' front rooms? The FCA would say not. The loss adjuster assumes the tree never fell—she or he excludes the underlying cause (the fallen tree) not just the property damage (to the roof and walls) from the counterfactual. It is common sense, and therefore what the parties would understand to have been intended.

Quantification machinery: Arch1 (Retailers, and Powerplace<sup>450</sup> (Offices & Surgeries))

481. The introductory words to the Extensions provide indemnity in respect of “*loss of Income as insured under this Section*” (Retailers) or “*loss as insured under this Section resulting from*” (Offices & Surgeries). As with the OGI Commercial Wording, and set out in paragraph 464 above, the FCA accepts that the quantification machinery was intended to be engaged in relation to these extensions. However, there is no trends clause in Arch1 (Retailers) or Arch1 (Powerplace Office & Surgeries) in relation to the claim for lost Income considered here, only claims for book debts.<sup>451</sup>
482. There is, however, provision that cover is (under the ‘Gross Income’ and ‘Income’ sections of the respective Cover clauses<sup>452</sup>) for “*the amount by which the Income falls short of the Income which would have been received during the Indemnity Period due to the Damage*”, which comprises the full quantification machinery for these clauses, with no use of the typical standard turnover reference point. There is no ‘Trends Language’ in relation to revenue losses under these Wordings (and Arch’s pleas that appear to assume the OGI Commercial standard turnover machinery with ‘trends and circumstances’ wording apply<sup>453</sup> are not understood).
483. Nevertheless, it is accepted that this quantification machinery does provide for a ‘but for the Damage’ test that is similar that that in the trends clause in the Combined policy (see above paragraphs 470ff) and the points made there as to why this does not lead to the result for which Arch contends are repeated.

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<sup>450</sup> This document was incorrectly referenced in the PoC at para 75.4 {A/2/45}. It should have been referenced in para 75.3 {A/2/44}.

<sup>451</sup> See p27 of Retailers {B/23/27} and p26 of Powerplace (Office & Surgeries) {B/24/26}.

<sup>452</sup> Ibid.

<sup>453</sup> E.g. Arch Def paras 7.19 {A/7/7} and 59 {A/7/19} and declaration (3) {A/7/22}.

### **Arch1 – Assumed Facts Example (Category 5)**

EE is an independent financial advisory business with five employees in a city centre. It suffered a downturn from 1 March because clients were unwilling to visit their premises due to fear of COVID-19 and no new customers were engaging the firm. The office closed on 17 March because people were unwilling to attend the premises in person due to the Government's instructions to stop non-essential contact with others, stop all unnecessary travel and work at home where possible. There was a drop in income after closure (people like to see their advisers face to face) and increase in working costs when home working was instituted.

The Arch1 Denial of Access clause is triggered:

- It is common ground that there was an emergency likely to endanger life from at least 3 March 2020.
- Due to that emergency, the Government took action and gave advice.
- Due to that action/advice, from 17 March the firm's five employees worked from home (they had to, because they could) and clients could not attend because that would have been non-essential conduct. This was prevention of access to the premises.

### C. Ecclesiastical1.1-1.2 government action emergency wording, no vicinity provision

484. The relevant Prevention of access extension in the 10 wordings under Wording type Ecclesiastical1.1<sup>454</sup> is as follows:

#### Extensions

The insurance by this section is extended to cover loss resulting from interruption of or interference with **your** usual activities as a result of the following.

Unless specifically stated otherwise these Extensions do not increase **our** liability as stated in the Limit of indemnity paragraph to this section.

#### 3. Prevention of access - Non-damage

Access to or use of the **premises** being prevented or hindered by

- (a) any action of government, police or a local authority due to an emergency which could endanger human life or neighbouring property;
- (b) any bomb scare at or in the vicinity of the **premises**.

#### Limit

£10,000 any one period of insurance.

#### Special conditions

- (1) For the purpose of part (b) of this Extension the General exclusion Terrorism does not apply.
- (2) The maximum indemnity period under this Extension will not exceed 3 months.

- (i) Any restriction of use of less than 4 hours.
- (ii) Any period when access to the **premises** was not prevented or hindered.
- (iii) Closure or restriction in the use of the **premises** due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease), food poisoning, defective drains or other sanitary arrangements.
- (iv) Closure or restriction in the use of the **premises** due to **vermin**.

The extension in the two wordings under Wording type Ecclesiastical1.2<sup>455</sup> covers loss ‘directly resulting’ from interruption or interference “...*in consequence of the following... Access to or use of the premises being prevented or hindered by ... (b) any action of Government, Police or Local Authority due to an emergency which could endanger human life or neighbouring property*”.

485. Both policy forms therefore require: (i) interruption or interference (ii) as a result of access or use being “*prevented or hindered*” (iii) by any action of government, police or local authority (iv) due to an emergency which could endanger human life or neighbouring property.

486. The relevant extensions include an exclusion for a restriction of use of less than 4 hours, and refer to sub-limits.

<sup>454</sup> {B/4/45}

<sup>455</sup> {B/5/42}

487. Ecclesiastical has confirmed in correspondence<sup>456</sup> that it had insureds in: Category 7 (churches and faith institutions, schools, nurseries) and Category 5 (charities and heritage businesses), but also Categories 1, 2, 4 and 6.<sup>457</sup>
488. These insuring provisions are both subject to certain exclusions which are dealt with below.
489. In addition, the policies respectively require that the loss is either “*resulting from*” or “*directly resulting from*” interruption or interference, and that the prevention or hindrance be “*as a result of*” or “*in consequence of*” the action of government police or local authority. These issues are discussed in the context of causation in paragraphs 538 to 542 below. The question of “*interruption or interference*” is addressed at paragraphs 526 to 527 below.
490. There is a degree of commonality between Ecclesiastical and the FCA as to the operation of the Wordings. The fact of an emergency is accepted (although the date from which this applied is not); the fact of hindrance of use (but not otherwise) is accepted in respect of churches (although not the date from which this applied and not so far as other businesses or entities were concerned); the action of government is probably accepted (although the date of the earliest of such action is not). Ecclesiastical asserts, however, that there is no cover because of the operation of an exclusion for acts of the competent local authority and further there is a dispute as to the determination of causation and loss.

### Cover

*“an emergency which could endanger human life or neighbouring property”*

491. Ecclesiastical has admitted that the “*presence and/or the real risk of the presence of SARS-CoV-2 and/or of COVID-19 amounted to an emergency which could endanger human life from 12 March 2020 onwards*”.<sup>458</sup> Ecclesiastical has denied that there was an emergency which could endanger human life prior to that date.
492. As set out in paragraph 43 of the Particulars, there was in fact an emergency which could endanger life or neighbouring property from 3 March 2020, from the date the UK Government action plan was published, quarantining was in place, and there were 176 Reported Cases across the country.<sup>459</sup> The submission that there was no “emergency which

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<sup>456</sup> See also Ecclesiastical Def paras 29 {A/9/14}, 33.3 {A/9/16}, 40 {A/9/19}

<sup>457</sup> Ecclesiastical Def para 29 {A/9/14}

<sup>458</sup> Ecclesiastical Def, para 35 {A/9/18}

<sup>459</sup> {A/2/28}

could endanger human life” prior to 12 March 2020 should be rejected. Such an emergency was in existence from at least 3 March 2020.

493. That said, the issue is of little moment in relation to the Ecclesiastical policies and the present Claim because the FCA does not allege that there was the necessary action preventing or hindering access or use to trigger cover until 16 March 2020.

*“action of government police or local authority” [“Government Police or Local Authority”]*

494. Ecclesiastical’s case is very unclear. It accepts that the UK Government was the “Government” or “government” within the Wordings<sup>460</sup> but, save in one respect, does not admit or deny the plea in PoC paragraph 44<sup>461</sup> that the actions of the Government relied upon by the FCA in PoC paragraph 18<sup>462</sup> were “actions” within the meaning of the Wording, and so must be taken not to have admitted or denied that plea.

495. The one exception is that (as set out below) Ecclesiastical accepts that use of churches was hindered by “government advice, instructions, guidelines, announcements and legislation, which discouraged their use for public gatherings as from 23 March 2020”<sup>463</sup>, which must be a reference to the Government announcement on that day that “we will immediately: close all shops selling non-essential goods, including clothing and electronic stores and other premises including libraries, playgrounds and outdoor gyms, and places of worship: stop all gatherings of more than two people in public – excluding people you live with, and we’ll stop all social events, including weddings, baptisms and other ceremonies, but excluding funerals.”<sup>464</sup> This did not become law until a few days after 23 March 2020.

496. Accordingly, so far as can be discerned, Ecclesiastical accepts that Government instructions, announcements and advice (including ‘discouragement’) amount to ‘actions’ within the meaning of the Wordings. In any event, they clearly were actions within the meaning of the Wordings.

497. Ecclesiastical appears to assert in passing that these clauses only respond to ‘local’ emergencies -arguing that the peril is “narrowly circumscribed and cover[s] localised events” and that “if the Insured would have suffered the same (or some) loss but for the local... emergency or public authority action being broader than local or for some other reason)” then the loss would be irrecoverable.<sup>465</sup> Insofar as this

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<sup>460</sup> Ecclesiastical Def para 34 {A/9/16}

<sup>461</sup> {A/2/29}

<sup>462</sup> {A/2/7}

<sup>463</sup> Ecclesiastical Def para 37 {A/9/18}

<sup>464</sup> PoC para 56.4 {A/2/37}

<sup>465</sup> Ecclesiastical Def paras 102, 104 {A/9/37}

is seeking to include a vicinity limit by the back door, it should be rejected. The clause does not have a vicinity limit. It deliberately extends to wide area or distant emergencies providing they lead to qualifying action. The prevention or restriction simply needs to be by the action or advice of a government due to an emergency (anywhere) likely to endanger life (anywhere).

*“prevented or hindered”*

498. The sum total of Ecclesiastical’s pleaded case on this, the central issue for cover, is that:

498.1. *“Neither access to nor use of the premises is prevented unless it is rendered physically (in the case of access and use) or legally (in the case of use) impossible”*.<sup>466</sup>

498.2. *“Use of and/or access to the premises is hindered where it is made more difficult or is inhibited, and whether the difficulty or inhabitation applies to the Insured and/or its employees (or office-holders) and/or to its parishioners, congregants, or members (in the case of a church) or customers, clients or consumers (in the case of a charity, school, care home or heritage business)”*.<sup>467</sup>

498.3. Access to churches was never prevented or hindered by anything the Government did, although use of churches was hindered *“by government advice, instructions, guidelines, announcements and legislation, which discouraged their use for public gatherings as from 23 March 2020”*.<sup>468</sup>

498.4. Nurseries, schools and colleges were at no time required to close by government action or legally prevented or hindered from remaining open,<sup>469</sup> although Ecclesiastical does not address whether their access or use was hindered or otherwise prevented.

499. Ecclesiastical appears to deny (by a general denial<sup>470</sup>) that there was (i) any prevention of access to churches at any time, (ii) any hindrance of access of churches at any time, (iii) any prevention of use of churches at any time, (iv) any hindrance of use of churches prior to 23 March 2020, (v) any prevention or hindrance of access or use of any other insureds, including schools, nurseries and heritage and leisure organisations at any time.

500. This is an untenable position.

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<sup>466</sup> Ecclesiastical Def, para 33.2 {A/9/16}

<sup>467</sup> Ecclesiastical Def, para 33.3 {A/9/16}

<sup>468</sup> Ecclesiastical Def, para 37 {A/9/18}

<sup>469</sup> Ecclesiastical Def paras 16.3(b) {A/9/10} and 40 {A/9/19}

<sup>470</sup> Ecclesiastical Def para 45 {A/9/20}

## Category 7 - Churches

501. The FCA addresses the issues by reference to churches first given that ME857 Parish Plus<sup>471</sup> is the lead Ecclesiastical 1.1 wording, and the only category of business specifically addressed by Ecclesiastical in its Defence.
502. Before turning to what ‘prevention’ and ‘hindrance’ mean, it is worth addressing the non-contentious issue of whose access or use is being considered. Ecclesiastical rightly accepts in Defence paragraph 33.3<sup>472</sup> (and by accepting that the discouragement to the public of use for public gatherings from 23 March 2020 amounts to hindrance of use) that the access or use being considered includes that of the public and anyone who would access or use the business- see the quotation at paragraph 498.2 above from the Defence. This is correct and agreed.
503. Turning to the meaning of the word “*prevent*”, the FCA’s general submissions on the meaning of “*prevented or hindered*” are set out in paragraphs 128-152 above and are repeated.
504. Ecclesiastical’s case is, as quoted in paragraph 498.1 above, that physical impossibility is required for prevention of access and physical or legal impossibility for prevention of use. The point may not matter much (because hindrance is sufficient) but this case as to the meaning of ‘prevention’ is extreme and not a sensible reading of the Wordings.
505. It is not clear what Ecclesiastical mean by “*physically impossible*”. True physical impossibility is a high bar indeed. Take the example at paragraph 140 above of a road being barred by police tape. Technically Ecclesiastical might say access is not “*physically impossible*” in that instance because police tape can be removed or a person may seek to step under it, but to say that access has not been prevented in such circumstances would be wholly unrealistic and indeed wrong.
506. As pleaded in paragraph 19.7 of the PoC,<sup>473</sup> Regulation 5(5) of the 26 March Regulations required places of worship to close, save for funerals, to broadcast an act of worship or provide essential voluntary services or urgent public support. The Regulation provided that the person responsible for the church “*must ensure that, during the emergency period, the place of worship is closed, except for uses permitted in paragraph (6)*”. The fact that churches were closed meant, just like with the example of police tape, that each of the church ministers, employees and the congregation

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<sup>471</sup> {B/4}

<sup>472</sup> {A/9/16}

<sup>473</sup> {A/2/15}

were prevented from gaining access to the church for the very purpose for which it was insured, namely as a place of organised worship and related activities. It is hard to think of a clearer example of access being prevented than the mandated closure of a church.

507. As set out in Section 6F above, “*access*” has to be construed against the insured business or activity which is insured under the policy and for which loss of income is insured. That is for the congregation to attend along with the minister and any church employees for usual activities. The mere fact that church ministers or employees could attend to check the building, prepare the annual accounts, deal with an issue at the premises or (as envisaged by the Regulations) to provide emergency support to individuals in need is nothing to the point. None of the key participants or attendees can have access in furtherance of the usual scope of the insured business/activity.
508. Indeed, the public, including the relevant congregation, were given clear instructions on 16 March 2020, well before the mandated closure. They were told, even if without symptoms, stay at home: “*even if you don’t have symptoms and if no one in your household has symptoms ... now is the time for **everyone***” (a) “*to stop non-essential contact with others*”; (b) to avoid “*unnecessary social contact of all kinds*”; (c) “*to stop all unnecessary travel*”; (d) to “*avoid pubs, clubs, theatres and other such social venues*”; (e) to ensure they are “*avoiding confined spaces such as pubs and restaurants*”.<sup>474</sup>
509. Accessing a church for the purpose of a church service would breach all of the above. Typical practices at many church services include the very type of activity that would give rise to concern, such as sitting in close proximity to others on communal pews; standing in lines; shaking hands; drinking and eating together.
510. Accordingly, there was prevention of access and use from at the latest 16 March, alternatively 23 March 2020.
511. In relation to the meaning of ‘hinder’, Ecclesiastical’s case is quoted at paragraph 498.2 above. There does not seem to be any real dispute between the parties as to the meaning of hindrance: it includes making access or use more difficult (without any requirement as to how much more difficult) for any user, including by ‘discouragement’ of accessing or using the premises.
512. The disagreement is simply as to the application to the facts. Ecclesiastical admit that use of churches was hindered by the 23 March 2020 Prime Minister’s statement, as set out above.

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<sup>474</sup> Agreed Facts 4 {C/7} and {C/8}

513. As outlined above, the FCA say that access was also hindered on 23 March 2020 and subsequently (such as by the 26 March Regulations), but also, and more importantly, that this test was met by 16 March 2020. The ‘discouragement’ which Ecclesiastical accepts from 23 March 2020 applies equally from 16 March 2020. It is hard to see how the announcements on 16 March 2020 quoted in paragraph 508 above are anything other than very clear and express ‘discouragement’.

#### Schools and nurseries

514. Ecclesiastical deny that access or use of schools and nurseries was ever prevented or hindered by government action.<sup>475</sup>

515. Their pleading unhelpfully does little to illuminate on this point, not admitting that the UK Government was exercising any legal power, or indicating the future exercise of any legal power, to require schools to close. The FCA was instead put to proof of the legal basis on which the announcement as to school closures was made and on which it is alleged that schools in fact closed. These points are, again, entirely disconnected from reality.

516. On Wednesday 18 March 2020 the Government announced that UK schools would be closed from 20 March 2020: “*we must apply downward pressure.. by closing schools... after schools shut their gates from Friday afternoon, they will remain closed for most pupils*”.<sup>476</sup>

517. The Chancellor then stated on 20 March 2020: “*We have closed schools.*”<sup>477</sup> On the evening of Sunday 22 March 2020, the Prime Minister reiterated to the public that they could not send their children to school the next day. The Coronavirus Act 2020<sup>478</sup> — which was introduced as the Coronavirus Bill on Thursday 19 March 2020, and received Royal Assent on Wednesday 25 March 2020 — provides an express statutory framework for school closures. See, in particular, sections 37 and 38, and Schedules 16 and 17.<sup>479</sup> That power was never formally used, because it was not needed. Schools were closed by government direction in that announcement. That direction was followed.<sup>480</sup> The FCA does not consider that the court will

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<sup>475</sup> Ecclesiastical Def para 40 {A/9/19} and 45 {A/9/20}.

<sup>476</sup> Agreed Facts 4 {C/7} and {C/8}

<sup>477</sup> Agreed Facts 4 {C/7} and {C/8}

<sup>478</sup> {J/13}

<sup>479</sup> {J/3/25, J/3/157} and {J/3/176}

<sup>480</sup> Reply para 15 {A/14/10}. Indeed, to fail to do so would probably be a breach of condition precedent 2 (p12 of the ME857 Parish Plus policy {B/4/12}): “*exercise reasonable care in seeing that all statutory and other obligations and regulations are observed and complied with*”; (p. 10 of the ME886 Nurseries policy {B/5/10}): “*exercise reasonable care in seeing that all statutory and other obligations and regulations are duly observed and complied with*”; PD3258 (ME871) Heritage Business and Leisure (p. 19) {B/26/19}; ME794 Education (p. 16) {B/27/16}; ME868 Education (p. 18) {B/28/18}; ME866 Charity and Community

be assisted in its task in construing the Wordings by a detailed exposition of constitutional law (if that is what Ecclesiastical is proposing by its somewhat cryptic drafting in paragraph 16.3(b) of its Defence<sup>481</sup>) either before or after the passing of the Coronavirus Act 2020. A school would be most surprised to hear that, the UK Government having stated that schools would be closed from 20 March 2020, and no children could attend (save for keyworkers) it nonetheless was not obliged to close. It would be even more surprised to hear that, obligation aside, the school's use had not even been hindered or, from the point of view of the parents and teachers and to use Ecclesiastical's own test in relation to churches, that the government had not even 'discouraged' the use of schools. This is simply wrong as a matter of application of the words used.

518. It is right that schools opened for the care of vulnerable children and the children of key workers. However, that was not in any way in the pursuit of the 'business' that was insured by the schools, but rather a separate provision for – essentially – childcare, or 'exceptional arrangements' for key workers only, as they were described by the Prime Minister in his statement on coronavirus on 19 March 2020.
519. For the "*vast majority of pupils*" (to quote the Prime Minister on 18 March 2020<sup>482</sup>), pupils being the main users of schools, the Government had instructed, advised, warned them not to attend the school, which is prevention or hindrance of access or use. It had also led to the schools physically closing to them (they would not be permitted to enter), which is also prevention or hindrance of access or use (even by Ecclesiastical's own test). Ecclesiastical adopts a new test of "*legally... prevent or hinder*" in its Defence, which it says the announcement of 18 March 2020 does not satisfy,<sup>483</sup> but its own correct test for hindrance is merely to make more difficult, does not require legal prohibition, and includes discouragement by Government announcement.<sup>484</sup> Ecclesiastical has simply failed correctly to apply its own test for hindrance.
520. Further, the fact that schools and colleges may have offered, as a modification to their usual business, online services is nothing to the point. Online services (alone or at all) are not the usual business of a school or college. Moreover, online services (largely provided by teachers from their own homes in lockdown) does not amount to access or use *of the premises*. It cannot prevent the test of "*Access to or use of the premises being prevented or hindered*", albeit that business

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(p. 19) **{B/29/19}**; ME867 Faith and Community (p. 19) **{B/30/19}**; ME869 Care (p. 10) **{B/31/10}**; ME858 Parishguard (p. 12) **{B/33/12}**; PD2513 Pound Gates (p. 14) **{B/34/14}**; MGM602 Marsh School and College (p. 6) **{B/35/6}**.

<sup>481</sup> **{A/9/10}**

<sup>482</sup> Agreed Facts 4 **{C/7}** and **{C/8}**

<sup>483</sup> Ecclesiastical Def para 16.3(b) **{A/9/10}**

<sup>484</sup> As set out above, and especially in Ecclesiastical Def para 33.3 **{A/9/16}**.

of the school is allowed to continue in a radically different and reduced form in some cases (not all schools provided online schooling, and further accessing school through new technology and through computers without in-the-room education is on any view a ‘hindrance’ of use even of the business, leaving aside that the test relates to the *premises*).

521. An insured entity cannot lose its cover by adapting its business and reasonably mitigating its loss (as the Wording requires<sup>485</sup>); the insurer cannot use the fact that the business has been adapted to circumvent the fact that the insured cannot access or use the premises to say that there was no such prevention or hindrance in the first place.

#### Other Categories

522. As set out above in paragraph 487, it is likely that Ecclesiastical’s Wordings cover businesses that are wholly or partly in categories other than Category 7 (schools and places of worship), such as churches or heritage businesses or charities that included a restaurant, food or non-food shop, or leisure facility that was ordered to close, or a heritage business offering accommodation, or other services offered by these insureds. Ecclesiastical does not plead otherwise.

523. The case can be put shortly: there was plainly a prevention or hindrance of access or use of all businesses required to close by the 21 and 26 March Regulations, but likewise there was prevention and/or hindrance of access or use by the statements, instructions, guidance and ‘discouragement’ given by the Government from 16 March 2020 onwards including to “stay at home”, only go out for essential journeys, avoid people, socially distance etc. This applies regardless of the categorisation of the business and regardless of whether they had to close. Customers could only attend those businesses that were not expressly required to close for necessities. Further, Ecclesiastical admits that all businesses owed occupiers and employer’s duties pleaded in PoC paragraphs 19.3 and 19.5<sup>486</sup>, although denied that they were obliged to comply with UK Government advice on social distancing, safety and hygiene, or that the effect of this advice etc on the occupiers and employer’s duties could amount to interruption or interference.<sup>487</sup>

524. This all satisfies the test of prevention and/or hindrance of access or use:

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<sup>485</sup> It is a condition precedent to liability that the insured shall “take all practicable steps to recover property lost and otherwise minimise the claim.” (Type 1.1 Parish Plus {B/4/15} and Type 1.2 Nurseries {B/5/14})

<sup>486</sup> {A/2/14}

<sup>487</sup> Ecclesiastical Def para 16.3 {A/9/10}, adopting RSA Def para 16(f) {A/12/5}.

524.1. First, it is plain that all businesses and organisations were subject to legal duties to avoid unnecessary risks of injury which required them to follow the Government’s advice. In addition, both policies include a condition precedent to liability which required policyholders to “... *take all reasonable precautions to prevent damage, accident, illness and disease and shall exercise reasonable care in seeing that all statutory and other obligations and regulations are duly observed and complied with*”.<sup>488</sup> As stated above, no responsible business or organisation could have ignored the Government’s advice, risking the spread of the disease. The type of modifications to practice which all will have seen in the news are extreme. The pictures of queuing and precautions for those shops allowed to stay open are evidence of that, as well as the kind of structural changes to separate people and create barriers that many businesses have undertaken to allow re-opening in July.

524.2. Second, customers were all subject to very clear guidance and mandatory rules, enforceable by fines under the 26 March Regulations to “stay at home” (save for very limited permitted activities). For businesses and organisations in categories 1, 2, 4, 5, 6 and 7, the activities undertaken by these businesses were not within the category of permitted reasons to leave the home. Therefore, those that would have made use of the facilities were wholly unable to access or use the premises for those purposes.

524.3. Even for businesses expressly permitted to stay open (category 3), the instruction and guidance to only make specific essential trips and “stay at home” amounted to prevention and/or hindrance to access or use from 16 March 2020 (in the same way that it did for churches from 23 March 2020).

525. Accordingly, there was prevention (or if not, hindrance) of access (and if not, use) by again 16 March 2020, but if not from the various subsequent dates set out in the PoC.<sup>489</sup>

#### *Interruption or interference*

526. Ecclesiastical does not expressly plead as to the meaning of interruption or interference in its Defence and accordingly no positive case is advanced in relation to these requirements. As previously addressed in paragraphs 158-169 above, interruption or interference requires some

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<sup>488</sup> ME857 Parish Plus (p. 12) **{B/4/12}**; ME886 Nurseries policy (p. 10) **{B/5/10}**; PD3258 (ME871) Heritage Business and Leisure (p. 19) **{B/26/19}**; ME794 Education (p. 16) **{B/27/16}**; ME868 Education (p. 18) **{B/28/18}**; ME866 Charity and Community (p. 19) **{B/29/19}**; ME867 Faith and Community (p. 19) **{B/30/19}**; ME869 Care (p. 10) **{B/31/10}**; ME858 Parishguard (p. 12) **{B/33/12}**; PD2513 Pound Gates (p. 14) **{B/34/14}**; MGM602 Marsh School and College (p. 6) **{B/35/6}**.

<sup>489</sup> Paras 18 **{A/2/7}**, 46-49 **{A/2/30}**.

‘operational impact’ on the insured’s business or usual activities, whether that is either physical or economic. It is self-evident that the government advice, instructions, guidelines, announcements and legislation gave rise to interruption of or interference with the operation of churches, schools, nurseries, charities and other community organisations.

527. If congregations are told to stay away from churches and/or church premises are closed then that clearly constitutes interference and/or interruption. If parents are told not to send their children to school and school premises are closed to children other than those of key workers then that clearly constitutes interruption and/or interference. If museums are closed or members of the public who would like to visit them are told to “stay at home” then then that clearly constitutes interruption and/or interference.

### The competent local authority exclusion

528. The Prevention of access clauses within Ecclesiastical1.1-1.2 include an exclusion for specific action taken by the ‘competent local authority’ as a result of disease. Taking the lead wording for Ecclesiastical1.1 as an example, the clause as a whole provides as follows, Ecclesiastical seeking to rely on exclusion (iii) on the right side of the page:

#### **3. Prevention of access - Non-damage**

Access to or use of the **premises** being prevented or hindered by

- (a) any action of government, police or a local authority due to an emergency which could endanger human life or neighbouring property;
- (b) any bomb scare at or in the vicinity of the **premises**.

#### *Limit*

£10,000 any one period of insurance.

#### **Special conditions**

- (1) For the purpose of part (b) of this Extension the General exclusion Terrorism does not apply.
- (2) The maximum indemnity period under this Extension will not exceed 3 months.

- (i) Any restriction of use of less than 4 hours.
- (ii) Any period when access to the **premises** was not prevented or hindered.
- (iii) Closure or restriction in the use of the **premises** due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease), food poisoning, defective drains or other sanitary arrangements.
- (iv) Closure or restriction in the use of the **premises** due to **vermin**.

529. However, the Government action relied upon in this Claim was not the order or advice of “*the competent local authority*” within this exclusion for the following reasons.

530. First, while Ecclesiastical refer to this as the “*Infectious Disease Carve-Out*” it is in substance an exclusion (regardless of whether it is referred to as ‘excluded’ or ‘what is not covered’) and must be construed accordingly. The burden is therefore on Ecclesiastical to show that the very wide grant of cover in the trigger clause is cut back. This they cannot do.

531. Second, the clause must be construed in the context in which it appears. It appears in a clause where the action to trigger cover must be of the “*government, police or a local authority.*” The grant of cover is wide indeed. In this part of the clause ‘*local authority*’ is additional to and contrasted with ‘*government*’. The inference must be in this part of the clause that local authority means something different to the UK Government. While there could be contexts in which ‘local authority’ is intended to be expansive and to include all forms of public authority, Ecclesiastical’s preferred meaning of ‘the competent local authority’ as “*any authority which is legally competent to make an order or issue advice affecting the locality of the insured premises. It extends to government, police, magistrates or a local authority (if so legally competent)*” is very challenging given the juxtaposition of ‘local authority’ to ‘government’ and ‘police’ in the trigger clause. Clearly mindful of this significant difficulty, Ecclesiastical seek to argue that reference to ‘a local authority’ in the trigger clause and ‘the competent local authority’ in the exclusion are being used to denote different bodies.<sup>490</sup> That again is a very challenging position to adopt.
532. Third, the trigger clause, referring to all three types of body, is in stark contrast to the exclusion which refers only to “*the competent local authority*”. No explanation is offered for this, and the obvious and correct explanation is that the latter is intended in this specific context to be much narrower; given that Ecclesiastical is a competent and experienced insurer the decision must be taken to be deliberate.
533. Fourth, the clear inference here, given that only one body is referred to and not three, is that the order or advice in relation to the carve out must be of the local authority exclusively and specifically. Some kind of specific, local and focused activity must be envisaged when this term is used in this context but, as is known, the principal action was taken by the UK Government. Further, given this particular context, the other matters referred to in the exclusion, being food poisoning, defective drains or other sanitary arrangements, would also support this construction.
534. The faint suggestion by Ecclesiastical that ‘competent’ (and not local) is the key adjective,<sup>491</sup> is not borne out by the rest of the Wording of Ecclesiastical 1.1: extension 11 covers the cancellation of a church event but excludes “*the order of a competent public authority*”.<sup>492</sup> Clearly here ‘competent’ and ‘public’ are operative; the same is true of the exclusion to the Prevention of access clause. As explained in paragraphs 108 to 114 above, competent is a qualifier to the

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<sup>490</sup> Ecclesiastical/MS Amlin Def para 34.2 {A/9/16}

<sup>491</sup> Ecclesiastical/MS Amlin Def para 34.1 {A/9/16}

<sup>492</sup> {B/4/49}

type of authority it is describing—a public authority, civil authority, local authority etc. Competent specifies a sub-set of the set ‘public authority’ or ‘local authority’, it does not enlarge it by in some way breaking apart the common idiomatic phrase ‘local authority’.

535. Ecclesiastical then turn to the Specified disease extension to say that “*the competent local authority*” must mean the same in both clauses and that the Prevention of access clause and Specified disease extension are intended to be complementary. As to this:

535.1. Were the clauses to be construed as perfectly complementary it might be expected that each would refer to the other. They do not. It would have been very easy for Ecclesiastical, as an experienced and competent insurer, to make clear that all cover for disease was excluded save to the extent that positive cover was conferred by the Specified Disease clause. They did not. Indeed, they do not even use the same adjective to describe the diseases in each clause.

535.2. Of the wordings listed in the test case five provide cover only for disease at the premises, with the remaining seven wordings including disease at the premises or within 25 miles.<sup>493</sup> Certainly for those policies which cover only disease at the premises, attempts by Ecclesiastical to infer the clauses are intended to be fully complementary makes it even harder for them to argue that the exclusion to the Prevention of access clause is engaged by widespread events as opposed to local events or those confined to the premises.

535.3. It is certainly possible that the reference to “*the competent local authority*” in the Specified disease clause and the Prevention of access exclusion were intended to have the same meaning.<sup>494</sup> This in no way assists Ecclesiastical, however. Ecclesiastical asserts that the fact that other bodies have powers to act in respect of infectious disease<sup>495</sup> assists in showing that any competent body qualifies, local or otherwise. However (a) there is no reference at all to such bodies on the face of the Wordings; and (b) the matters pleaded by Ecclesiastical cannot be shown to be admissible factual matrix; there is no evidence to show that the average insured Parish Church or school or charity was aware that

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<sup>493</sup> PD3258 (ME871) Heritage Business and Leisure {B/26/61}, ME866 Charity and Community {B/29/59}, ME867 Faith and Community {B/30/59}, ME869 Care {B/31/38} and PD3259 (ME872) Heritage Arts and Culture {B/32/61} require disease at the Premises. Education (ME794) {B/27/57}, Education (ME868) {B/28/59}, ME857 Parish Plus {B/4/47}, ME858 Parishguard {B/33/40}, PD2513 Pound Gates Nursery {B/34/48}, ME886 Nurseries {B/5/43} and MGM602 Marsh School and College {B/35/37} require disease within 25 miles of the Premises.

<sup>494</sup> Ecclesiastical/MSAmlin Def para 34.8 {A/9/17}

<sup>495</sup> Ecclesiastical/MSAmlin Def para 34.3(a) {A/9/16}

national bodies may have such powers. Accordingly, paragraph 34.3 of their Defence takes them nowhere.

536. Ecclesiastical's assertion that the parties "*patently*" did not intend by the PoA to include any disease cover<sup>496</sup> does not find support in the wording (or any evidence).
537. In summary, the clause, which is one of a kind in this test case, is not happily worded. The natural construction is that the wide Prevention of access cover is subject to an exclusion limited to very specific and local issues. The reference to 'the competent local authority' is at best ambiguous and Ecclesiastical cannot discharge the burden upon them to have the wide construction contended for. There may or may not have been some subjective intention for the Prevention of access clause and Specified disease clause to be complementary but that intention was neither express nor manifest and Ecclesiastical looks to rely on inadmissible evidence to create a factual matrix which doesn't exist in any admissible form so far as the Specified disease clause is concerned. This result in favour of the policyholder may be achieved either by the application of the *contra proferentem* approach, or because, in the case of ambiguity, the Court opts for the more commercially sensible construction.<sup>497</sup>

### The causal connectors

538. Ecclesiastical1.1 requires loss *resulting from* interruption of or interference with the business/usual activities *as a result of* access or use being prevented or hindered *by* action of the government police or a local authority *due to* an emergency which could endanger life. This is a clause with a variable sub-limit (mostly £10,000 or £20,000)<sup>498</sup> and usually a 3-month indemnity period sub-limit.<sup>499</sup>
539. Ecclesiastical1.2 has slightly different causal connectors, requiring loss *directly resulting from* (instead of 'resulting from' in Ecclesiastical1.1) interruption of or interference with the business *in consequence of* (instead of 'as a result of' in Ecclesiastical1.1) access or use being prevented or hindered *by* action of the government police or a local authority *due to* an

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<sup>496</sup> Ecclesiastical/MSAmlin Def para 34.7 {A/9/17}

<sup>497</sup> See *Crowden v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (Comm) at para 65 {J/135}.

<sup>498</sup> £10,000 sub-limit in Education (ME794) {B/27/54}, Education (ME868) {B/28/56}, ME866 Charity and Community {B/29/56}, ME867 Faith and Community {B/30/56}, ME857 Parish Plus {B/4/45}; £20,000 sub-limit in PD2513: Pound Gates Nursery {B/34/45}; £100,000 sub-limit in ME871 Heritage Business and Leisure {B/26/58} and ME872 Heritage Arts and Culture {B/32/58}; scheduled sub-limit in ME858 Parishguard {B/33/39}, ME869 Care {B/31/36}.

<sup>499</sup> 3-month limit in ME857 Parish Plus {B/4/45}, ME794 Education {B/27/54}, ME866 Charity and Community {B/29/56}, ME867 Faith and Community {B/30/56}, ME868 Education {B/28/56}, ME871 Heritage Business and Arts {B/26/58}, ME872 Heritage Arts and Culture {B/32/58}, PD2513 Pound Gates Nursery {B/34/45}; no temporal sub-limit in ME858 Parishguard {B/33/39}, ME869 Care {B/31/36}.

emergency which could endanger life. The indemnity sub-limit is either £25,000 (Marsh School and College<sup>500</sup>) or as scheduled (Nurseries<sup>501</sup>).

540. Ecclesiastical does not obviously advance any case as to the meaning of the words “(hindered) *by* (action)” or “*due to*”.<sup>502</sup> It appears therefore to be common ground that if the FCA’s case is correct on the authority action and the underlying emergency, then these terms are satisfied.

541. Nor does Ecclesiastical advance a positive case on the meaning of the connectors between the loss and the interruption / interference (“*resulting from*”, “*directly resulting from*”) or between the interruption / interference and the prevention / hindrance of access / use (“*as a result of*”, “*in consequence of*”). Plainly these terms require a causal link—they cannot merely be unrelated and coincidental (e.g. there is an emergency but unrelated to that the local authority shuts down a shop for a public holiday). The parties will have intended to import a proximate cause test. But that test is satisfied here: the UK COVID-19 outbreak is the emergency (see above paragraphs 491ff above), the government actions were (and expressly) a response to and so ‘due to’ that emergency, and the prevention/hindrance of access/use was ‘by’ this action. Access/use was prevented/hindered because of what the Government did and said.

542. The focus of Ecclesiastical’s Defence is therefore on the counterfactual (addressed below) and the exclusion (addressed above).

### Counterfactual

543. Whether in order to quantify loss, or alternatively (contrary to the FCA’s case) by virtue of a trends clause, the FCA’s general case as to the counterfactual is as set out in Section 8 above. As addressed there, the proper counterfactual is the situation in which there was no COVID-19 in the UK and no Government advice, orders, laws or other measures in relation to COVID-19, or alternatively in which such of these events as the Court adjudges to be interlinked had not occurred.<sup>503</sup>

544. Ecclesiastical argues that “*the insured peril was interruption of or interference with the Insured’s usual activities as a result of government action due to an emergency which could endanger human life which action prevented or hindered access to or use of the premises*”, and that it is “*not liable for any loss which is not*

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<sup>500</sup> {B/35/37}

<sup>501</sup> {B/5/42}

<sup>502</sup> See Ecclesiastical Def para 111.2 {A/9/40}.

<sup>503</sup> PoC para 77 {A/2/45}.

*proximately caused by the insured peril*".<sup>504</sup> So it would logically follow on this case that if the insured peril is interruption/interference + action + emergency + prevention/hindrance of access/use, then all of that is subtracted for the counterfactual.

545. But this would not work for Ecclesiastical. So, instead, it argues that the counterfactual should subtract only part of the insured peril, being "*the defined action, whereby access to or use of the premises was prevented or hindered... but all other factors remain unchanged*".<sup>505</sup> It argues that the counterfactual therefore assumes that:<sup>506</sup>

545.1. All other Government action continued to take effect (even though government action is part of the insured peril), "*and/or*"

545.2. There continued to be an emergency which could endanger human life from SARS-CoV-2 and/or COVID-19 (even though an emergency is part of the insured peril), "*and/or*"

545.3. SARS-CoV-2 and/or COVID-19 continued to be present and to cause illness and the risk of illness (even though this would be the emergency and part of the insured peril), "*and/or*"

545.4. There remained an adverse economic impact on businesses and other organisations as a result of SARS-CoV-2 and/or of COVID-19 (but there would have been no adverse economic impact without the emergency, which is part of the insured peril).

546. This narrow approach to the counterfactual has been addressed in general terms in Section 8. In particular:

546.1. Following *The Silver Cloud*<sup>507</sup>, the underlying cause (here, the emergency which could endanger life or human property) is expressly required as part of the trigger. It would be illogical and unrealistic for other events caused by that underlying cause to be competing causes which prevent the prevention/hindrance of access/use resulting from that emergency action.

546.2. Ecclesiastical proposes a world in which only part (but not all) of the insured peril is removed. There is no *logical* reason for stripping out only the prevention/hindrance of

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<sup>504</sup> Ecclesiastical Def paras 33.1 {A/9/15}, 97 {A/9/35}.

<sup>505</sup> Ecclesiastical Def para 133 {A/9/47}.

<sup>506</sup> Ecclesiastical Def para 134 {A/9/47}.

<sup>507</sup> ¶/91

access/use (which appears halfway through the clause) but leaving in the government action, the underlying emergency, and the interruption/interference.

546.3. Such a counterfactual appears to require that the Government restrictions on every property in the country remain *except* the particular insured premises – as Ecclesiastical argues that one assumes that “*All other Government action continued to take effect*”<sup>508</sup> which, while evidently far-fetched, would in any event lead to a windfall for that premises (being the only one of its type allowed to remain open). And, if such a world was difficult enough to envisage as a snapshot, it proposes that such a modelling exercise take place for the whole indemnity period – many months or even years.

546.4. Further, quite how Ecclesiastical expects an SME to conduct this modelling exercise for clauses with primarily £10,000 or £20,000 sub-limits is unclear. While the burden of proof falls on Ecclesiastical to make this out, as set out in paragraphs 249ff, that does not make the exercise any easier in practice for the insured.

547. There is no credible counterfactual other than that there was no emergency.

#### The quantification machinery and trends clauses

##### *Ecclesiastical 1.1*

548. There are two main types of quantification machinery here.

549. First, the Parish Plus and Parishguard policies. Taking the Parish Plus policy (sub-title “*Put your faith in us*”) as the lead, Section 3 (p42<sup>509</sup>) provides cover for Loss of Income. After giving definitions, the policy provides for its damage business interruption cover, stating under the heading “What is covered” (on p42<sup>510</sup>) that it covers loss following damage to property insured under the policy. Next, the Basis of settlement clause (on pp43-44<sup>511</sup>) provides that the insurer will pay for loss of income, additional expenditure necessarily and reasonably incurred to minimise the effect of any damage, and accountants’ charges. The loss of income clause provides that the insurer will pay “*the difference between the **income you would have received during the indemnity period** if there had been no **damage** and the **income you actually received during that period**”.*

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<sup>508</sup> Ecclesiastical Def para 134.1 {A/9/47} emphasis supplied.

<sup>509</sup> {B/4/42}

<sup>510</sup> {B/4/42}

<sup>511</sup> {B/4/43}

550. The other type of quantification machinery within Ecclesiastical 1.1 is slightly different. Taking the Education (ME794) policy as an example, its machinery includes ‘standard turnover’ to be Adjusted ‘*as necessary to provide for the trend of the business and any other circumstances affecting the business either before or after the damage or which would have affected the business had the damage not occurred so that the adjusted figures represent as near as possible the results which would have been obtained during the relative period after the damage had the damage not occurred*’.<sup>512</sup>
551. However, none of this machinery applies here. This is because the policies go on to provide (on p45<sup>513</sup>), under the heading “*Extensions*”, that “*The insurance by this section is extended to cover loss resulting from interruption of or interference with **your** usual activities as a result of the following*”, and then lists 13 items including prevention of access cover. Importantly, what is extended is the insurance cover, but there is no reference in relation to the word “loss” to the application of the damage Basis of settlement clause (which in terms, and using the defined word ‘damage’, only applies to property damage). Absent any such reference, the extensions are self-contained. Where necessary, the extensions provide their own quantification machinery (e.g. extension 6 Specified disease etc, 7 Book debts, 11 Church event, 12 Reinstatement of data<sup>514</sup>) but the PoA clause contains none, and does not refer back to the quantification machinery or its defined terms ‘Income’ and ‘Indemnity period’, leaving as the only quantum machinery the cover words ‘loss resulting from interruption or interference as a result of’, and the extension’s own maximum indemnity period of 3 months and limit of indemnity of £10,000.
552. This is subject to the further exclusion for “*Any period when access to the premises was not prevented or hindered*”, in other words the focus is on the period during which access (or, presumably, use) to the premises was prevented or hindered (rather than any subsequent period of economic recovery from such prevention or hindrance, for example).
553. Ecclesiastical assert that ‘damage’ must be read as “*peril insured against*”,<sup>515</sup> but provide no reason why. There is no basis for such an assertion because, as set out above, the quantification machinery works perfectly well without needing to perform that substitution.
554. Even if the trends clause does apply through this substitution, the right substitution is to remove the full peril insured against, *i.e.* the interruption/interference, prevention/hindrance

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<sup>512</sup> {B/26/54}

<sup>513</sup> {B/4/45}

<sup>514</sup> {B/4/46}

<sup>515</sup> Ecclesiastical Def para 135 {A/9/48}

of access/use, authority action, and underlying emergency, as explained in further detail under the Counterfactual heading. The trends clause therefore makes no difference.

555. The quantification of loss ‘resulting from’ the interruption or interference is at large and, subject to the £10,000 sub-limit, is intended to be satisfied merely by proof of the amount by which the revenue of the business was less during the period of interruption/interference than it had been previously. It is not possible or appropriate to import a but for test by reference to any particular ingredient of the extension other than, perhaps, the interruption or interference itself (which would allow for the underlying trend of the insured business or activity to be taken into account). This points towards a counterfactual without technical excisions of any part of the insured event, but rather removing the entire event, emergency, government action, prevention/hindrance and all. The points made at paragraphs 543ff above apply here too, although *a fortiori* because no trends clause (with an express ‘but for’ test) applies to Ecclesiastical1.1.

#### *Ecclesiastical1.2*

556. The introductory words in the extensions in Ecclesiastical1.2 provide “*The insurance by this section is extended to cover loss as insured hereunder directly resulting...*”<sup>516</sup> Although the point could be far clearer, the FCA accepts that the words ‘loss as insured hereunder’ provides sufficient reference to the main Cover clause as to indicate that the quantification machinery set out there applies, although it requires adaptation as it is drafted around ‘damage’ meaning destruction or damage of property under the Cover section: that machinery provides for the typical calculation for loss of income of “*the amount by which the **revenue** during the **indemnity period** shall in consequence of the **damage** fall short of the **standard revenue**”<sup>517</sup> Standard revenue refers to the revenue in the previous year during the period corresponding to the indemnity period, but including a trends clause:*

[Nurseries:] to which such adjustments shall be made 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 **damage** or which would have affected the **business** had the **damage** not occurred so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the **damage** would have been obtained during the relative period after the **damage**<sup>518</sup>

[Marsh School and College:] adjusted as necessary to provide for the trend of the **business** and any other circumstance affecting the **business** either before or after the damage or which would have affected the **business** had the **damage** not occurred so that the adjusted figures

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<sup>516</sup> {B/5/42}

<sup>517</sup> {B/5/40}

<sup>518</sup> {B/34/41}

represent as near as possible the results which would have been obtained during the relative period after the **damage** had the **damage** not occurred<sup>519</sup>

557. Ecclesiastical again argues that the word ‘damage’ is to be substituted for “*peril insured against*”. The points made above in relation to that substitution are repeated (*i.e.* the substitution is not as narrow as Ecclesiastical contend, and makes no difference to the counterfactual test required above). See further Arch1 at paragraphs 474ff apply.
558. The additional points with the Nurseries policy are that (i) it requires consideration of “*the trend... and...variations in or other circumstances affecting*”, rather than merely “*the trend... and any other circumstance*”; and (ii) that the ‘but for the damage’ position is there to be achieved not as near as possible, but “as nearly as may be reasonably practicable”. ‘Circumstances’ takes its meaning from its surrounding words, ‘trend’ and ‘variation’, both of which are narrow and refer to ordinary business vicissitudes. ‘Circumstance’ needs to be read in that context, *i.e.* as encompassing only ordinary business vicissitudes. In the context of this size of policy, and this claim, an adjustment to remodel the world without government action but with COVID-19 is not ‘reasonably practicable’ in addition to it not being intended for the reasons set out in those paragraphs.

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<sup>519</sup> {B/35/34}

### **Ecclesiastical - Assumed Facts Example (Category 7a)**

Church GG is a small rural Church of England parish church, staffed by a vicar. The insured is the Parochial Church Council (“PCC” – a body corporate). Church GG ordinarily holds weekly services and rents the church hall to local groups two evenings per week. The PCC’s income derives from the weekly collection at services and rental income from hire of the hall. No public services were held after 17 March 2020, although the church remained open for private prayer with social distancing observed. On 24 March 2020, the church was closed in line with the government announcement, save for the limited purposes identified in the government regulations. This was in line with the Government announcement on 24 March 2020, and the subsequent 26 March Regulations.

Cover under the Ecclesiastical 1.1 Prevention of Access clause is triggered:

- Loss from collections results from interruption of or interference with the provision of church services because the church was closed to services and/or the congregation were told to stay at home.
- This prevented or hindered access to or use of the church by action of the government police or a local authority (in closing churches and telling congregations to stay at home) due to an emergency which could endanger life, such emergency being admitted by Ecclesiastical.
- Why did the Parish church lose money? Because the government ordered closure of churches and for people to stay at home, so they could not attend services and did not make their usual contribution to the Parish.
- How much did they lose? The difference in collections with and without the emergency which triggered the closure and instructions to stay at home.

## D. RSA4 governmental authority or agency action or advice, Vicinity provision

### Introduction to the different cover provisions relied upon

559. RSA4 are wordings drafted by brokers Marsh/Jelf. There are no material differences between the wordings for current purposes.<sup>520</sup> They are used for business placed with a number of insurers including AIG, Aviva, QBE, RSA and Zurich. RSA accepts that the policy was used for SMEs (and also for larger businesses).<sup>521</sup>
560. RSA initially pleaded that the RSA4 wording was to be treated as a policyholders' wording, having been drafted by brokers. However, it now accepts that it adopted the wording as its own by virtue of General Condition 7(ix) of the policy.<sup>522</sup> This reflects the commercial reality of such contracts, and accordingly genuine ambiguities are to be construed against RSA – see paragraphs 92-99 above.
561. Clause 2.3 of RSA4 ('Business Interruption – Specified Causes') provides:

### 2.3 BUSINESS INTERRUPTION – SPECIFIED CAUSES

In the event of interruption or interference to the **Insured's Business** as a result of:

- viii. **Notifiable Diseases & Other Incidents:**
- a. discovered at an **Insured Location**;
  - b. attributable to food or beverages supplied at or from the **Insured Locations**;
  - c. which are reasonably likely to result from an organism discovered at an **Insured Location**; and/or
  - d. occurring within the **Vicinity** of an **Insured Location**,
- during the **Period of Insurance**;

[...]

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<sup>520</sup> They appear identical after careful study and share the same document ref and date code. The logos are different, but obviously both Marsh businesses.

<sup>521</sup> RSA Def para 5(e) {A/12/3}

<sup>522</sup> (p15) {B/20/20}. See the deleted allegation at para 34(b) of its Amended Def {A/12/15}

- xii. **Prevention of Access – Non Damage** during the **Period of Insurance** where such interruption or interference is for more than eight (8) consecutive hours; and/or

within the **Territorial Limits**, the **Insurer** agrees to pay the **Insured** the resulting **Business Interruption Loss**.

562. “**Notifiable Diseases & Other Incidents**” is defined at Definition 69 to include

- i. an exhaustive list of diseases,
- ii. any additional diseases notifiable under the Health Protection Regulations (2010), where a disease occurs and is subsequently classified under the Health Protection Regulations (2010) such disease will be deemed to be notifiable from its initial outbreak;
- v. defective sanitation or any other enforced closure of an **Insured Location** by any governmental authority or agency or a competent local authority for health reasons or concerns.

563. “**Prevention of Access – Non Damage**” is defined at Definition 87 to include:

- ii. the **actions or advice** of the police, other law enforcement agency, military authority, governmental authority or agency in the **Vicinity of the Insured Locations**; and/or

which prevents or hinders the use of or access to **Insured Locations** during the **Period of Insurance**.

564. Accordingly this Wording has three relevant clauses which require the following elements for cover:

- 564.1. Disease clause (within Notifiable Disease definition ii): (i) “interruption or interference to the Insured’s Business” (ii) “as a result of any diseases notifiable under the Health Protection Regulations (2010)”, (iii) “occurring within the Vicinity of an Insured Location”.

564.2. Enforced closure clause (within Notifiable Disease definition v.): (i) “interruption or interference to the Insured’s Business” (ii) “as a result of enforced closure of an Insured Location by any governmental authority or agency or a competent local authority for health reasons or concerns”, (iii) “occurring within the Vicinity of an Insured Location”.

564.3. Prevention of access clause: (i) “interruption or interference to the Insured’s Business” (ii) “as a result of the actions or advice of the police, other law enforcement agency, military authority, governmental authority or agency” (iii) “in the Vicinity of the Insured Locations” (iv) “which prevents or hinders the use of or access to Insured Locations”.

565. The disease within the Vicinity clause (paragraph 564.1 above) is considered in section L below; the enforced closure/prevention of access wording (paragraphs 564.2 and 564.3) above are considered in this section.

566. A number of the other “specified causes” covered by Clause 2.3 of RSA4 could be triggered by causes which could affect a wide geographical area, including Offsite Utilities -(Non-Damage and Supply Chain & Contract Sites. Whether or not an insured peril can be triggered by causes affecting a wide area should be determined by the terms of each cover, without predisposition as to its intended scope. Indeed, RSA4 expressly contemplates overlapping cover, General Condition 8 iii providing that the largest sub-limit would be applicable in such a case.

#### Cover – Enforced closure for health reasons or concerns clause

*“Enforced closure by any governmental authority or agency”*

567. RSA appears to accept that the actions of the UK Government were the actions of ‘any governmental authority or agency’, so no submissions are made on this point.<sup>523</sup> RSA also admits that that where a business in Categories 1, 2, 4, 6 and 7 was required to close their premises in full or in part between 20 and 26 March 2020 as pleaded in PoC 47, there was an “enforced closure” within this clause.<sup>524</sup>

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<sup>523</sup> RSA ADef paras 46-47. {A/12/18-19}

<sup>524</sup> RSA ADef para 50(d). {A/12/21}

568. The dispute therefore only arises in relation to other government actions and whether they amounted to “enforced closure”.
569. Starting with the meaning of ‘closure’ (which in this context refers to the ‘Insured Location’):
- 569.1. The natural meaning of (the verb) “*close*” in this context is to cease to be in operation or accessible to the public,<sup>525</sup> meaning ‘closure’ is the act or process of something being closed.<sup>526</sup>
- 569.2. The closure here must be of the ‘Insured Location’, although in the context of a BI policy, i.e. total or partial closure for the purposes of carrying on the insured business. ‘Insured Location’ is defined as all sites of the Insured “*for the purpose of the Insured’s Business*” (p22).
- 569.3. In *Cat Media*<sup>527</sup> the Supreme Court of New South Wales considered the meaning of “*closure or evacuation*” in a BI extension (see further paragraph 108 above). The judge decided that each of the events within the extension was something which was dangerous or threatening to the health or wellbeing of people having access to the premises (paragraph 55). This, together with the collocation of the words ‘closure’ and ‘evacuation’, led the judge to conclude that ‘closure’ meant “*the closure of the whole, or part of, the building or buildings comprising the Premises, that is, preventing physical access to the whole or part of the Premises*” (paragraph 60).
- 569.4. The FCA submits that in this context ‘closure’ of premises is synonymous with ‘prevention of access’, considered at paragraphs 128 to 155 above. The word “enforced” makes clear that a voluntary closure is insufficient, and is considered in paragraphs 119ff above.
- 569.5. As to the question of partial closure, see also *SAS Maison Rostang v AXA France LARD SA* (22 May 2020)<sup>528</sup>, discussed above at paragraph 152. This decision reflects the common-sense view that when a substantial part a business cannot be accessed by its customers due to government restrictions, that part is ‘closed’ as a result of such

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<sup>525</sup> See, e.g., *the Shorter Oxford Dictionary of English* (6 edn, 2007) : “*Closed, shut; having no part left open*” an act of closing or shutting”; Merriam-Webster, “*to deny access to*”, “*to suspend or stop the operations of*”, “*to cease operation*”.

<sup>526</sup> See, e.g., *the Shorter Oxford Dictionary of English* (6 edn, 2007): “*an act of closing or shutting*”.

<sup>527</sup> *Cat Media v Allianz Australia Insurance* [2006] NSWSC 423, (2006) 14 ANZ Insurance Cases 61-700 **{J/98}**

<sup>528</sup> **{J/143}**

restrictions: a restaurant permitted during the COVID-19 outbreak to remain open for take-away orders only had been subject to “*closure*” (*fermeture*).

570. Accordingly:

570.1. There was a closure of the Premises and/or Insured Location (within RSA1 and RSA4) where there was a prevention of physical access to the whole or part of the Insured Location, and an ‘enforced closure’ (within RSA4) where that prevention was compulsory (and not voluntary).

570.2. There were restrictions placed on the Premises (within RSA1) where there were restrictions which hindered or prevented (directly or indirectly) access to or use of the Premises.

571. Thus:

571.1. In all cases for which access to or use of the premises by the owners / employees / customers was material to the trading of the business, the advice, instructions and / or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working given on 16 March 2020 and on many occasions subsequently amounted for all businesses on that date (alternatively on such subsequent date to be determined by the Court), to the required closure / restrictions within RSA1 and RSA4. This was because many owners, employees and / or customers could not access the premises or use them for their normal business use, and because constraints had been placed on owners, employees and / or customers and the way they could use or access the premises and any business there.

571.2. Further, for businesses in Category 6, from 16 March 2020, given the Government requirements including to cease travel and self-isolate, alternatively from 24 March 2020, given the Government advice to close for commercial use as quickly as was safely possible, there was the required closure or restrictions within these policies given that restrictions had been placed on owners, employees and customers and the way they could use or access the premises and any business there.

571.3. Further and alternatively, where a business in Categories 1, 2, 4, 6 and 7 was ordered on 20, 21, 23, 24 and/or 26 March 2020 to close the premises or cease the business, or only to provide a take-away/mail order/online business (and save where the business was not prior to the COVID-19 outbreak already a wholly take-away/mail

order/online business), and did so, there was the required closure / restrictions within these policies. This was because owners, employees and/or customers were ordered not to access the premises for, and not to use the premises for, its normal business.

572. The effect of the government restrictions was that many owners, employees and/or customers could not access the insured premises. Customers (as members of the public) were first instructed to and then forbidden from leaving their homes to visit any non-essential businesses. This effect was equivalent, for such customers, to the non-essential business premises being sealed off with police tape. In practical terms these measures amounted to enforced closures from 16, 23 or 26 March 2020 and relief is sought accordingly.

*(Enforced closure)... “for health reasons or concerns occurring within the Vicinity of an Insured Location”*

573. The “*health reasons or concerns*” within this clause must occur “*within the Vicinity of an Insured Location*” (or be discovered at an Insured Location). Thus, the “*health reasons or concerns*” must be reasons or concerns which extend to the premises or the Vicinity of the premises.

574. The FCA’s case here is that this clause is equivalent to ‘danger’ or ‘emergency’ clauses, and danger and emergency were everywhere in the UK including in the Vicinity of the premises, since the pandemic was a nationwide emergency, from at least 3 March 2020, alternatively 12 March 2020, alternatively such other date as the Court shall decide.<sup>529</sup> Alternatively, there such were such health reasons or concerns whenever it is proven that a person with COVID-19 had been present within the Vicinity of the premises (the submissions on proof and Vicinity set out above being repeated here).<sup>530</sup>

575. But ‘health reasons or concerns’ is even broader than ‘emergency’. It is very broad indeed. It plainly does not require there to be a case of COVID-19. Indeed, the fact of the nationwide response (including in the Scilly Isles) shows that there were health reasons or concerns—i.e. it was thought that there was a risk of COVID-19 spreading to anywhere in the UK.

576. In this regard it is clear that there were health reasons or concerns affecting all such “Vicinity” in the UK by the time government published its advice on 3 March 2020. It was beyond doubt the case by the time of Prime Minister’s statement and associated action taken on 16 March 2020. The objective observer would readily understand that the restrictions enforced by the government authorities were “for health reasons or concerns” surrounding the spread of

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<sup>529</sup> PoC 43. {A/2/28}

<sup>530</sup> PoC 43 alternative case. {A/2/28}

COVID-19 and the consequent risks to health and life. That is clear from, for example, the following (emphasis added):

576.1. The Prime Minister’s 16 March 2020 announcement stated that:

“As we said last week, our objective is to delay and flatten the peak of the epidemic by bringing forward the right measures at the right time, **so that we minimise suffering and save lives**”<sup>531</sup>;

576.2. The explanatory note to the 21 March Regulations stated that:

“These Regulations require the closure of businesses selling food or drink for consumption on the premises, and businesses listed in the Schedule, **to protect against the risks to public health arising from coronavirus**”<sup>532</sup>;

576.3. The Prime Minister’s statement on 22 March 2020 provided that:

“And the reason we are taking these unprecedented steps to prop up businesses, support businesses and support our economy and these preventative measures **is because we have to slow the spread of the disease and to save thousands of lives**”<sup>533</sup>;

576.4. The Prime Minister’s announcement on 23 March 2020 provided that:

“**To put it simply, if too many people become seriously unwell at one time, the NHS will be unable to handle it - meaning more people are likely to die, not just from Coronavirus but from other illnesses as well.** So it’s vital to slow the spread of the disease. Because that is the way we reduce the number of people needing hospital treatment at any one time, so we can protect the NHS’s ability to cope - and save more lives. **And that’s why we have been asking people to stay at home during this pandemic. And though huge numbers are complying - and I thank you all - the time has now come for us all to do more**”<sup>534</sup>; and

576.5. The explanatory note to the 26 March Regulations provided that

“These Regulations require the closure of businesses selling food or drink for consumption on the premises, and businesses listed in Part 2 of Schedule 2, **to protect against the risks to public health arising from coronavirus**, except for limited permitted uses”.

577. It is plain, therefore, that businesses were closed for health reasons and concerns. RSA accepts that “*COVID-19 gave rise to a general public health emergency*”<sup>535</sup>. The only question is whether those reasons or concerns applied (i.e. were “*discovered*”) at the premises or extended (were “*occurring*”) within the Vicinity.

578. Plainly that was the case: if these reasons and concerns did not apply in relation to a particular premises (at or within the Vicinity of that location), why close the premises? There is no answer

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<sup>531</sup> Agreed Facts 1, {C/1} and {C/2}

<sup>532</sup> Agreed Facts 1, {C/1} and {C/2}

<sup>533</sup> Agreed Facts 1, {C/1} and {C/2}

<sup>534</sup> Agreed Facts 1, {C/1} and {C/2}

<sup>535</sup> RSA ADef, para 45(a). {A/12/18}

other than the obvious one: the premises were collectively and individually closed to protect against the risks to public health as part of a stated strategy to prevent the spread of the disease and the NHS from being overwhelmed.

579. In any event, the FCA’s submissions on the wide area of the Vicinity under RSA4 are set out below in the disease clause section where the issue is likely to be more important: see paragraph 982 below.
580. RSA does not seriously dispute that there were health reasons or concerns within the Vicinity, but instead argues that that the closure for health reasons or concerns must be “*attributable to an event in the ‘Vicinity’ of the Premises*”.<sup>536</sup> The suggestion that there needs to be an ‘event’ within that Vicinity (and seemingly nowhere else) is no part of the wording in RSA4 and should be rejected. There is no requirement for health reasons or concerns to themselves be an occurrence - or, in the gloss put on these words by RSA, ‘an event’. This is not required by the clause and is entirely inapt – a ‘reason’ or ‘concern’ is not an event or an incident. The only incident or occurrence required is the closure.
581. Nor is there any requirement for health reasons or concerns to be “specific to” (*i.e.* only within) the Vicinity of Premises. Provided that the health reasons or concerns include the Vicinity, that is sufficient.

*“Interruption or interference”*

582. As previously addressed in paragraphs 158-169 above, interruption or interference requires some ‘operational impact’ on the insured’s business or usual activities, whether that is either physical or economic. It is self-evident that the government advice, instructions, guidelines, announcements and legislation gave rise to interruption of or interference with the operation of all Categories of business as set out more fully above.

Cover – Prevention of access clause

*“Actions or advice of...governmental authority or agency”*

583. It is common ground that each of the following UK Government’s actions was action or advice of the governmental authority or agency within this clause: 12 March 2020 (elevating the risk level to ‘high’ and telling those with symptoms to self-isolate for 7 days), 16 March

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<sup>536</sup> RSA ADef para 45(c). {A/12/18}

2020 (stay-at-home announcement), 18 March 2020 (announcement of school closures), 20 March 2020 (announcement of cafes, pubs etc to close that night), 21 March and 26 March Regulations and their equivalents, further announcements on 22-24 March 2020 (2-metre distancing *etc*), and 10 May 2020 ('stay alert' message).<sup>537</sup>

584. The only apparent dispute is whether the coming into force of the Coronavirus Act 2020 on 25 March 2020 and the designations of the Secretary of State made on 4 April 2020 were 'actions or advice' as pleaded.<sup>538</sup> It is difficult to see how it could be argued these are not Government 'action or advice' (as to which see the FCA's submissions at paragraphs 116ff). The bringing into force of primary legislation and the making of designations by the Secretary of State under secondary legislation is clearly Government action or advice within this clause.

*(actions or advice)... "within the Vicinity of the Insured Location"*

585. This is easily satisfied: the UK Government's action and advice took place nationally and without distinction between localities, meaning it took place everywhere within the UK including within the Vicinity of the premises.

586. RSA argues that the cover cannot apply in respect of actions taken or advice given at a national level "*because that would render the Vicinity requirement redundant?*", and that the cover can only apply if the action or advice "*is operative within (and specific to) the 'Vicinity' of the premises*".<sup>539</sup> This again interpolates wording into the clause which is not there. There is no suggestion that the clause applies if the action takes place only within the Vicinity but that it does not apply if the action takes place both within and outside the Vicinity. RSA is therefore wrong to treat the government advice or action as an insured 'event'. Clause 2.3 lists covered causes of interruption, not events. All that is required is that the government actions or advice have some effect in the Vicinity which prevents or hinders use of or access to the insured premises.

587. Further, the widest possible descriptors are used to describe the authority concerned, which includes both local and national forms of government, including military authorities. There is absolutely no justification for reading in a requirement for government action to be exclusively local in effect or "specific to" the Vicinity. Indeed, it is very difficult to see why the UK Government would be acting in respect of such a local event.

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<sup>537</sup> RSA ADef paras 46-47. {A/12/18-19}

<sup>538</sup> PoC 18.20, 18.23 {A/2/11-12} and 44 {A/2/29}, RSA ADef paras 46-47. {A/12/18-19}

<sup>539</sup> RSA ADef para 46(b). {A/12/18}

588. This does not render the Vicinity requirement redundant – the action must be effective in the Vicinity and the insured business must be interfered with for cover to respond. Take for example café located in the suburbs of a city, that draws its business almost exclusively from people who live locally within that suburb. If a Government lockdown due to an outbreak of disease in the city were to be imposed on all businesses in that city including the suburbs, it would be artificial and uncommercial for the policy not to respond on the basis that such action or advice was directed to businesses both within the suburb (assuming that is the Vicinity) and nearby areas (the city and other suburbs). The answer is no different here. What matters is that the action or advice was in the Vicinity, and that that prevented or hindered use of access of the insured premises.

*“which prevents or hinders the use or access to the Insured Locations”*

589. RSA admits that where a business in Categories 1, 2, 4, 6 and 7 was required to close their premises in full or in part between 20 and 26 March 2020 as pleaded in PoC 47, there was a prevention or hindrance of use of the premises with respect to any business ordered to close their premises in full or in part within this clause.<sup>540</sup> The issues between the parties are therefore (i) whether the ‘social-distancing’ measures and other Governments announcements amounted to a prevention / hindrance of access / use, and (ii) whether the Regulations and other enforced closure measures amounted to a prevention or hindrance of access (it being common ground that the did amount to a prevention or hindrance of use).

590. As to this, the submissions in Sections 6B (Actions or Advice) , 6D (Prevent and Hinder) and 6E (Access or Use) above are repeated.

#### The causal connectors

591. For each of the Disease, Enforced closure and Prevention of access clauses, the causal links are the same: *the resulting* loss in the event of interruption/interference, and interruption/interference *as a result of* disease, closure or prevention/hindrance of access/use. These connectors require a proximate causal link.

592. The submissions in section 8 above are repeated in relation to the general question of causation.

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<sup>540</sup> RSA ADef para 50(d). {A/12/21}

593. Each of these clauses overlaps with the others. It is intended that (i) Notifiable Disease within the Vicinity can trigger all three clauses, if it results in enforced closure of the Premises (such closure always being a prevention of access); (ii) a non-Notifiable Disease within the Vicinity can provide cover under the Enforced closure and Prevention of access clauses, but not the disease clause, if it results in enforced closure; and (iii) a Notifiable or non-Notifiable Disease outside the Vicinity can trigger the Enforced closure and Prevention of access clauses but not the Disease clause, if that nonetheless results in enforced closure for health reasons or concerns (Enforced closure clause) or government action or advice (prevention of access clause) within the Vicinity.
594. Just like other cases above where there is overlap between the insured perils (such as Arch1), this overlap demonstrates that the parties cannot have intended the ‘but for’ test to have been applied as RSA suggests, given this would lead to the conclusion that no clause responds even though all three are triggered, because (for example) but for the ‘enforced closure’ (first PoA clause) the ‘prevention of access’ (second PoA clause) would have caused the loss, and the same vice versa, thus neither caused the loss.
595. The causal language supplied does not require a technical causal test other than a requirement of proximity, which is satisfied here as it is within all the other clauses above.

#### The quantification machinery and the counterfactual

596. The FCA accepts that the quantification machinery in RSA4 must apply to the extensions set out above, albeit through a roundabout route. The loss covered is the ‘Business Interruption Loss’, whose definition refers to the ‘Reduction in Turnover’, which is itself defined as meaning the drop in ‘Standard Turnover’, which means the previous Turnover adjusted to ‘represent as nearly as may be reasonably practicable’ the results which ‘but for’ the ‘Covered Event’, which means those described in Insuring Clauses 2.1-2.4, which include the clauses in issue.
597. The relevant definition of Standard Turnover provides:

107. **Standard Turnover** means the **Turnover** during that equivalent period before the date of any **Covered Event** which corresponds with the **Indemnity Period** to which adjustments have been made to take into account the trend of the **Insured's Business** and for variations in or other circumstances affecting the **Insured's Business** either before or after the **Covered Event** or which would have affected the **Insured's Business** had the **Covered Event** not occurred so that the figures thus adjusted will represent as nearly as may be reasonably practicable the results which but for the **Covered Event** would have been obtained during the **Indemnity Period**.

598. Thus the counterfactual here is that which would operate 'but for the Covered Event'.

599. Covered Event is defined as:

17. **Covered Event** means the events as described in Insuring Clause 2.1, 2.2 2.3 or 2.4. or any applicable **Extension**.

600. Thus it is necessary to look for the 'events' as described in Insuring Clause 2.3 (the cover clause quoted at paragraph 561). RSA is wrong to suggest that the loss will be adjusted to strip out only the insured peril, which it appears to identify as 'health reasons or concerns within the Vicinity' or 'actions or advice of the government within the Vicinity' and not anything else.<sup>541</sup>

601. First, the word 'event' is deliberately broad and its ordinary meaning would encompass the underlying insured event, here the nationwide COVID-19 pandemic, as in *The Silver Cloud*.

602. Second, this would lead to the absurd situation where there is no loss under the disease clause because of the denial or hindrance of use or access, and *vice versa*. The policyholder would thus be worse off by engaging multiple insured clauses than just one. Plainly what is intended (all the more in a trends clause which only requires adjustments not as near as possible, but 'as nearly as may be reasonably practicable') is that all the interlinked causal events are to be stripped out, therefore leading to a sensible counterfactual: and see the analysis in relation to Hiscox at paragraphs 414ff, in relation to QBE at paragraphs 825ff below, and the general points in Sections 6J and 8 above.

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<sup>541</sup> RSA ADef para 91(c) {A/12/31} and 62 {A/12/23}

### **RSA4 - Assumed Facts Example (Category 1)**

Business AA operates a restaurant and café located in a city centre. It does not provide a takeaway service. There is an initial downturn in customer numbers from 1 March 2020 and a more substantial downturn in business after the Prime Minister's 16 March announcement. The restaurant was closed from 21 March by the 21 March Regulations. It opened a takeaway service on 1 May.

Is the disease clause and/or enforced closure clause and/or the POA clause in RSA4 triggered?

- On 5 March COVID-19 became notifiable and pursuant to RSA4 was deemed to have been notifiable at the outset of the outbreak. From when there were cases of COVID-19 in the vicinity, AA sustained covered loss resulting from AA's clientele staying at home, interfering with its normal operations. Cover under the disease clause was triggered immediately for all.
- From 16 March (by which time there were cases of COVID-19 in the vicinity) there was interruption and interference as a result of the measures taken to control COVID-19, recoverable under the disease clause and also triggering the POA clause.
- From 21 March there was further interruption or interference as a result of the enforced closure of the premises for "health reasons or concerns" or government action or advice within the vicinity, thus triggering the enforced closure clause, in addition to the disease clause and POA clause.
- Therefore, all three clauses are engaged. Even if the business partially re-opened from 1 May to sell food for takeaway, that makes no difference: that's not the same insured business, customers are prevented from accessing the restaurant to eat-in for a meal (which is the insured business). This is a quantum issue only.
- The policy responds to the resulting loss.

## E. RSA2 public authority action or advice emergency wording, vicinity provision

603. RSA2.1 and 2.2 include identical prevention of access- public emergency insuring provisions (albeit with different exclusions), which provide cover for “*interruption or interference with the Business*” (and to reproduce the RSA2.1 clause):

### F Prevention of Access - Public Emergency

The actions or advice of a competent Public Authority due to an emergency likely to endanger life or property in the vicinity of the Premises which prevents or hinders the use or access to the Premises

Any loss

- a) during the first four hours
- b) during any period other than the actual period when access to the Premises was prevented
- c) as a result of labour disputes
- d) occurring in Northern Ireland
- e) as a result of the diseases specified in Extension A (a) - Diseases

Any amount in excess of £10,000

604. They therefore require the following elements: (i) interruption or inference, (ii) actions or advice of a competent public authority, (iii) due to an emergency likely to endanger life or property in the vicinity of the Premises, (iv) which prevents or hinders the use or access to the Premises.

605. RSA2.1 (Eaton Gate Restaurants, Wine Bars and Public Houses) is intended for Category 1 policyholders as the name indicates. RSA 2.2 (‘Eaton Gate Shop Policy’) is intended for shops and thus Category 3 and 4 (and possibly Category 2) policyholders.<sup>542</sup> RSA2.2 is similar to RSA2.1 but with a more extensive range of insuring sections and different exclusions.

## Cover

“*actions or advice of a competent Public Authority*”

606. Much is common ground here as it is with RSA4 – see paragraphs 583 to 584. The dispute over ‘actions or advice’ appears to be limited to whether the coming into force of the Coronavirus Act 2020 on 25 March 2020 and the designations of the Secretary of State made on 4 April 2020 were ‘actions or advice’ as pleaded.<sup>543</sup> These have also been addressed in the same paragraphs above.

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<sup>542</sup> See RSA ADef para 5(b)-(c) {A/12/2}

<sup>543</sup> PoC 18.20, 18.23 {A/2/11-12} and 44 {A/2/29}, RSA ADef paras 46-47 {A/12/18-19}

607. ‘Public Authority’ is not a defined term (and is used indiscriminately throughout the policy in capitalised and uncapitalised forms).<sup>544</sup> RSA accepts that the term is wide enough to include all the public authority action involved in this dispute.<sup>545</sup>

*(due to) “an emergency likely to endanger life or property in the vicinity of the Premises”*

608. RSA’s case on whether or not there was an emergency likely to endanger life or property in the vicinity of the Premises is unclear. It admits that the COVID-19 outbreak gave rise to a “*general public health emergency within the UK*”, and makes no admissions as to (rather than denying) the FCA’s case that there was such an emergency in the vicinity of the premises from at least 3 March 2020, alternatively 12 March 2020, alternatively such other date as the Court shall determine.<sup>546</sup> This is an odd and inexplicable plea: RSA does not even admit that the pandemic (and/or its local effects) were likely to endanger life, giving no reason why it is unable to admit or deny that plea. Having failed to plead any proper case in response, the FCA’s case on this (as set out at length above) should be accepted.

609. Elsewhere, RSA pleads that (i) a national emergency is not the same as an emergency in the vicinity; (ii) the word ‘vicinity’ denotes a requirement for “*a close spatial proximity to the Premises*”, and (iii) the word ‘likely’ requires a greater than 50% chance that life in the vicinity of the premises would be endangered.<sup>547</sup> Addressing these in turn:

610. The FCA’s primary case is that the emergency was within the vicinity of the premises just as it was everywhere else in the country from 3/12 March 2020 (as set out above). RSA’s case drives a conclusion that the emergency was nowhere, which is wrong. Insofar as RSA is seeking to argue that an emergency both inside and outside the vicinity would not be covered,<sup>548</sup> that has no textual or commercial support in the policy, is illogical, is in effect seeking to import an implied exclusion (without being able to satisfy the test for implying such a term), and would be unworkable. What if an emergency was 99% within and 1% outside the vicinity? Why should that not be covered? And how is that to be determined in any case?

611. The FCA’s alternative case is that such an emergency is established whenever a person with COVID-19 enters the vicinity of the Premises.<sup>549</sup> RSA has not admitted this alternative case

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<sup>544</sup> See RSA2.1, p36 (capitalised) {B/17/36}, p53 (lowercase) {B/17/53}, p54 (lowercase) {B/17/54}; RSA2.2, p51 (capitalised) {B/18/51}, p63 (lowercase) {B/18/63}

<sup>545</sup> RSA ADef paras 46-47 {A/12/18-19}

<sup>546</sup> RSA ADef paras 45(a)-(b) {A/12/18}, 73 {A/12/26}

<sup>547</sup> RSA ADef paras 73-75 {A/12/26-27}

<sup>548</sup> As appears to be the case at RSA ADef para 94 {A/12/32}

<sup>549</sup> PoC 43. {A/2/28-29}

and, not having put forward any alternative case, it is assumed that the alternative is admitted.<sup>550</sup>

612. As for the word ‘vicinity’, this is undefined in the policy. It is common ground that it should be given its natural meaning, and understood as importing a requirement that something occur within 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 – see the submissions made in respect of the term defined with that effect in RSA4 at paragraphs 982ff below.
613. As for the meaning of ‘likely’, it is unclear quite what case RSA is putting forward here. It cannot really be arguing that the nationwide or local presence of COVID-19 is *not* likely to endanger life, in the vicinity of the premises and throughout the country. RSA is wrong to argue that this is “*fact sensitive*” and “*not admitted*”. It is not fact sensitive: the emergency within this clause plainly was likely to endanger life in the vicinity of the Premises.

*which “prevents or hinders the use or access” to the Premises*

614. RSA’s case on these words as they appear in RSA2.1-2.2 is essentially the same as it is for the RSA4 Prevention of access clause: it admits that businesses forced to close or cease by the 21 / 26 March Regulations suffered a prevention or hindrance of use of their Premises,<sup>551</sup> but denies any cover for anything short of these Regulations, and denies that access (as opposed to use) was prevented or hindered, adopting MSAmclin’s Defence as to the meaning of prevention of access in this context.<sup>552</sup> The meaning of this phrase and the reasons why RSA’s case should be rejected has been addressed already in the context of RSA4, as to which paragraphs 589 to 590 above are repeated. The FCA addresses MSAmclin’s case on ‘prevention of access’ at paragraph 748ff below.

*“interruption or interference”*

615. As previously addressed in paragraphs 158-169 above, interruption or interference requires some ‘operational impact’ on the insured’s business or usual activities, whether that is either physical or economic. In summary, the FCA’s case is that there was interruption of or interference with the business from 16 March 2020, or such subsequent date as determined by

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<sup>550</sup> RSA ADef para 45. {A/12/18}

<sup>551</sup> RSA ADef para 50(c). {A/12/21}

<sup>552</sup> RSA ADef paras 49(c)(ii) {A/12/20}, 50(e) {A/12/21}, 78(a)-(b) {A/12/27}, the latter adopting the Def of MSAmclin paras 49.4, 49.5 {A/9/21}, 54 (second sentence) {A/9/22}, and 56-60. {A/9/22-24}

the Court, by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18.<sup>553</sup> There was also interruption of or interference with the business for businesses in Categories 1, 2, 4, 6 and 7, by reason of their mandated closure or cessation from 20, 21, 23, 24 and/or 26 March 2020, as pleaded in PoC 47.<sup>554</sup>

*RSA's disease sub-limit exclusion argument*

616. It is common ground there are no relevant exclusions in RSA2.1. RSA does, however, seek to rely on exclusion e) in RSA2.2, set out below:

<p><b>F Public Emergency</b></p> <p>The actions or advice of a competent Public Authority due to an emergency likely to endanger life or property in the vicinity of the Premises which prevents or hinders the use or access to the Premises.</p>	<p><b>Any loss:</b></p> <ul style="list-style-type: none"> <li>a) During the first four hours;</li> <li>b) During any period other than the actual period when access to the Premises was prevented;</li> <li>c) As a result of labour disputes;</li> <li>d) Occurring in Northern Ireland;</li> <li>e) As a result of infectious or contagious diseases any amount in excess of £10,000.</li> </ul>
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617. As it appears, exclusion e) is a sub-limit of £10,000 for any loss that would otherwise be covered by this clause which results from infectious or contagious diseases. This reading of the clause (i) is the clear literal wording of the phrase, (ii) makes grammatical sense, and (ii) makes commercial sense, in that RSA would want to give limited cover on the basis that it had otherwise limited recovery for infectious or contagious disease to those covered by the notifiable disease clause.

618. RSA contends that this exclusion is “*subject to a manifest formatting error whereby what was plainly intended to be a free-standing inner limit of application to the whole Public Emergency extension was set out on the same line as sub-exclusion (e)*”.<sup>555</sup> It therefore argues in effect that there should be a return after the word “diseases” in exclusion e), with the words “any amount in excess of £10,000” beginning on a new line (whether as exclusion f) or otherwise).

<sup>553</sup> PoC 18 {A/2/8-13}, PoC 46 {A/2/30}, RSA ADef paras 49(c)(ii)-(iii). {A/12/20}

<sup>554</sup> PoC 47 {A/2/32}, RSA ADef paras 50(b)-(d), 51. {A/12/20-21}

<sup>555</sup> RSA ADef para 79 {A/12/27-28}, also 54. {A/12/21}

619. This should be rejected. RSA needs to point to specific reasons why the FCA’s interpretation should be displaced. It is not enough to make a bare assertion that the sub-limit was “plainly” not intended to be a free-standing inner limit: there is nothing plain about it. As stated, the limit makes commercial sense. The disease clause (B) has a sub-limit of £25,000 but covers a limited list of diseases. The PoA clause covers all diseases, but only if they are emergencies and give rise to public authority actions or advice, and only up to a lesser limit of £10,000.
620. RSA also cannot point to any inconsistency with the rest of the policy. The first of the exclusions is a deductible. Many of the BI extensions do not have sub-limits at all, including the damage-based Prevention of Access clause (A), failure of public supply (D) and telecommunications (E). That supports the case that the parties intended to leave the PoA clause without any sub-limit save in the case of disease (given its overlap with extension A). And it would be a bootstrapping argument to suggest that the exclusion is intended to leave all disease cover to Extension A alone—there is no reference to Extension A or its terms in this exclusion to Extension F, and on its face the exclusion does not have that effect, or therefore, intention. The extensions also demonstrate a selective use of sub-limits (Extensions A, D and E have no sub-limits at all) and there would be no reason for a reasonable reader to conclude that applying a sub-limit only to disease in Extension F was not intended.
621. Finally, this is a standard form contract of a professional insurer written through brokers and dating back to April 2018 (per the policy’s footer) with over 1,200 policies in force. The reasonable reader would assume that care had been taken by those drafted and selling the policy and that any such mistake would be spotted and corrected, if mistake it was. It cannot be said that the parties intended to agree a free-standing inner limit. RSA’s case should be rejected.

## Causation

### *The causal connectors*

622. Both clauses within RSA2.1-2.2 provide cover for the actions or advice of a competent Public Authority *due to* an emergency likely to endanger life or property in the vicinity of the Premises *which* prevents or hinders the use or access to the Premises. There is no express causal link between (i) the loss and the interruption / interference, or (ii) the interruption / interference and the authority action, but plainly the parties will have intended one to apply in each case. The wording is therefore very similar to Arch1 above, as to which paragraphs 442ff are

repeated, save that here the emergency needs to be in the vicinity of the premises. As to the suggestion at paragraph 76 of RSA's Amended Defence<sup>556</sup> that the Government's actions or advice was not caused by an emergency likely to endanger human life in the vicinity of the premises, paragraphs 608ff above are repeated.

623. The policies provide a range of non-damage BI extensions, including up to £25,000 (the sub-limit applies only to RSA2.1) for competent authority restrictions following a specified list of diseases, vermin/pests and defective sanitation (all at the premises) as well as injury or illness sustained by any person arising from or traceable to food or drink supplied from the premises; £25,000 for murder or suicide occurring at the premises; and other extensions.
624. The PoA clause in RSA2.1 does not overlap with the disease clause, there being an exclusion within the PoA clause for loss as a result of the exhaustive list of diseases. In RSA2.2 there is a broader exclusion / sub-limit for loss over £10,000 as a result of *any* infectious or contagious diseases (not just those defined in the policy), so cover here is broader than that available under the disease clause (but subjected to a lower sub-limit, £10,000 instead of £25,000 under the disease clause).
625. As with the other policies considered above, the parties will have intended a proximate cause test by the causal links of 'due to' and 'which', and that test is satisfied here for all the reasons given above.
626. RSA argues that:
- 626.1. Any loss was not proximately caused by the insured peril (which was an emergency likely to endanger life in the vicinity of the premises), because had there had not been such an emergency in the vicinity, public authority restrictions would still have been imposed on the premises;<sup>557</sup>
- 626.2. The correct counterfactual is one in which the emergency in the vicinity is absent, but everything else remains the same, including COVID-19 in the relevant area and the measures to tackle it at a national level would still have been the same.<sup>558</sup>
627. As to the first of these, paragraphs 573ff and 586ff above (RSA4, although there Vicinity is defined) and 608ff above (RSA2)] are repeated. The effect of RSA's case is that cover for an

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<sup>556</sup> RSA ADef para 76 {A/12/27}

<sup>557</sup> RSA ADef para 76(a) {A/12/27}

<sup>558</sup> RSA ADef para 62 {A/12/23}

emergency within the vicinity disappears when that emergency extends beyond the vicinity: this should be rejected. As to the second issue, the FCA has addressed RSA's case on the correct counterfactual at paragraphs 600 to 602 above, which are repeated here.

*The quantification machinery*

628. The primary insuring clause under the BI sections in these policies is under the heading 'What is Covered' (on p35 in RSA2.1 and p49 in RSA2.2). This provides for loss of Gross Profit, Increased Cost of Working and Auditors' Charges in the usual way, and possibly provides trends language (applicable to Damage only) in sub-paragraph (a), since the indemnity payable is "*the amount by which the Gross Profit during the Indemnity Period as a result of the Damage falls short of the Gross Profit which would have been received during the Indemnity Period had no Damage occurred*".
629. It is only after this basis of settlement that the Policy provides for 'Extensions', including the Prevention of Access clause (Extension F, p36 in RSA2.1 and p51 in RSA2.2). Those extensions are prefaced by the statement that "Cover provided by this Section is extended to include interruption or interference with the **Business**". Notably this extends the cover but not the loss machinery from the prior clauses. Thus, the relevant indemnity is for loss arising from interruption of or interference with the business arising from the extension, and the contractual bases of settlement (and any trends language within them) are irrelevant.<sup>559</sup> (As to the approach where there is no specified quantum machinery, see the discussion at paragraph 555 above in relation to Ecclesiastical1.)
630. Even if the trends clause does apply, RSA is wrong to suggest that the word 'Damage' in it should be substituted for a very narrow 'insured peril'.<sup>560</sup> The PoA clause provides cover for public authority action due to an emergency likely to endanger life in the vicinity which prevents or hinders the use or access to the property. It would be illogical (as RSA suggest) to remove only the emergency in the vicinity of the premises: that is only part of the insured peril, as outlined in relation to RSA4 above.

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<sup>559</sup> Contrary to RSA ADef para 77 {A/12/27}

<sup>560</sup> RSA ADef paras 63 {A/12/24}, 77 {A/12/27}

## F. Zurich1-2 civil authority action danger wording, vicinity provision

### Introduction

631. The Zurich1-2 wordings both have (separately scheduled in the case of Zurich1) “Action of Competent Authorities” (AOCA, as Zurich calls it) extensions, in virtually identical terms, covering loss caused by

#### **EXTENSIONS - CONTINUED**

##### **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.

For the purpose of this Extension:

- a) the limit is 5.7%
- b) the Maximum Indemnity Period is 12 months.

The words “*Police or other competent Local, Civil or Military Authority*” are undefined despite being capitalised in Zurich1, and appear in lower case in Zurich2. “*Vicinity*” is undefined.

632. This is very similar to the MSAmIn1 ‘Denial of access’ clause, raising similar issues.
633. Zurich cover responds if (by virtue of the introductory wording to the extension) there is “*loss... resulting from interruption or interference with the B[b]usiness in consequence of*” the AOCA.<sup>561</sup>
634. The extension is part of the all risks Zurich 2 Wording, and is an elective endorsement (labelled ‘POA3’) applicable to some policyholders for the Zurich1 Wording where included in the appropriate Schedule (of which a sample of three have been included). The extensions operate by deeming the AOCA to be an ‘Incident’ within the meaning of the BI section (a term that but for that deeming would refer only to ‘Damage’ to property,<sup>562</sup> and by reference to which the quantum machinery operates). Zurich1 can be written on three bases: Loss of Revenue, Loss of Gross Profit, and Increased Cost of Working.
635. The following points are worth noting about the AOCA extensions:
- 635.1. They include a deductible of 3 hours (Zurich2) or a varying amount in the Zurich 1 schedules (the sample schedules include 6 and 12 hours);

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<sup>561</sup> Zurich1 endorsement POA3 {B/21/51}, Zurich2 p34 {B/22/34}

<sup>562</sup> Per the special definition ‘Incident’ at the start of the BI section (p28 in Zurich2 {B/22/28}), and the definition of ‘Damage’ in the general Definitions at the start of the Wording (p13 in Zurich2) {B/22/13}

- 635.2. They include a maximum indemnity period of 12 months (Zurich2) or a varying amount in Zurich1 schedules (the sample schedules include 3 and 12 months); and
- 635.3. They include sub-limits of a % of the sum insured (4.8% in the Zurich1 lead wording, 1% in the other).
636. The provisions contain the following requirements for coverage: (i) “action” (ii) “by the police or other competent local, civil or military authority” (iii) “following a danger or disturbance” (iv) “in the vicinity of the Premises” (v) “whereby access thereto shall be prevented” (vi) “Interruption or interference” (vii) “in consequence of” the prevention of access (viii) “resulting” in loss.
637. On their clear words, these cover clauses apply. Zurich’s case to the contrary (leaving causation to one side) depends upon: (i) implying an exclusion for diseases into the AOCA clause which has none, (ii) implying the word ‘only’ into the requirement for danger in the vicinity, where it does not appear, (iii) adopting an unnaturally restrictive meaning for ‘civil authority’ and ‘access’.
638. The cover issues are considered first, then the causal connectors (‘following’, ‘whereby’, ‘in consequence of’, ‘resulting’) and causation issues thereafter.

## Cover

*“Action” (by the police or other competent local, civil or military authority)*

639. Zurich denies that any of the Government actions pleaded in paragraph 18 of the PoC are “actions by the police or other competent local, civil or military authority” for the purposes of Zurich1-2.
640. Zurich’s response on the meaning of ‘action’ is unclear. It asserts that (contrary to Ecclesiastical and MSAmelin, who agree with the FCA<sup>563</sup>) the term “does not include advice or guidance”<sup>564</sup> because if that had been intended the parties would have used the words ‘advice’ or ‘guidance’,<sup>565</sup> and “advice or guidance in relation to matters such as “social distancing” does not constitute “action”...”.<sup>566</sup> It pleads that not all the matters in paragraph 18 of the PoC are ‘actions’<sup>567</sup> but there is no positive case as to the meaning of the word ‘action’, and the thrust of Zurich’s

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<sup>563</sup> See para 117 above.

<sup>564</sup> Zurich Def, para 39(2)(a) {A/13/13}, also 44 {A/13/17}

<sup>565</sup> Zurich Def, para 39(2)(a)(ii) {A/13/14}

<sup>566</sup> Zurich Def, para 39(2)(b) {A/13/14}

<sup>567</sup> Zurich Def, para 44 {A/13/17}: “it is denied that they all constituted “action(s)””

position seems to be that although many of the actions in paragraph 18 of the PoC plainly are ‘actions’, it would rather not admit that and instead simply pleads that the cover does not include actions *of the UK Government*, i.e. it focuses on the ‘by the police or other competent local, civil or military authority’ part of the cover.

641. As to the meaning of ‘action’, this is addressed above at paragraph 118. It naturally has a broad meaning. It means anything someone does. That can include things said. It encompasses all the steps taken by the Government in paragraphs 18.9, 18.14, 18.15(b), 18.16-24 and 18.26 of the PoC, including its legislation, prohibitions, instructions, but also ‘advice or guidance’.<sup>568</sup>
642. There is no reason to give this term a narrow meaning, and the breadth of the civil authorities involved means that it would be unrealistic to do so. A police or fire authority may instruct or advise certain action/behaviour (such as closing a business’s doors for a period) without necessarily invoking any formal power to do so. It relies upon its authority and its power or ability potentially to progress to further, more formal prohibitions (obtaining an order from a magistrate etc). Zurich has not sought to identify formal powers of those authorities to respond to emergencies by giving legally binding prohibitions, and there can be no suggestion that that is the way such authorities always or even usually operate. So too with other authorities. Where the policy contemplates a specific type of action it sets this out expressly e.g., in the different context of Terrorism clauses the relevant action is expressly limited to “*action designed to influence the government de jure or de facto*”<sup>569</sup>. The AOCA clause provides a limit on action, which is to define the means by which the action should impact on the business through the term ‘whereby access thereto shall be prevented’, and there is no commercial reason why some types of public authority action would be intended to be included but not others.
643. The contrast with the disease clause, which is triggered by “*restrictions... on the order or advice*” of the public authority is instructive. The parties have chosen not to use the word ‘order’<sup>570</sup> (which they might have been expected to do on Zurich’s case, to exclude ‘advice’ or ‘guidance’) but instead the deliberately broad term ‘action’ which must encompass both of these and more besides.

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<sup>568</sup> In Zurich 2 p13 {B/22/13} ‘Denial of service attack’ refers to “*Any actions or instructions constructed with the ability to damage, interfere with or otherwise affect the availability of networks, network services...*” but here actions and ‘instructions’ are used in a particular context of computers and computer hacking—instructions mean ‘computer’ instructions.

<sup>569</sup> In Zurich 1, {B/21/36}

<sup>570</sup> Also employed in the Product recall section of Section K Public and products liability recall “*ordered by an authorised regulatory body or other competent authority*” {B/22/68}

644. Similarly, the breadth of the trigger event—‘danger or disturbance’ indicates the breadth of the likely public authority response that is contemplated as possible or likely. The thrust of the clause is to capture all intervention of a public authority that gives rise to<sup>571</sup> prevention of access.
645. The Government’s statements, typically in mandatory terms, mixed prohibitions then backed or subsequently backed by legislation (closure of businesses and prohibitions on mass gatherings) and those that were not (social distancing, closure of schools), and mixed mandatory with advice language, without formal distinction: all were actions of the Government as part of its joined-up plan to tackle the spread of COVID-19.
646. As to the degree of compulsion required by any action, in addition to the policyholders’ duty of care to prevent injury to employees and (as occupiers) to the public, the Zurich policies included “Reasonable Care” provisions, requiring them to prevent accidents<sup>572</sup> and take additional precautions in response to any danger (if such danger could not be made good).<sup>573</sup>

*(Action) “by the police or other competent local, civil or military authority”*

647. As to the question of the relevant authority, Zurich’s case can be summarised as follows: ‘Civil authority’ means “*authorities such as the Health and Safety Executive and/ or the Civil Aviation Authority and, consistent with the character of the reference to “Police”, the Fire Service*” and not national government;<sup>574</sup> and this is supported by the local nature of the required danger or disturbance (which must be in the vicinity);<sup>575</sup> and by the exclusion of the first hours of the danger or disturbance which “*contemplates a transient incident (such as a gas explosion or discovery of unexploded munitions)*”.<sup>576</sup> (This contrasts with MSAmclin’s more sensible position of accepting that the Government is a competent civil authority within the meaning of materially identical words.<sup>577</sup>)
648. As introduced above at paragraphs 111ff, the natural meaning of ‘civil authority’ is deliberately broad. It covers all relevant public authorities and must include at least any authority of the state including central/government authorities. Zurich’s own case is that it includes national UK Government agencies such as the HSE, and the CAA which is a statutory corporation of the UK Government’s Department of Transport. There is nothing to suggest that the term

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<sup>571</sup> The causal connector in the Wording is ‘whereby’.

<sup>572</sup> General Condition 2 of Zurich1 {**B/21/32**} and General Condition 10 of Zurich2 {**B/22/130**}

<sup>573</sup> General Condition 2 of Zurich1 {**B/21/32**}

<sup>574</sup> Zurich Def, para 39(2)(c) {**A/13/14**}, also 8 {**A/13/3**} and 44 {**A/13/17**}

<sup>575</sup> Zurich Def, para 39(2)(d) {**A/13/14**}

<sup>576</sup> Zurich Def, para 39(2)(e) {**A/13/14**}

<sup>577</sup> Implicitly in MSAmclin Def paras 69-70 {**A/9/28**}

should be circumscribed to exclude actions of the Government (including Ministers) some of which included delegated legislation such as the 21 and 26 March Regulations which were made urgently by the Secretary of State for Health. Zurich effectively concedes this itself when it says that the authority must be “*a local arm of a civil authority (not central government)*”, admitting that on its natural meaning civil authority encompasses government and arguing for an (unpleaded) implication of the qualifier ‘local arm of’ in order to cut back the express term ‘civil authority’. There is no basis for such a qualification and Zurich has not provided one.

649. The FCA’s case is supported by:

649.1. The inclusion of the term ‘military authority’. Military authorities do not respond to food poisoning outbreaks, or burst gas mains. They respond to major disturbances on a large scale, and are a national authority. ‘Civil’ used in conjunction with ‘military’ simply means the civilian organs of state, as opposed to the military.

649.2. The choice of the terms ‘police or other competent local, civil or military authority’ in contrast with ‘restrictions on the use of the premises on the order or advice of *the competent local authority*’ in the Zurich1-2 disease clause (which contains a pandemic exclusion in Zurich 2). Those latter words in the disease clause appear, given their contrast with the words of the PoA clause, not intended to include national authorities such as the government. The distinction between national authorities/government and local authorities is an obvious one employed within the Wordings. See e.g.

- (a) the *How we use your personal information* section<sup>578</sup> which contrasts ‘central government’ with ‘local councils’;
- (b) the riot exclusion including “*nationalisation requisition destruction or damage by any government or local authority [in Zurich1, or ‘public authority’ in Zurich2]*”<sup>579</sup>.

649.3. The broader words, incorporating ‘civil or military’, show a clear intention to be inclusive beyond local and to include all public authorities going beyond local authorities and so necessarily including but not limited to all national/governmental authorities. The word ‘civil’ authority is broader than ‘government’ as it includes regional authorities and public agencies or other bodies going outside the term ‘government’, but includes government.

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<sup>578</sup> In Zurich1, p. 3 {B/21/3} and Zurich2, p. 4 {B/22/4}

<sup>579</sup> In Zurich1 p. 20-21 {B/21/20-21}, in Zurich2 p. 126 {B/22/127}

650. The Wording does not define ‘civil authority’<sup>580</sup> and the use of the word ‘civil’ elsewhere does not provide much relevant colour, it being used in relation to civil legal actions, ‘civil war’, ‘civil strife’ and ‘civil commotion’. Of some relevance, perhaps, is the Cyber exclusion in Zurich2 for “*Civil, administrative or regulatory money penalties... for any violations of any law, regulation or statute*”,<sup>581</sup> showing a broad meaning of ‘civil’ as a type of penalty imposed for breach of the law.
651. The scope of the terms ‘danger or disturbance’ and ‘vicinity’ are a matter of further dispute (see below), but there is nothing in those terms that points towards happenings that would not engage national Government, even if the term ‘civil authority’ were otherwise ambiguous in that regard, which it is not. Similarly, the suggestion that having an exclusion for the first hours of the danger or disease—a de minimis requirement or, essentially, retention, to avoid claims for disproportionately small events—does not indicate that the relevant danger or interruption needs to be short. Indeed, it indicates that the most transient incidents are not covered at all, only longer incidents are. What is indisputable is that the cover contemplates an interruption period of up to 12 months (the maximum indemnity period), which is a substantial interruption to a business upon a substantial prevention of access by the public authority on any view.
652. Finally, the qualifier ‘competent’ adds little (and nothing that indicates a limitation away from national government), merely confirming that what is contemplated is that there may be a range of authorities who are competent and so may potentially act in response to dangers and disturbances in ways that can give rise to prevention of access. ‘Competent’ merely requires the authority to be one with jurisdiction over the relevant trigger in the clause (which, in the case of COVID-19, the UK Government clearly is).

*(Following) “a danger or disturbance within the vicinity of the premises”*

653. Zurich is unclear as to its case on ‘danger’. It admits that in principle the presence of COVID-19 is capable of amounting to a “*danger*” in ordinary English<sup>582</sup>—an inevitable concession. It also argues that ‘vicinity’ is a reference to “*immediate locality... and requires a close spatial proximity*”.<sup>583</sup> That much is clear.

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<sup>580</sup> The capitalisation of those terms in Zurich1, which remain undefined, adds nothing to their meaning. If Zurich intended these general terms to have a specific legalistic meaning it should have made that clear with such a definition.

<sup>581</sup> In Zurich2, p. 92 {B/22/92}

<sup>582</sup> Zurich Def paras 6 {A/13/3} and 29(1) {A/13/9}

<sup>583</sup> Zurich Def para 43(2) {A/13/17}

654. What is unclear is what Zurich says as to the meaning of the term ‘danger’. It seems to say that ‘danger’ must be specific to the immediate locality of the premises, although that may just be its case on the meaning of ‘vicinity’.<sup>584</sup> It also appears to argue that a disease cannot be a ‘danger’ because diseases are already covered by the separate disease clause<sup>585</sup> (and so not intended to be also covered by the AOCA clause).
655. Before turning to the question of ‘vicinity’ or locality, there is no basis for construing ‘danger’ so as not to include diseases such as COVID-19. The term is a broad one.<sup>586</sup> It deliberately encompasses not only the occurrence or infliction of harm/damage/injury, but the mere possibility (which may or may not eventuate) of the same. That is what ‘danger’ means. See above paragraphs 170ff. (‘Danger’, ‘dangerous’ etc are used in a variety of places in the Wording but do not add to that general point as it is a common and broad word: terrorism might ‘endanger life’, places may be ‘dangerous’ and so excluded from travel cover, goods may be ‘dangerous’ and so excluded etc.) Indeed, the fact that the ‘danger’ must be in the ‘vicinity’ rather demonstrates that the word ‘danger’ is not itself restricted geographically.
656. The AOCA clause does provide for ‘danger *or disturbance* in the vicinity’. It is correct that the FCA does not rely on ‘disturbance’—it may well be triggered in some situations but ‘danger’ is a far better fit for a sometimes fatal infectious disease. On its face, there is nothing especially local about disturbance either, certainly not so as to indicate that ‘danger’ must be local. Zurich’s argument to the contrary is not understood.<sup>587</sup>
657. As to the meaning of ‘vicinity’, Zurich draws attention<sup>588</sup> to the BI extension for damage to ‘property in the vicinity of the premises’ POA4 which prevents or hinders use or access to the insured premises. Zurich argues that only damage to property within the immediate locality could prevent or hinder access to the premises, therefore ‘vicinity’ must mean immediate locality. This does not follow, any more than the fact that only nearby fire could damage property means that ‘fire’ must mean nearby fire: the clause provides its own *restriction* by saying that the underlying event must damage the relevant property in both cases, which tells the reader nothing about the breadth of the underlying cause without that restriction.<sup>589</sup>

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<sup>584</sup> Zurich Def paras 29(1) {A/13/9}, 39(3)(b) and (d) {A/13/15}, 43(2) {A/13/17}

<sup>585</sup> Zurich Def para 39(3)(d) {A/13/15}

<sup>586</sup> Oxford English Reference Diction definition of danger is: "1. *Liability or exposure to harm; risk, peril.* 2. *A thing that causes or is likely to cause harm.* 3 *An unwelcome possibility.* 4 *The status of a railway signal directing a halt or caution*".

<sup>587</sup> Zurich Def para 39(3)(b) {A/13/15}

<sup>588</sup> Zurich Def para 39(3)(f) {A/13/15}

<sup>589</sup> Further, Zurich1 POA4 is an optional extension and may not even be included in (and so part of the factual matrix for) some policies on this Wording, although it is included in all three Zurich1 Sample Schedules before the Court. {B/21/51}, {B/79/14}, {B/80/7}

658. More instructive is reference to the Section G (Zurich1)/Section K (Zurich2) special condition precedent on use of heat that “*the area in the immediate vicinity of the work... must be cleared of all loose combustible material*”. The key point is that the parties have here used ‘immediate vicinity’, in contrast with ‘vicinity’ in the PoA extension and BI damage to other property extension (and, for that matter, Loss of attraction BI extension). This demonstrates that, in this Wording, the parties do not intend ‘vicinity’ to be ‘immediate’ otherwise there would be no need to use the additional qualifying adjective or to draw the contrast.
659. Ignoring this, Zurich contends that it means ““*immediate locality*” and requires a close spatial proximity having regard to the nature of the insured’s business and the geographical area in which the business is located...”.<sup>590</sup> This is an illegitimate gloss on the wording.
660. The natural meaning of the term is a surrounding district or the nearness or closeness of a place<sup>591</sup>. The relevant context is that of the business that has taken out insurance for the purpose of covering business interruption and/or interference. Within the vicinity should be understood as importing a requirement that something occur within 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.<sup>592</sup> In the *Orient Express* the term “vicinity” used in relation to a hotel was applied by the judge (and the parties) on the assumption that it included the entire 900 km<sup>2</sup> city of New Orleans plus the surrounding area, presumably because the hotel was taken to benefit from custom across that area.<sup>593</sup> That is a purposive and functional explanation reflecting the fact that whether something can be said to be ‘in the vicinity’ (i.e. sufficiently near) depends upon the reason why the question is being asked.
661. The FCA’s alternative case accepts that it means a localised area (although not an ‘immediate’ one) with a fixed distance around the premises to be determined in each case save that being within at least the same city, town, village or other development would always be in the same ‘vicinity’.<sup>594</sup>

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<sup>590</sup> Zurich Def para 43(3) {A/13/17}

<sup>591</sup> Oxford English Reference Dictionary.

<sup>592</sup> This adopts the wording explicitly used in RSA4 for its defined term ‘Vicinity’, not because that wording is part of the factual matrix for Zurich’s policies (it is not), but because the FCA considers that it reflects the ordinary meaning of ‘vicinity’ in the context of a BI clause such as this.

<sup>593</sup> *Orient-Express*, paras 5 and 7 {J/106}.

<sup>594</sup> PoC para 43 {A/2/28} and 41.5(b) {A/2/27}

662. The key question on this wording is whether there was *in the present case* a ‘danger in the vicinity’ of the premises. In this regard, while the FCA can understand (although rejects) Zurich’s case that the nationwide COVID-19 pandemic does not satisfy the necessary causal connection with the prevention of access (the causal word is ‘following’ and the FCA disagrees), it does not understand the case that the COVID-19 pandemic was not a danger in the vicinity of the premises (i) in all cases, and (ii) ever even when there were COVID-19 cases at the premises or next door.
663. As to the first way that the FCA puts its case:<sup>595</sup> COVID-19 was plainly a danger everywhere in the country. It was a national pandemic. The Court will need to determine from which date—the FCA says 3 March 2020, or else 12 March 2020, or else such date as the Court shall determine—but the national measures reflect a nationwide danger.
664. As to the FCA’s alternative case:<sup>596</sup> Zurich appears to deny that there was a danger in the vicinity even if there was a COVID-19 case (a case of an infectious often fatal disease) within the vicinity, or hundreds of cases (e.g. in the centre of a city).<sup>597</sup>
665. Zurich is seeking to argue, merely at this trigger stage, that any danger that is within but also wider than the vicinity is not a ‘danger in the vicinity’. In other words, that ‘danger in the vicinity’ means ‘danger only in the vicinity’. It has a special meaning. There is no basis for this.
666. First, it doesn’t pass a common sense check: one can look at a particular locality and determine whether there was a danger in that area; but to show that that danger – which may not have readily ascertainable geographical bounds – didn’t exist anywhere outside of the locality is a different challenge altogether.
667. Second, the only argument advanced seems to be that the disease clause in Zurich2 excludes pandemics (“*any infectious diseases which have been declared as a pandemic by the World Health Organisation*”) and in Zurich1 only includes an allegedly exhaustive list of diseases, therefore, argues Zurich: “*It follows that the Zurich Wordings are not intended to cover losses arising out of pandemics... There is no warrant for allowing policyholders to recover through the back door of the AOCA Extension cover which is not available through the front door of the Notifiable Disease Extension*”<sup>598</sup> and “*In circumstances where pandemics are the subject of an express exclusion in relation to notifiable diseases cover, it would be surprising and uncommercial if such cover were provided by an AOCA Exclusion which is (a)*

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<sup>595</sup> PoC para 43 {A/2/28}

<sup>596</sup> PoC para 43 {A/2/28}

<sup>597</sup> Zurich Def para 43 {A/13/17}

<sup>598</sup> Zurich Def para 6 {A/13/3}

*concerned with prevention of access rather than disease and (b) makes no reference to diseases or pandemics at all.*”<sup>599</sup>

668. This argument requires the Court to read an exclusion for disease into the AOCA clause where there is none. There is no term excluding cover overlapping between the two extensions. A number of the extensions have their own exclusions. Had diseases been intended to be excluded from the AOCA clause they would have been. That is really the beginning and end of the point.
669. It also requires the Court to assume that the extensions are mutually exclusive based presumably on an intention that no event could trigger more than one cover clause i.e. to assume that there is only one ‘door’ (the disease clause) and that it is the ‘front door’.
- 669.1. There is no basis for that, and it is normal for events to trigger more than one insuring clause on occasion, sometimes with different requirements.
- 669.2. The clauses do different things, and each extension must be read on its own terms, although they overlap:
- (a) The notifiable disease clause requires restrictions on use by order or advice of competent local authority caused by disease at the premises and has a maximum indemnity of 3 months—it is triggered by a disease actually occurring at the premises and public authority responding to that.
  - (b) The AOCA clause requires action by a broader range of authorities following danger or disturbance in the vicinity where access is prevented and has a maximum indemnity of 12 months—it is triggered by the *risk* of harm in the vicinity, and preventative action by public authorities. The disease clause is narrower (the type of authority, ‘at the premises’ versus ‘vicinity’) but different (actual disease versus danger) and may have greater or smaller lengths of indemnity or sub-limits, which depend upon what is Scheduled and vary.
- 669.3. At least in Zurich<sup>1</sup>, the clauses provide a menu of extensions that are selected from in the Schedule. In some or all policies containing the AOCA clause there will be no disease clause. Zurich<sup>1</sup>’s ‘Increased Cost of Working’ Sample Schedule includes the AOCA clause with no disease clause. It remains unclear whether Zurich would

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<sup>599</sup> Zurich Def para 35(6) {A/13/12}

contend that the policyholder under that clause is somehow to appreciate that Zurich nevertheless did not intend the AOCA clause to cover disease. The reality is that whether there is a disease clause or not, the AOCA clause fills its natural scope which includes dangers whether they are diseases or not.

- 669.4. Other cover clauses overlap: damage to property in the vicinity may engage Extension 6 (Loss of attraction), Extension 10 (Prevention of access), Extension 12 (Public utilities), Extension 14 (Unspecified UK customers) and Extension 15 (Unspecified UK suppliers). That does not mean, for example, that extension 6 must be read as not applying where the damage is to a public utility supplier which is more directly covered by extension 12. It is right that extensions 10 and 15 must be read as not covering damage to public utilities, because extensions 10 and 15 (unlike extension 6) expressly excludes such damage and therefore specify mutually exclusive spheres.
670. The point is that the parties specify mutually exclusive spheres where they are intended. That was not done in this Wording vis-à-vis the disease and AOCA clauses. Accordingly, and following the natural meaning of ‘danger’ (which Zurich accepts includes disease<sup>600</sup>), the AOCA clause includes disease where the other requirements are met.
671. Zurich’s purported reliance in its Defence on its pandemic clause<sup>601</sup> seeks unsuccessfully to turn a vulnerability into to an an advantage. The facts are: the AOCA clause covers disease, the disease clause in Zurich2 explicitly excludes pandemics, the AOCA clause does not exclude pandemics. This means that it was contemplated in Zurich2 that the AOCA clause might be triggered by pandemics, as the reasonable reader would understand. The parties chose to apply that exclusion only to the disease clause. (In Zurich1, there is no pandemic clause and the point is simply that there is no disease exclusion in the AOCA clause.)
672. Returning to the question at hand: the reasonable reader would understand that COVID-19 caused danger (to health and life) in the vicinity of everywhere in the UK (alternatively almost everywhere), not, as Zurich says, *nowhere*. Accordingly, as set out above in relation to a similar RSA 2 wording at paragraphs 608ff, it is clear that there was a “danger” from at least 3 March 2020 (when a UK Government action plan was published, quarantining was in place, and there were 176 Reported Cases across the country). This is reflected by Arch’s admission that (in a

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<sup>600</sup> Zurich Def paras 6 {A/13/3} and 29(1) {A/13/9}

<sup>601</sup> Zurich Def paras 5-6 {A/13/3}, 35(4)-(6) {A/13/11-12}

policy without a ‘vicinity’ clause) there was an ‘emergency likely to endanger life’ from that date.<sup>602</sup>

673. Alternatively, there was such a danger from 12 March 2020 (when the UK Government elevated the risk level to high, following COVID-19 being designated notifiable in the UK and characterised as a pandemic by WHO, and a week after the first reported UK death). This would reflect Ecclesiastical’s admission that (in a policy without a ‘vicinity’ clause) there was an ‘emergency which could to endanger human life’ from that date.<sup>603</sup>

*(Whereby) “access thereto shall be prevented”*

674. The meaning of ‘access’ is clear. See above section 6F and paragraphs 432ff in relation to Arch1. It means the means to approach or enter the premises.

675. Zurich’s case in relation to the prevention requirement is that “[p]revention requires entry to the premises to be physically obstructed or otherwise impossible. It is not enough that access is reduced, impaired or hindered. Entry to the premises must be prevented altogether.”<sup>604</sup>

676. Likewise, Zurich asserts that the Regulations which require cessation of business activities are insufficient to amount to a ‘prevention’ of access because they do not have the effect of physically preventing access to premises.<sup>605</sup> Alternatively, even if cessation of a business is enough, it would have to be a “complete cessation of business”—partial continuation of the business is not enough.<sup>606</sup> But if cessation is sufficient, Zurich accepts that the Regulations prevented access to businesses in Category 2 only,<sup>607</sup> because they were permitted to continue any part of their business. Categories 1, 4, 6 and 7 were not prevented because “access was expressly permitted in certain circumstances”: Category 1 could do take-away service, Category 4 could do mail order, Category 6 and 7 for limited purposes.<sup>608</sup> The specific limited purposes permitted are in the Regulations.

677. The FCA’s case on the meaning of ‘prevention’ is set out above in paragraphs 128ff. It is a broad term. It does not itself import any necessary element of physical restraint. Thus, in Zurich1, the term ‘fraud prevention’ is often used. It does include the need for stopping access,

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<sup>602</sup> Arch Def paras 36 {A/7/13} and 63 {A/7/20}

<sup>603</sup> Ecclesiastical/MSAmlin Def para 35 {A/9/18}

<sup>604</sup> Zurich Def, para 9 {A/13/4}, 39(4) {A/13/16} and 47(1) {A/13/18}

<sup>605</sup> Zurich Def, para 39(4) {A/13/16}

<sup>606</sup> Zurich Def para 9 {A/13/4}

<sup>607</sup> Zurich Def, para 39(5) {A/13/16}, 47(2)(a) {A/13/19}

<sup>608</sup> Zurich Def paras 26(2) {A/13/8} and 47(2)(b) {A/13/19}

but there is no specification that access must be prevented *for all people at all times*. If that were intended, the drafters would have referred to closure of the premises or access to the premises being *totally* prevented or prevented for all.

678. As set out above, Zurich’s case is wholly unrealistic. There will never be total prevention of access to a premises for all people. Even with a danger, there will usually still be access for emergency services, cleaners seeking to eradicate a disease, construction workers fixing a building-related danger, the owner and others. It is hard to imagine a danger that would ever lead to a prevention of access to all people for all purposes. What the Wording must contemplate is preventing access for the purposes for which the ordinary business (typically identified in the Schedule) for which premises operate, for at least some people.
679. In this context, it is noteworthy that the Wordings cover ‘interruption or interference’, not merely interruption. The bases of settlement provide that they indemnify against *reduction* in revenue, assuming that some revenue is earned (and compared with standard revenue in the prior period); hence the definition of the ‘Indemnity period’ explains that the relevant period covers the time when “*the results of the business are affected in consequence of the incident*”. This is a BI section but it covers business interference—i.e. impairment of revenue due to various causes. Thus it covers ‘diminished attraction to customers’ (Loss of attraction) and ‘restrictions on use of the premises’ (disease clauses).
680. Further, the Wordings expressly require the policyholder to “*take action to minimise the loss or damage and to avoid interruption or interference with the Business and to prevent further damage or injury*”.<sup>609</sup> Similarly, the cover includes the increased cost of working “*necessarily 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*”.<sup>610</sup>
681. It would be perverse if the cover was lost entirely because an insured shop managed partially to operate its business by way of mail order from the premises. That cannot be intended. Even if the owner is permitted to attend the premises for administrative reasons or to operate a mail order business, or even if customers are permitted to visit a restaurant to collect take away food, or even if a church is permitted to stay open for blood donations, there is still prevention of access: customers cannot attend for the ordinary (i.e. pre-existing) business, or some of it.

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<sup>609</sup> Zurich1 General Condition 9(a)(iv) p33 {B/21/33}, Zurich2 Claims condition1 p131 {B/22/131}

<sup>610</sup> Zurich2 pp30, 32, 33 {B/22/30-33}

682. Further, the stay-at-home instruction on 16 March 2020 itself amounted to a prevention of access (see paragraph 438 above). It was an instruction not to go to pubs, clubs, restaurants, cinemas, leisure venues (i.e. Categories 1 and 2) because they were not essential trips. It was respected. That is prevention of access by action of the government: people (owners, employees, customers) were told not to access the premises for its business (the reason they would access it, and the way the business made money). And, of course, the 21 March Regulations, 23-24 March announcements and instructions, and 26 March Regulations, provided further instructions to “stay at home” and cease businesses and close business premises. Stay-at-home instructions prevent customers accessing the premises for its ordinary purposes—that was forbidden save for essential journeys.
683. It is of course correct that the ‘Prevention of access’ (property damage) clause covers damage that “*will prevent or hinder the use of the premises or access thereto*”, which is deliberately broader than the AOCA clause, perhaps because the peril is narrower (damage to nearby property). The limitation in the AOCA clause to ‘access’ not ‘access or use’ indicates that where the peril is government action following a danger there must be an actual impairment of the ability to approach or enter the premises—not merely its use. (If hindrance of use were included in a public authority clause then it might cover e.g. a police or public authority rule that knives or flammable goods could not be sold.) But that is not a licence to read ‘access thereto will be prevented’ wider than the ordinary words and context require.

#### The causal connectors

684. The relevant causal connectors are that there must be loss *resulting from* interruption or interference with the business *in consequence of* 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 will be prevented.
685. Zurich’s case is that:
- 685.1. “following’ requires proximate case “*alternatively... a strong causal connection*”.<sup>611</sup> The government action did not ‘follow’ a danger in the vicinity because it was not a “*response to*” a danger in the vicinity,

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<sup>611</sup> Zurich Def paras 7 {A/13/3}, 39(3)(a) {A/13/14}

“but rather was a response to a nationwide pandemic that was determined on a national basis irrespective of whether there was a danger in any particular vicinity and irrespective of the number of cases of COVID-19 which might actually have occurred there”.<sup>612</sup>

Further:

“before any action (of the relevant authority) could be said to be a response to any incidence(s) of COVID-19, the authority in question (by definition) would have to be aware of the existence of such incidence(s)”.<sup>613</sup>

685.2. The loss was not ‘but for’ caused because the counterfactual is one in which

“the action which prevented access had not occurred, but everything else which actually happened still happened, including (i) the COVID-19 pandemic, nationally and internationally; (ii) the response of individuals and the public at large to COVID-19, including the adverse impact of such response on economic activity and public confidence; (iii) the advice and/or guidance issued by the UK Government; and (iv) the Regulations introduced by the UK Government (or, on Zurich’s alternative case as set out at paragraph 9 above, the Regulations introduced by the UK Government except those which prevented access).”<sup>614</sup>

It appears that the counterfactual may also be intended to include all “*Government measures other than the action within the Relevant Policy Area (i.e. the vicinity of the premises)*”.<sup>615</sup>

These were “independent concurrent causes”.<sup>616</sup> Policyholders “*would or would be likely to have suffered the same or substantially the same loss in any event.*”<sup>617</sup>

685.3. This is supported by the trends clauses in Zurich1 & 2 (other than Zurich2 when written on an Increased Cost of Working basis which it is agreed has no trends clause), which require a calculation of what loss would have happened but for the action of the civil authority.<sup>618</sup>

686. The focus of Zurich’s causation Defence is therefore on the link between government action and the danger in the vicinity (*following*), and the link between the loss and the interruption (*resulting from*, and trends clause).

687. To that end, the FCA does not spend time on whether the government action was action ‘whereby’ access was prevented (Zurich does not advance even an alternative case that e.g. “stay at home” orders prevented access), or whether the interruption or interference was ‘in

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<sup>612</sup> Zurich Def para 8 {A/13/3}, para 42 {A/13/16}, 44-5 {A/13/17-18}, 46(5) {A/13/18}, 55(1) {A/13/23}

<sup>613</sup> Zurich Def para 39(3)(e) {A/13/14}

<sup>614</sup> Zurich Def para 11 {A/13/4}, also paras 52(3)(a) {A/13/20} and 53(1) {A/13/22}

<sup>615</sup> Zurich Def para 69(3) {A/13/27}

<sup>616</sup> Zurich Def para 52(5) and 56 {A/13/21-23}

<sup>617</sup> Zurich Def para 12 {A/13/5}

<sup>618</sup> Zurich Def paras 61, 64-5 {A/13/24-25}

consequence of prevention of access (Zurich advances no case that it was not, unsurprisingly). Self-evidently, these causal connectors are satisfied.

688. Zurich's first key point is rather as to whether the police or other competent local, civil or military authority action was *following* a danger or disturbance in the vicinity of the premises. Its case is quoted above at paragraph 685. The gist is that the Government had its eyes on a national pandemic, not on any particular local incidence of the COVID near the insured's premises. The facts of the Government response and its reasons are not seriously in dispute. The question is how to characterise them and what 'following' means.
689. As to the term 'following', of all the causal connectors in this case, it is the one that most naturally imports a relaxed link. See above paragraphs 325.3 and 385. Zurich obviously think so because it does not refer, when making its case in its Defence, to the question of whether the action *follows* the danger or disturbance, instead stipulating its own preferred question of whether the action was 'in response to' the danger in the vicinity (that being a phrase not used in the cover clause) and then repeating that different test 20 times by the FCA's count.
690. Before turning to the FCA's case, it should be noted that to have reached these causation issues it must have been determined, against Zurich, that:
- 690.1. 'danger' can include disease (and, re: Zurich2, there is a pandemic exclusion for the disease clause but not the AOCA clause), i.e. the AOCA clause contemplates being triggered by perils that can be wide including infectious diseases;
  - 690.2. 'civil authority' can include government action, i.e. the AOCA clause contemplates being triggered by action by a national authority, which would often be in response to a wide area danger on a national or regional scale;
  - 690.3. there was 'danger' in the 'vicinity' of all (or at least some) premises; and
  - 690.4. the AOCA clause is not triggered only where the danger is *only* in the vicinity.
691. The Court's findings on the breadth of 'actions' and 'prevention of access' will also be relevant, although the causation issues arise whether the FCA's or Zurich's case is accepted on those issues.
692. As to the FCA's case, it is as follows:

- 692.1. The common sense interpretation of the terms used are comfortably satisfied by the present situation.
- 692.2. That is because the Government acted *nationally* by reason of various substantial measures at great cost to the Government, the economy and personal liberties. That must have been (and there is no evidence to contradict this obvious inference) because the Government understood that there was a *national danger*, i.e. a danger everywhere. (As the Health Secretary stated, “*the shape of the curve*” had been “*similar across the whole country*” hence acting nationally.<sup>619</sup>) The question is not whether there were COVID-19 cases everywhere, but whether there was a danger everywhere.
- 692.3. The danger in the vicinity of the premises was part of the jigsaw that made up the national danger that led to the national response (see further paragraph 240 above).
- 692.4. Therefore, the Government actions were a ‘response’ to danger in the vicinity of the premises, and in any event (an easier test) were ‘following’ the danger in the vicinity.
- 692.5. This makes sense where (i) the AOCA clause contemplates dangers that may be broader than the vicinity (if the FCA’s primary case on vicinity is accepted), including disease and (ii) makes no provision to exclude them. The word ‘following’ certainly does not do so.
693. Zurich does not attack the ‘following’ link on the basis of a ‘but for’ test, and it is right not to do so. It would be absurd for the above to apply, and the common sense meaning of ‘following’ to apply to this situation of a wide area disease, but then to apply a ‘but for test’ that that excludes only the disease in the vicinity. It is correct that, if the Court determines that vicinity is a relatively small, but for disease *only in that vicinity* the national measures may still have occurred, but that is far from clear (and the burden would fall on Zurich to prove to the contrary: see paragraphs 249ff above): the trigger here is not disease, it is ‘danger’. If there truly was not only no COVID-19 cases but actually *no danger of COVID-19* in a particular area (for some impossible to imagine medical or other reason) then in all likelihood the Government would likely not have imposed any restrictions there. (This is not like the Scilly Isles, where there was a danger of COVID-19, just no Reported Cases.)

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<sup>619</sup> PoC para 18.25 {A/2/12}, Agreed Facts 1 row 76 {C/1}

The quantification machinery: Zurich1 (Increased Cost of Working)

694. Therefore, the remaining defence of Zurich on causation grounds relates to the application of the ‘but for’ test (inside or outside a trends clause) to whether the interruption or interference caused loss. This is really a quantum question, as it is difficult to deny (although Zurich does by its primary case<sup>620</sup>) that the interruption or interference (i.e. the prevention of access by closure orders, cessation orders, “stay at home” orders and such others as are found to amount to ‘prevention’) caused *any* loss. (This distinction between the types of dispute raised by cover and quantum is contemplated by the arbitration clause, which applies only to disputes as to the amount of the dispute.)
695. Zurich1 can be written on three bases: Loss of Revenue, Loss of Gross Profit, and Increased Cost of Working. If written on the last of these, it is common ground that the policy does not contain a trends clause<sup>621</sup> and therefore the insured is to be paid merely the increased cost of working “*reasonably incurred by the Insured during the Indemnity Period in order to minimise any interruption of or interference with the Business in consequence of the Incident*”.
696. As Zurich sets out,<sup>622</sup> the Incident is the “*loss... resulting from interruption of or interference with the Business in consequence of... accidental loss.... at the under-noted situations*”.
697. This is in increased costs provision, which merely entails recovery of costs reasonably incurred to minimise interruption or interference once there is such interruption or interference. That interruption or interference must have been in consequence of prevention of access etc, but those triggers having been satisfied, the question is merely what costs were reasonably incurred to minimise the interruption or interference. There is no need for a ‘but for’ test.
698. If, contrary to this case, there is a need to engage a ‘but for’ test, then the arguments below apply.

The quantification machinery: Zurich1 (Loss of Revenue or Loss of Gross Profits bases)

699. If Zurich1 is written on a Loss of Revenue basis, the policy calculates loss by reference to the amount by which the Gross Revenue during the Indemnity period falls short of the Standard Gross Revenue in consequence of the “Incident”. If written on a Loss of Gross Profit basis, the figure is calculated by applying the Rate of Gross Profit to the amount by which the

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<sup>620</sup> Zurich Def para 12 {A/13/5}

<sup>621</sup> Zurich Def para 60 {A/13/24}

<sup>622</sup> Zurich Def para 63 {A/13/25}

Turnover during the Indemnity Period falls short of the Standard Turnover in consequence of the “Incident”. Both Wordings include a trends clause next to their definitions of Standard Gross Revenue / Standard Turnover:

to which such adjustments shall be made 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.

700. The counterfactual is defined by the word “Incident”. Both Schedules state in their introductory wording to section B1 preceding the specified extensions that “*Any loss as insured by this Section 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*”.<sup>623</sup> That definition is rather circular (Incident is ‘loss’, and loss is calculated on the position but for ‘the Incident’), and drafted at least in part with property damage in mind, albeit it is quite difficult to see what could suffer “*accidental loss destruction or damage*” except physical property. In any case, and whilst the FCA accepts that the quantum machinery must be made to work here, that does not mean that ‘Incident’ / physical property damage can be replaced by something overly narrow.
701. The ‘incident’ according to this definition is the loss or else the interruption or interference. The interruption or interference is that triggered by the public authority action, but that does not mandate an inquiry into exactly what interruption or interference there would have been without that public authority action. The ‘but for’ test is at the level of the interruption or interference, not steps further down the chain. That being the case, one compares a business that was interrupted or interfered with, with one that was not.
702. Zurich is unable to make this definition work for it, and thus ignores it: “*That in turn requires an 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*”.<sup>624</sup> But there is no basis for this in the definition of Incident quoted by Zurich just one paragraph earlier in its Defence.
703. If, however, the counterfactual does require excision of the government action, then that does not assist Zurich. The parties agree that that government action was national. It was incorporated in the various actions (the Regulations, instructions from the Prime Minister)

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<sup>623</sup> As Zurich sets out in Zurich Def para 63 {A/13/25}

<sup>624</sup> Zurich Def para 64(2) {A/13/25}

that made no distinction between areas. That is Zurich's own case. And there is no requirement that the government action be in the vicinity, only that follow danger in the vicinity. The 'incident' is the government action, full stop. If one excludes government action, then one is excluding the entirety of the orders that prevented access to these premises, not rewriting them to cover all places other than the premises. At the very least, any losses caused by prevention of access rather than other causes would be covered.

704. As for Zurich's case, it has no answer to the absurdity of the windfall case: on its counterfactual, which excludes the Government action in the vicinity of the premises only, leaving Government action elsewhere (see the quotations from its Defence at paragraph 685.2 above), many businesses existing in an island of no Government action would have led to a huge rise in revenue as customers flocked to the only legal cinema, hair salon etc, Zurich merely denies the conclusion, contending illogically that the population would have stayed away from the one prohibition-free zone. Some would, but a huge amount more from far and wide would have come.
705. But in any event, it cannot be intended that the counterfactual should include some public authority action preventing access but not that which falls short of that, or the danger without the public authority action from which it resulted and to which it was 'something extra'.<sup>625</sup> The danger was contemplated explicitly by the AOCA clause. This would be to subtract only part of the insured event even though wide area disease or other damage triggers (including pandemics) are contemplated by this clause.

#### The quantification machinery: Zurich2

706. Zurich2 policies contain their Business interruption and book debts cover in Section B (see p28 of SME557 Commercial Combined – Manufacturing). Immediately after their definitions section, they state (p30)<sup>626</sup>:

##### **Notes to the special definitions**

In respect of the definitions of *annual research and development expenditure, standard gross revenue, insured amounts per week, standard fees* and *standard turnover* adjustments will be made 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* which would have affected the business had the *incident* not occurred so that the figures thus adjusted will 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*.

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<sup>625</sup> As Zurich argues: Zurich Def paras 64-65 {A/13/25}

<sup>626</sup> Zurich 2 p. 30 {B/22/30}

707. “Incident” is defined as property damage (see p28), but the extensions such as the AOCA clause are deemed (p34) to be incidents. There are six bases of settlement described as ‘Items’ (pp30) and based on one of Gross Profit, Gross Revenue, Fees, Rent receivable, Increased cost of working or Additional increased cost of working, stated only to apply if they appear in the schedule. As to the extensions, the policy states that “*Unless otherwise stated the **maximum indemnity period** in respect of each extension will be that applicable to the relevant item to which the extension applies as stated in the schedule at the time of the **incident***” (p34).
708. Accordingly, the schedule also indicates which items are applicable to each extension such as the AOCA clause. It can be assumed that the trends clause applies, as the terms to which it applies (standard turnover, standard gross revenue) feature in the main bases of settlement.
709. Here it is the ‘under-noted contingency’ that is deemed to be an incident. The same approach as is taken in Zurich 1 (Loss of Revenue or Loss of Gross Profits bases) immediately above should apply, and the points made there are repeated.

### **Zurich1 - Assumed Facts Example (Category 4)**

Business DD is a clothing business with a retail outlet in a country town, based in an enclosed town centre shopping centre. It sells outdoor clothing. It had been performing reasonably well in recent years, bucking the trend on the struggling high street. The town had its first COVID-19 case on 1 March 2020. Sales held up well and there was no downturn until 17 March. However, the shop made no sales at all on 17 March after the Government's 16 March guidance/instructions – customers simply were not shopping. DD therefore closed for in person sales on the evening 17 March but modified its business to focus on online trading. That was not particularly successful. The business was insured under Zurich1.

Zurich1's Actions of Competent Authorities clause is triggered:

- The Government's announcement on 16 March was action which prevented access to DD's premises as its customers followed the direction given by the State (and the closure by legislation on 23 March 2020 reinforced such prevention).
- Did that follow a danger in the vicinity of the premises? Yes, COVID-19 was present within the town (plainly within the vicinity for a town centre shop) before 16 March.
- Was there loss resulting from interruption or interference with the business in consequence of this? Yes, the business was interrupted by the prevention of access. The business traded online, but for a fraction of the turnover from a shop.

**G. Hiscox 1, 2 and 4 government/statutory authority action incident clause, with vicinity/1 mile provisions**

Cover

710. The Hiscox Wordings and cover clauses in issue (which are more numerous in variations and in that sense more complex than for other Defendants) are introduced above in paragraphs 329ff. As noted there, there are two slight variants to Hiscox’s denial of access clauses.

710.1. The main clause (with immaterial variations) provides as follows and appears in various Wordings including the lead wording for Hiscox1, and some of the non-lead wordings in Hiscox2 and 4:<sup>627</sup>

<b>What is covered</b>	<b>We will insure you for your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to your activities caused by:</b>
Non-damage denial of access	3. an incident occurring during the <b>period of insurance</b> within a one mile radius of the <b>insured premises</b> which results in a denial of access or hindrance in access to the <b>insured premises</b> , imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 consecutive hours;

710.2. The second (rarer) formulation, in two non-lead wordings in Hiscox2, formulates the trigger as follows:<sup>628</sup>

Non-damage denial of access	3. an incident during the <b>period of insurance</b> within the vicinity of the <b>business premises</b> which results in a denial of or hindrance in access to the <b>business premises</b> imposed by the police or other statutory authority.
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711. These clauses therefore require: (i) ‘an incident’, (ii) ‘within a one mile radius / the vicinity of the insured premises’, (iii) ‘which results in a denial of or hindrance in access to the insured premises’ (iv) which was either (a) ‘imposed by a civil or statutory authority or by order of the government or any public authority’ or (b) ‘imposed by the police or other statutory authority’.

*“Incident within a one mile radius” / “incident within the vicinity”*

712. Hiscox argues that (i) an ‘incident’ must be “... a specific, small-scale, identifiable physical event of short temporal duration and limited geographical extent”, and (ii) the requirement that the incident be

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<sup>627</sup> All Hiscox1 policies {B/6/41}, {B/36/2}, {B/37/2}, {B/38/3}, {B/39/2}, {B/40/2}, {B/41/2}, {B/42/2}; Hiscox 2 policies 16725 {B/48/2}, 7103 WD-CCP-UK-PVB(2) {B/49/2}, 7103 WD-VEN-UK-PYZ (3) {B/50/2}; and the Hiscox 4 policy 15480 {B/70/2}

<sup>628</sup> Hiscox2 policies 16258 {B/43/2} and 11431 {B/62/2}

within a one mile radius or vicinity of the premises means that “*an event which is only incidentally within and entirely or preponderantly outside the radius is not an “incident” within the radius*”.<sup>629</sup>

713. Thus Hiscox seek to impose restrictions of both duration and geographical scale on the term ‘incident’, restrictions that no reasonable reader could possibly discern.
714. ‘Incident’ is not defined and should be given its ordinary, natural meaning, which is an occurrence or an event.<sup>630</sup> It is instructive that the ‘reasonable precautions’ clause in Hiscox1-4 each provide that Hiscox will not make any payment “*in respect of any incident occurring whilst you are not in compliance with this condition*”, the word there clearly having a broad meaning so as to encompass anything leading to cover under the policy. Similarly, each of the damage covers in Hiscox1-4 have an exclusion for “*any indirect losses which result from the incident which caused you to claim*”. Because the Hiscox policies cover wide area damage (see paragraphs 352ff) the word ‘incident’ is again clearly being used in a wide and open manner (not the narrow sense of ‘*incident of loss*’). In short, a pandemic (or wide area disease or other incident) is contemplated yet neither pandemics nor the effects of a wide disease outside 1 mile / the vicinity are excluded.
715. There can be no logic for either of the restrictions. Consider ‘time’ first: what does ‘short temporal duration’ mean? Does a fire that rages for two days trigger cover, but then once the fire has continued for a week, or a month, the cover is lost (for the entire period)? Was there cover for the COVID-19 outbreak had it only lasted a shorter time? What amount of time? The nexus to the insured business premises is (as well as proximity) that the incident results in denial of access imposed by an authority. There is no logical reason to restrict the length of the incident.
716. Moreover, the words point against that. First, the denial of access must last “*for more than 24 hours*” (Hiscox 1 and 4<sup>631</sup>). So far from requiring an incident of short temporal duration, the policy only responds where the incident is not of short temporal duration. Second, the wordings all respond to the imposition of denial of access by government. Governments typically do not—indeed, cannot—respond to incidents of short temporal duration.

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<sup>629</sup> Hiscox Def paras 13.1-13.2 {A/10/4}, 80. {A/10/20}

<sup>630</sup> *The Shorter Oxford Dictionary of English* (6 edn, 2007) defines “incident” as: “*a distinct occurrence or event*”; and “occurrence” as: “*a thing that occurs, happens, or is met with; an event, an incident*” or “*the action or an instance of occurring, being met with, or happening. Also the rate of measure of occurring, incidence.*”

<sup>631</sup> Hiscox 1 {B/6/41}, Hiscox 4 policy 15480 {B/70/2}

717. As to the geographical restriction, that also makes no sense. Hiscox proposes two elements: small-scale, and it may overlap the 1 mile boundary but cannot be preponderantly outside it. Again: how does this derive from the word ‘incident’? How is the insured to ascertain this complex test of preponderance? What is its logic anyway? Once it is accepted, as Hiscox does, that the incident need not be wholly within one mile (because that would (i) be arbitrary and (ii) require the word ‘wholly’ before ‘within a one mile radius’), it has accepted that the incident can be wide area. There is nothing available from which then to imply a size limitation, or the ratio of the incident’s scope within the circle to that outside it.
718. The great fire of London would be an example of an incident occurring on a wide scale – if access to insured premises in the suburbs was hindered by authority responses to such an incident the policy would provide cover, provided the fire encroached within one mile of insured premises. The fact that the “preponderance” of the fire occurred outside the 1 mile zone would be irrelevant. An incident can be of local, regional or national scale, provided it occurs within the applicable radius.
719. As to the requirement for an “incident” in the present case, the FCA’s primary case is that there was an incident from at least (i) 3 March 2020 – when a UK Government action plan was published, quarantining was in place, and there were 176 Reported Cases in the country; (ii) 12 March 2020 – when the UK Government elevated the risk level to high, following COVID-19 being designated notifiable in the UK and characterised as a pandemic by the WHO, and a week after the first reported UK death, or (iii) alternatively such other date as the Court shall determine.<sup>632</sup> The other possible dates are matters for the Court but might include, for instance, the 21 March and/or 26 March because of the Regulations made on those dates. Plainly these events took place everywhere in the Country: this was a national incident reflecting a danger and threat to life everywhere, including within 1-mile / the vicinity of insured premises.
720. Further or alternatively, the requirement for an “incident” is satisfied by the occurrence of COVID-19 within the relevant vicinity, i.e. upon proof by the policyholder that a person with COVID-19 had been within that vicinity.<sup>633</sup> Paragraphs 358ff and Section 7 above in relation to proof of occurrence within the vicinity are repeated. Hiscox argues baldly that a person with an illness being within a distance of a location is not an ‘incident’ but gives no explanation as

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<sup>632</sup> PoC 43 {A/2/28-29}

<sup>633</sup> PoC 43 (alternative case) {A/2/28-29}

to why that is not the case.<sup>634</sup> Hiscox’s own definition of ‘incident’ is a short, small-scale identifiable physical event; why can the entrance of a person with COVID-19 into that vicinity not be such an event? No explanation is given.

721. As for the meaning of ‘vicinity’, Hiscox does not put forward a positive case on this, merely ‘not admitting’ that the meaning of ‘vicinity’ in the Hiscox policies is the same as in RSA4, *viz.* an area surrounding or adjacent to the premises in which events that occur within such area would be reasonably expected to have an impact on the insured or its business’.<sup>635</sup> This is a question of the meaning of a word within Hiscox’s own policies and clearly something which Hiscox can admit or deny. Having not put forward a positive case on the same, and on the FCA’s meaning of ‘vicinity’ being natural, clear and supportable, the FCA’s case should be accepted.

*(which results in) “a denial of access or hindrance in access”*

722. The meaning of ‘denial of access’ and ‘hindrance in access’ (a deliberately broader phrase) are clear: see Sections 6E to F, and paragraphs 498ff in relation to hindrance (Ecclesiastical).

723. Hiscox’s case is that (i) there was no denial or hindrance in access because not even the Regulations requiring the closure or cessation of businesses denied or hindered access to the premises; (ii) alternatively, there was such a denial/hindrance but only in respect of those businesses forced to close/cease; and (iii) whether or not there was an actual denial or hindrance may be a question of fact.<sup>636</sup>

724. These submissions largely mirror Hiscox’s case on the meaning of ‘inability to use the premises’ which are addressed at paragraphs 360ff.

725. Hiscox does not argue that the denial or hindrance of access must be limited to that of the insured / its employees (unlike the argument it makes on “inability of use”). It is right not to take such a point: the clause refers to a (non-specific) “*denial of access or hindrance in access to the insured premises*”, by contrast with clauses such as the damage denial of access clause in the same Wording which responds to insured damage “*which prevents or hinders your access to the insured premises*”. The denial or hindrance can relate to anyone including customers or suppliers.

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<sup>634</sup> Hiscox Def 13.1 {A/10/4}

<sup>635</sup> Hiscox Def 82.1 {A/10/21}

<sup>636</sup> Hiscox Def 13.4 {A/10/4}

*“imposed by” a public authority*

726. Hiscox argues that “imposed” requires the denial or hindrance of access to have the force of law and compliance with which is compulsory.<sup>637</sup> This again mirrors Hiscox’s case on the meaning of “imposed” within the public authority clauses and paragraphs 373ffare repeated.

#### The causal connectors and counterfactual

727. The NDDA clause requires loss *resulting solely and directly from* an interruption to activities *caused by* an incident within 1 mile / the vicinity of the premises which *results in* denial of or hindrance in access imposed by a relevant authority. The first of these two causal connectors have been addressed in detail the contest of the public authority clause at paragraphs 387ff above. In short:

727.1. The causal connection wording does no more than apply the proximate cause test, and the ‘solely and directly’ wording does not help Hiscox.

727.2. The clause expressly contemplates an underlying cause (incident, here COVID-19) triggering the public authority intervention, and it would be counter to the parties’ apparent intentions for the incident to then compete with and reduce recovery for the intervention that was responding to that incident.

728. The new connector in this Wording is that the denial or hindrance of access has to be *the result of* an incident within 1 mile / the vicinity of the premises. Hiscox’s case is that this was not the case and the denial/hindrance was “*as a result of nation-wide conditions*”.<sup>638</sup> However, both are true. All of the Government actions subsequent to their being an incident within one mile/the vicinity, led to the action.

729. The FCA has introduced the proper counterfactual, and why Hiscox’s case on it should be rejected in general terms, at paragraphs 0ff above.

730. More generally, first, and this is the jigsaw point referred to above at paragraph 240 above, the Government and indeed members of the public were responding to the accumulated totality of events relating to COVID-19 up to the date of each of their actions. Government action was a response to the presence of COVID-19 across the country. It was a response to the danger around the country, and the presence of COVID-19 around the country. If there was

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<sup>637</sup> Hiscox Def 83.2 {A/10/22}

<sup>638</sup> Hiscox Def 13.5 {A/10/5}

a case of COVID-19 within 1 mile or the vicinity of the premises then that was part of what the Government was responding to. The incident within the vicinity of the premises was part of the jigsaw that made up the government action. It would be absurd to argue that the incident was *nowhere* within the country and that if every business in the UK had cover with the same vicinity limit, then none could claim.

731. To further test the ‘something extra’ point, the NDDA clause only responds where the denial or hindrance in access is “*for more than 24 hours*”. This is (like the vicinity limit) something extra required, to avoid claims for brief interruptions of less than 24 hours. The insured retains the risk of denials of access lasting in total for less than 24 hours. But this is not a deductible.<sup>639</sup> If the denial lasts for more than 24 hours then the whole denial or hindrance to access is recoverable. The quantification machinery does not specify any deduction of the first 24 hours, and none can be achieved by a side wind by saying ‘had there not been an interruption caused by denial of access for more than 24 hours, there would have been interruption caused by denial of access for 24 hours, so the first day’s loss would have occurred anyway/was not solely and directly caused by the insured interruption’. The cover being triggered, the loss must then be quantified, without unrealistically seeking to apply a limited view of the insured peril so as to have the effect of operating as an exclusion of all losses that would have resulted had any of the cover requirements not been satisfied. This example demonstrates that excising from what actually happened the minimum that triggers the peril is the wrong approach; the peril must be excised with all its realistic incidents to produce the world as it would in fact have been without the peril.

#### The quantification machinery

732. All the Hiscox quantification machinery and trends clauses have been addressed at paragraphs 398ff above.

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<sup>639</sup> Contrast the drafting of e.g. the exclusion in the PoA clause in MSAmIn3 which does operate as a deductible: “*but excluding (i) the first 6 hours of any interruption or interference*”. {B/12/50}

### **Hiscox1-4 – Assumed Facts Example (Category 4)**

Business DD is a retail clothing outlet popular with young people. It trades at one location in a shopping district within a rural market-town. It has no on-line business. There was no loss of sales prior to 16 March 2020. After 16 March 2020 it restricted entry to the shop to maintain social distancing and sales dropped over 50%, which was not financially viable. The outlet closed its doors on the morning of 24 March 2020 in accordance with the Government announcement on 23 March 2020. It has never traded on-line and decided this was not feasible during lockdown given the nature of its business, which was as a destination boutique. There were reported COVID-19 cases by mid-March within 1 mile and/or at 25 miles of the outlet (the true figure being much higher).

The Hiscox 1-4 (lead policies) public authority/disease wordings are triggered:

- The business has sustained financial loss resulting solely and directly from interruption to its activities. DD had continued to trade, unprofitably, between 17 March and 23 March but it had no option but to close from 24 March. No customer or prospective customer was allowed to enter the insured's premises from 26 March. DD could make no further sales from that point.
- The interruption began from 17 March once the Government instructed all members of the general public to stay at home and socially distance. There was partial inability to use the premises thereafter until that inability became total from 24 March, alternatively 26 March, onwards. However, from 17 March DD had been unable to use the shop, as it ordinarily would, in a profitable manner and could not use it from that date in a financially viable way.
- The inability to use the premises for business purposes was due to restrictions imposed by a public authority - the Government's actions and advice from 16 March and the 26 March Regulations.
- This followed multiple occurrences of COVID-19 (within 1 mile for Hiscox 4).
- Accordingly, there is cover for losses sustained from 17 March.

Further or alternatively, the non-damage denial of access clause is triggered for Hiscox 1, (some Hiscox2 policies) and Hiscox4 policies:

- From 16 March there was (at the very least) a hindrance of access to DD's premises (and a denial of access from 26 March), imposed by civil or statutory authority or by order of government or public authority for more than 24 consecutive hours.
- The denial of access and hindrance was the result of an incident within a one mile radius of the premises, namely the occurrence of COVID-19 either as part of a single national outbreak, or, alternatively a concurrent cause within the jigsaw of causes to which the Government responded.
- Accordingly, there is cover for losses sustained from 17 March.

## H. MSAmlin1-3 civil authority danger/threat wording, vicinity/1 mile provisions

### Introduction

733. MSAmlin1-3 have different forms of prevention of access clause, each with slightly different requirements. All prevention of access clauses were either “*provided as standard*” or “*automatically included*” with the BI cover (as is stated at the start of the extensions). MSAmlin1-3 are standard form contracts.
734. MSAmlin1 it is a general commercial combined policy and appears to have covered policyholders in Category 3<sup>640</sup> (and possibly Category 4 and others).
735. MSAmlin2 was issued in several forms, to suit Retail (Categories 3 and 4), Leisure (Categories 1 and 2) and Office and Surgery (Category 3) business.
736. MSAmlin3 was a specialist cover for forges (Category 5).
737. Each MSAmlin Policy included a reasonable precautions clause, requiring policyholders “*to take, practical steps to prevent further damage or bodily injury, recover property lost and otherwise minimise the claim*” and provided that “*If you fail to do so we may not pay your claim, or any payment could be reduced.*”<sup>641</sup> This obligation operated in addition to policyholders’ duties of care to their employees and to the public.

### Cover- MSAmlin1

738. MSAmlin1 includes the following insuring provision:

**We will pay you for:**

**1. Action of competent authorities**

loss resulting from interruption or interference with the **business** following action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the **premises** where access will be prevented provided always that there will be no liability under this additional cover for loss resulting from interruption of the business during the first 24 hours of the **indemnity period**.

**We will not pay more than £50,000** under this additional cover for a period not exceeding 12 weeks.

739. The requirements of this clause are similar to those required by the Zurich1-2 “Action of Competent Authority” clause referred to above.

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<sup>640</sup> Predominantly Category 3 according to MSAmlin Def, para 47 {A/9/20}

<sup>641</sup> MSAmlin1-3, Claims Condition 3(f) {B/10/22}, {B/11/23}, {B/12/23}

*“danger or disturbance in the vicinity of the premises”*

740. MSAmclin contend that “[a] *danger within the meaning of MSA1 Clause 1 requires an acute risk of harm from something specific happening.*”<sup>642</sup> However, it also admits that “[e]ach of the presence and/or the real risk of the presence of SARS-CoV-2 and/or of COVID-19 amounted to an emergency which could endanger human life from 12 March 2020 onwards.”<sup>643</sup>

741. The FCA’s general submissions on ‘danger’ appear in Section 6I (also paragraph 608 above in relation to RSA2). Further:

741.1. The pandemic was a nationwide emergency arising out of a highly contagious disease with a serious risk of fatality if contracted. It affected (and continues to affect) the entire country. Anyone leaving their homes had to take precautions to avoid infection and keep their distance. The risk of contracting COVID-19 was, from at least 3 March 2020 or, alternatively, 12 March 2020 or such other date as may be determined, a danger everywhere in the UK (i.e. in the vicinity of any UK premises).<sup>644</sup> From 12 March 2020 onwards this conclusion is supported by MSAmclin’s admission that the real risk of the presence of SARS-CoV-2 and/or of COVID-19 amounted to an emergency which could endanger human life from that date.

741.2. Alternatively, the requirement for a “danger” can be satisfied by proof of the occurrence of COVID-19 within the relevant vicinity, i.e. upon proof by the policyholder that a person with COVID-19 had been within that relevant vicinity (as to which approach to proof in Section 7 (Prevalence of COVID-19 in the UK) is relevant).

742. MSAmclin seeks to reduce the relevant area of “*in the vicinity of the premises*” by rewriting it as “*in the immediate locality of the premises*” (MSAmclin Defence, paragraph 51, emphasis added). It asserts that there was no such danger anywhere in the UK prior to 12 March 2020. That is quite extraordinary considering that by 12 March 2020 there were already 590 reported cases of COVID-19, a far higher number of actual cases, and there had been nine deaths. After 12 March 2020 it alleges “*it is a question of fact to be determined in each case having regard to the location of the insured premises whether and, if so, when there was first a danger in the vicinity of such premises.*”<sup>645</sup>

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<sup>642</sup> MSAmclin Def, para 51 {A/9/21}

<sup>643</sup> MSAmclin Def, para 35 {A/9/18}, emphasis added.

<sup>644</sup> PoC, para 43 {A/2/28}

<sup>645</sup> MSAmclin Def, para 51 {A/9/21}

743. “Vicinity” is not defined by the policy and is not a precise term. In this context, it should be construed as extending beyond the “immediate locality” to such surrounding area as would be reasonably expected to have an impact on a policyholder or the policyholder’s business. Take for example a Category 3 hardware/DIY store in Birmingham’s city centre. If its customers came from throughout Birmingham city and suburbs that would be the appropriate vicinity and it would inevitably be able to establish a danger in the vicinity prior to the actions taken from, 16 March 2020. See further paragraphs 653ff above. In this context, it is notable that MS Amlin is well able to specify immediate vicinity where that it was intended, as in the Debris removal clause in MS Amlin1 which refers to “the area immediately adjacent” (p35) or the welding clause which refers to “the immediate vicinity” (p85 and 86).

*“action by the police or other competent local, civil or military authority”*

744. ‘Action’ is addressed at Section 6B above. Virtually the same wording is addressed in the FCA’s submission on Zurich1-2 above.

745. MS Amlin accepts that the UK Government and Parliament falls within ‘competent local, civil or military authority’ but contends that this only applies *“if and when exercising authority over the location of the premises.”*<sup>646</sup>

746. This is the equivalent of an unpleaded implied term and unjustified by any of the express words. Provided the action takes effect within the specified vicinity, there is no basis for implying that action with a nationwide effect cannot fulfil this requirement. The clause does not even specify that the action (rather than the danger) must be in the vicinity, let alone that it must only be in the vicinity. Excluding nationwide action would disregard the obvious possibility, which the parties should be taken to have contemplated, that action may be taken at a legislative level during emergency situations, particularly for dangers affecting numerous local areas. The government has specific legislative powers to intervene in this way,<sup>647</sup> as were in fact exercised when tackling the COVID-19 pandemic. The COVID-19 advice, guidance and legislation was plainly action by a civil authority. The broad words of the clause are clearly sufficiently wide to encompass such measures.

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<sup>646</sup> MS Amlin Def, para 50 {A/9/21}. See also paras 69-70 {A/9/28}. The action taken by the various authorities pleaded in paragraph 18 of the PoC {A/2/7-13} is admitted, subject to limited exceptions in paragraph 15 of MS Amlin Def and subject to its case as to what constitutes a public authority response: para 15.1 of MS Amlin’s Def {A/9/7}

<sup>647</sup> Including, for example, the powers to legislate under the Public Health (Control of Diseases) Act 1984 {J/5}. Powers are also available under above Civil Contingencies Act 2004 {J/8} – see paragraph 30 above. The breadth of the clause is not constrained by any particular statutory powers available under these statutes.

*“where access will be prevented”*

747. MSAmclin contends that “access will be prevented” only where access is not physically possible, and that this will not be achieved *“where (i) physical access is merely made harder or is hindered; and/or (ii) use of the premises is restricted or not legal.”*<sup>648</sup>
748. This is a wholly unrealistic construction. The FCA’s submissions on prevention (at Section 6E above) are repeated. ‘Prevention’ of access:
- 748.1. includes prevention of access in whole or in part;
  - 748.2. includes prevention of access for specific purposes required by the insured business (e.g. for its customers to make to purchases);
  - 748.3. does not require any physical element or legal restraint. If the practical effects of action taken prevent access in whole or part, the requirement is satisfied.
749. In the alternative, MSAmclin argue that if *“access could be prevented by legal impediment to the use of the premises for the business”*, that the requirement is met only for businesses on listed on Part 2 of Schedule 2 to the 21 March Regulations and 26 March Regulations, since all other businesses were permitted to stay open for some (or all) purposes.<sup>649</sup>
750. This is wrong. For example, in the case of the hardware store, once the Government had imposed restrictions on 16 March 2020 and also once it had supplemented them by regulations 6 and 7 of the 26 March Regulations which prevented people leaving home without a specified “reasonable excuse”, no customer could visit the hardware store either at all or save in exceptional circumstances. Those measures was just as effective in preventing access to the hardware store by customers as placing police tape across the entrance door. This was sufficient to be a prevention of access, even if technically employees were permitted to travel to work in the store. It is the substance and effect of the action which must be judged, not the form it took.

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<sup>648</sup> MSAmclin Def, para 49.2-49.5 {A/9/21}

<sup>649</sup> MSAmclin Def, para 55 {A/9/22}. On its alternative case, prevention is accepted for Category 2 businesses but not any other business – see paras 58-60 {A/9/23-25}

*“interruption or interference”*

751. It follows from the above that for businesses to which access was prevented in the sense the FCA contend for above (from 16 March 2020, or such subsequent date as may be determined by the Court):

751.1. there was interruption to or interference with the business following the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC paragraph 18.

751.2. additionally, there was interruption to or interference following prevention in access to premises for businesses in Categories 1, 2, 4, 6 and 7, from 20, 21, 23, 24 and/or 26 March 2020, as pleaded in PoC paragraph 47.

#### Cover - MSAmclin 2

752. The MSAmclin2 prevention of access clause provided an indemnity against

8. **Prevention of access – non damage**

**your** financial losses and other items specified in the schedule, resulting solely and directly from an interruption to **your business** caused by an incident within a one mile radius of **your premises** which results in a denial of access or hindrance in access to **your premises** during the **period of insurance**, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 hours.

We will not pay under this clause more than 5% of the sum Insured or **£250,000** whichever is the lesser for any one loss

753. For the Leisure and Retail policies cover under this clause is limited to 5% of the sum Insured or £250,000 (whichever is the lesser) for any one loss, while under the Office and Surgery policy cover is limited to the amount specified in the relevant schedule.

*“an incident within a one mile radius of your premises”*

754. MSAmclin2 requires an “incident” within a one mile radius of the insured property. MSAmclin contends that an “incident” means a “... a distinct and specific happening”<sup>650</sup>, and that an incident is “... not a mere state of affairs and it is not something which forms part of the generality of a situation to

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<sup>650</sup> MSAmclin Def, para 75.4 {A/9/30}

*which the government might respond: the distinct and specific happening must specifically cause the qualifying authority to deny or hinder physical access to the premises”.*<sup>651</sup>

755. The FCA’s case is that the arrival and spread of the pandemic in the UK was an incident affecting the whole of the UK. Alternatively, the occurrence of a COVID-19 case within 1 mile of the insured premises was an incident. These are clearly “*distinct and specific*” happenings, albeit of differing scale and duration. MSAmclin’s objection seeks to impose a time limit on the duration of an incident where there is none. The outbreak of COVID-19 is simply an incident with a lengthy duration. Given that the indemnity period for this cover has no separate limit, the cover contemplates that some incidents may be prolonged in nature (bearing in mind that access would usually be restored when an incident is over). The objection based on the duration of the incident should be rejected.

*“imposed by any civil or statutory authority or by order of the government or any public authority”*

756. MSAmclin contends that this requires “... *any denial of or hindrance in access to be imposed by civil or statutory authority or by order of the government or any public authority means that nothing short of legislation or legally enforceable requirement could suffice.*”<sup>652</sup>

757. This issue is addressed above in Section 6C above. Any instructions by the Government, including on 16 March 2020 to “stay at home”, were authoritative and in imperative terms, and amount to orders of the government and were imposed and were rightly understood as such by the populace.

*“denial of access or hindrance in access”*

758. MSAmclin contends that the requirement for “denial of access or hindrance in access” is a requirement that “... *denial of or hindrance in access to the premises will only occur where physical access is impossible or inhibited, but not where the mere use of the premises is legally restricted or proscribed.*”<sup>653</sup> Further, it is pleaded that “*None of the government’s legislation (nor, if relevant, guidance, advice, exhortation, encouragement and/or instructions) had the effect of denying or hindering physical access.*”<sup>654</sup>

759. This is simply wrong. Physical barriers are not the only means of denying or hindering access. In the case of the hardware store, the Government’s 16 March restrictions and the prohibition

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<sup>651</sup> MSAmclin Def, para 75.5 {A/9/30}

<sup>652</sup> MSAmclin Def, para 75.7 {A/9/31}

<sup>653</sup> MSAmclin Def, para 75.6 {A/9/30}

<sup>654</sup> MSAmclin Def, para 76 {A/9/31}

on members of the public leaving their homes without reasonable excuse, followed up by the 26 March Regulations, clearly had the effect of denying or hindering their access to the store. See sections 6E to F above.

*“interruption”*

760. MS Amlin contends that *“interruption”* requires a complete cessation of the business.<sup>655</sup>

761. The FCA’s case is there is no requirement for there to have been a complete cessation of the business conducted at the premises for it to have been subjected to interruption. An element of cessation in terms of operations is all that is required. For example, if a hardware store ceases to operate for walk-in customers but opens a remote delivery service, there would be sufficient cessation in operations. If a business was ordered to close one of two manufacturing lines in a factory it would be an abuse of language to suggest that its business had not been interrupted. See section 6H above.

762. It follows from the above that for businesses to which access was denied or hindered in the sense discussed above (from 16 March 2020, or such subsequent date as may be determined by the Court):

762.1. there was interruption to the business caused by the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18.9, 18.14, 18.15(b), 18.16-24 and 18.26<sup>656</sup>.

762.2. additionally, there was interruption of businesses caused by a denial of or hindrance in access to the premises for businesses in Categories 1, 2, 4, 6 and 7, from 20, 21, 23, 24 and/or 26 March 2020, as pleaded in PoC 47.

Cover - MS Amlin 3

763. The MS Amlin3 prevention of access cover indemnifies against:

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<sup>655</sup> MS Amlin Def, para 75.3 {A/9/30}

<sup>656</sup> PoC 18.9 {A/2/9}, 18.14 {A/2/10}, 18.15(b) {A/2/10}, 18.16-24 {A/2/11-12} and 18.26 {A/2/13}

1) **Prevention of access**

Loss resulting from interruption of or interference with **your business** because of

- a) **damage** as insured by this section resulting from **damage** to property in the vicinity of the **premises** which will prevent or hinder the use of the **premises** or access thereto whether **your property** at the **premises** will be damaged or not; and
- b) action by a competent public authority following threat or risk of **damage** or injury in the vicinity of the **premises** which will prevent or hinder use of the **premises** or access to them whether **your property** will be damaged or not

is included but excluding

- i) the first 6 hours of any interruption or interference ; or
- ii) any interruption or interference with **your business** because of outbreaks of either foot & mouth disease or avian flu.

*“threat or risk of damage or injury in the vicinity of the premises”*

764. MSAmmlin states in its Defence that it has received no claims under this form of policy.<sup>657</sup> It is not known whether claims may emerge due course.

765. MSAmmlin admits that COVID-19 is an “injury”,<sup>658</sup> but contends that there “... *was no threat or risk of injury anywhere in the UK prior to 12 March 2020. After 12 March 2020, it is a question of fact to be determined in each case...*”,<sup>659</sup> and that “[t]he threat or risk of injury must be a specific threat or risk of injury referable specifically to the vicinity of the premises”<sup>660</sup> ... “*general countrywide threat or risk of injury attracting indiscriminate central government action which has no specific reference to the vicinity or to anything specifically happening in the vicinity is not covered.*”<sup>661</sup>

766. The FCA’s case as to the threat or risk is the same as its case for “danger” under MSAmmlin1, which is repeated. There is no justification for adding the words ‘specific’ (a word used frequently in the Wording, although not here) to ‘threat or risk of injury’, especially ‘referable specifically to the vicinity of the premises’. ‘Threat or risk’ merely mean that the ‘injury’ need not be suffered and that a chance of it being suffered suffices. It is similar to ‘danger’ although if anything more relaxed. And MSAmmlin rightly does not dispute that contracting and dying of COVID-19 are not ‘injuries’.

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<sup>657</sup> MSAmmlin Def, para 93 {A/9/34}

<sup>658</sup> MSAmmlin Def, para 87 {A/9/33}

<sup>659</sup> MSAmmlin Def, para 89 {A/9/33-34}

<sup>660</sup> MSAmmlin Def, para 88.2 {A/9/33}

<sup>661</sup> MSAmmlin Def, para 88.3 {A/9/33}

767. The real risk of the presence of SARS-CoV-2 and/or of COVID-19 was the threat or risk of injury, which was throughout the UK, including therefore the vicinity of the premises. MSAmliin’s case that there was no threat or risk of injury prior to 12 March 2020 is difficult to comprehend, given that over 400 people were known to have tested positive in England alone, it was known to be contagious and had been made notifiable, and *people had in fact* died of it. The FCA’s case that there was a threat or risk since at least 3 March 2020 is to be preferred.<sup>662</sup>

*“action by a competent public authority”*

768. MSAmliin admits that the Government and Parliament is a competent public authority within the meaning of MSAmliin3 Clause 1.<sup>663</sup> It appears to admit that they took action (although disputes that it was ‘following’ a risk in the vicinity).<sup>664</sup> However, it denies that such authorities *“took action following any specific threat of risk of injury in the vicinity”* nor *“which had the effect of preventing or hindering the use of the premises or access to them by any Insured operating a business of a type covered under MS43.”*

769. Thus it appears to be common ground that the Government took action, the issue merely being whether there this was ‘following the’ sufficient *“specific threat of risk of injury in the vicinity.”* The FCA’s submission on this issue is the same as for *“action by the police or other competent local, civil or military authority”* in respect of MSAmliin1 above.

*“prevent of [sic] hinder use of the premises or access to them”*

770. MSAmliin takes a very narrow view of the meaning of the word “prevent”.

771. MSAmliin accepts that *“[u]se of and/or access to the premises is hindered where it is made more difficult or is inhibited, and whether the difficulty or inhibition applies to the Insured and/or to its employees and/or to its customers.”*<sup>665</sup> This much is common ground.

772. However, MSAmliin contends that neither *“..access to nor use of the premises is prevented unless it is rendered physically (in the case of access and use) or legally (in the case of use) impossible.”*<sup>666</sup>

773. The FCA’s submission on this issue is the same as for *“where access will be prevented”* in respect of MSAmliin1 above.

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<sup>662</sup> PoC para 43 {A/2/28}

<sup>663</sup> MSAmliin Def, para 92 {A/9/34}

<sup>664</sup> MSAmliin Def, para 92 {A/9/34}

<sup>665</sup> MSAmliin Def, para 88.5 {A/9/33}

<sup>666</sup> MSAmliin Def, para 88.4 {A/9/33}

*interruption/interference*

774. It follows from the above that for businesses to which access was prevented or hindered in the sense discussed above (from 16 March 2020, or such subsequent date as may be determined by the Court) there was interruption of or interference with the business, because of action which prevented or hindered access or use of the premises by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and/or home-working as pleaded in PoC 18 and 46.<sup>667</sup>

Causal connectors and the counterfactual

*MSAmlin1*

775. The PoA clause in MSAmlin1 requires loss *resulting from* interruption or interference with the business *following* action by the police or other competent local, civil or military authority *following* a danger or disturbance in the vicinity of the premises *where* access will be prevented.

776. Before engaging with the detail, the core point is this: it is entirely contrary to what the parties could have intended from the wording in MSAmlin1 for MSAmlin, in a situation in which COVID-19 was the danger leading to Government action interrupting or interfering with the insured's business (all of the above cover triggers, it must be assumed for these purposes, having been satisfied) to be able to resist cover on the following basis:

“Covid-19 nationally and internationally was a proximate cause of all losses suffered. If it was the sole proximate cause, there is no cover for any Insured under any of the relevant policies because Covid-19 *per se* is not an insured peril.”<sup>668</sup>

777. There is nothing in the words used that licenses a distinction between an insured peril and a *per se* insured peril. There is nothing that indicates that if the danger that forms part of the trigger has other effects then even though cover is triggered the insured will not recover.

778. Turning to MSAmlin's case, it is that<sup>669</sup>:

778.1. “*Covid-19 nationally and internationally*” was a proximate cause of all losses and may have been the sole proximate cause,

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<sup>667</sup> PoC 18 {A/2/7-13}, 46 {A/2/30}

<sup>668</sup> MSAmlin Def para 100.1 {A/9/36}

<sup>669</sup> MSAmlin Def para 100 {A/9/35}, 104 {A/9/37}, and for MSAmlin2-3 {B/11}, {B/12}; MSAmlin Def paras 119 {A/9/43} and 125 {A/9/45}

- 778.2. *“the response to Covid-19 of individuals... and businesses?”* including the decisions of customers and suppliers and the economy generally is likely to have been a proximate cause of *“at least a material proportion of the losses suffered by many, possibly most, Insureds in most situations, regardless of any relevant government action of any kind”*, and may have been the sole proximate cause,
- 778.3. the only recovery can be for loss which would not have occurred but for the defined government action/order (the insured peril) and of which that was a proximate cause, and
- 778.4. the appropriate counterfactual is that there is no Government action whereby access was prevented but all other factors remain unchanged including: other action of the Government or other public authorities, the danger in the vicinity, danger outside the vicinity, COVID-19 and its economic effects.<sup>670</sup>
779. As explained in relation to the disease clause below at paragraphs 893ff, ‘following’ is a relaxed causal nexus. In this Wording, the parties have therefore chosen a deliberately relaxed nexus for all trigger stages other than the last stage linking interruption or interference and loss (which is ‘resulting from’). Further, the present circumstances clearly satisfy these ‘following’ nexuses: the COVID-19 danger is what led to civil authority action. The danger everywhere in the country led to action everywhere. The danger in the vicinity was part of that ‘danger everywhere’ that led to the action, and easily satisfies the ‘following’ test (which, contrary to MS Amlin’s case<sup>671</sup>, does not import a ‘but for’ approach), as does the link between the interruption and that action.
780. As to the final causal nexus, the loss (and in any event, some of the loss, such that cover is triggered) did result from the interruption or interference, in a ‘but for’ and proximate cause sense. This does not (in this cover with a a £50,000 limit and a mere 12 week indemnity period limit) contemplate or require in each and every or even in any case the type of complex case-by-case analysis separating out the government action from the other things MS Amlin puts forward as causes (other public authority action, voluntary reactions to the danger, the danger outside the vicinity).
781. The question is whether the loss resulted from the interruption or interference, with the interruption or interference being interlinked with the underlying cause on which it is expressly

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<sup>670</sup> MS Amlin para 118-9 {A/9/43}

<sup>671</sup> MS Amlin Def para 111.3 {A/9/40}

premised, similarly for the ‘but for’ test. The clause contemplates a danger, and a danger that might extend outside the vicinity. The government action triggers cover but does not circumscribe the limits of the counterfactual. For causation purposes the insured peril and proximate and ‘but for’ cause is the single, indivisible, entire danger everywhere. This is a matter of construction as to what the parties can reasonably be understood to have intended by the words used (simply: ‘loss resulting from’). The discussion of this issue above in relation to Hiscox, Arch and the other Defendants is repeated.

*MSAmlin2*

782. The PoA clause in MSAmlin2 requires loss *resulting solely and directly from* interruption with the business *caused by* an incident within a one-mile radius of the premises *which results in* a denial of or hindrance in access to the premises, imposed by any civil or statutory authority or by order of the government or any public authority.
783. This is not linear but rather a split requirement tracing back to the incident: the incident within one mile must (i) have caused an interruption (which solely and directly results in loss) and (ii) have resulted in denial or hindrance in access imposed by government order.
784. MSAmlin’s main focus here is on the ‘solely and directly’ wording: Defence paragraphs 4.1(b)(i), 100.5, 109 and 123-4<sup>672</sup>. Its case is that that wording provides that there is no intention to insure for loss proximately caused (concurrently or otherwise) by anything but the insured peril, namely the incident within one mile.
785. However, the solely and directly wording does not link the incident within one mile with anything, but rather only the interruption with the loss. And plainly, once it has occurred, all interruption did solely and directly result in loss.
786. The PoA wording is identical to the Hiscox1-4 DoA clauses (see section 9A above) and the same analysis applies here.
787. Further, on MSAmlin’s approach there can be no recovery under either the 25 mile disease clause (considered below in Section 10J) or the PoA clause even where there was a disease amounting to a danger that was solely within one mile, because neither the disease within one mile nor the danger within one mile were ‘but for’ or sole proximate causes of loss.

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<sup>672</sup> MSAmlin Def paras 4.1(b)(i) {A/9/3}, 100.5 {A/9/36}, 109 {A/9/39} and 123-4 {A/9/44}

*MSAmlin3*

788. The PoA clause in MSAmlin3 (the only cover clause in this Wording relied on by the FCA) requires loss *resulting from* interruption of or interference with the business *because of* action by a competent public authority *following* threat or risk of damage or injury in the vicinity of the premises *which will* prevent or hinder use of the premises or access to them.
789. As with MSAmlin1-2, the policy provides a range of non-damage BI additional covers. This includes, in each case up to £100,000, loss resulting from failure of electricity, gas or water supply at the premises, or from damage to the premises of suppliers or customers.
790. There is no disease clause in the policy, but the PoA clause expressly contemplates that it will be engaged in situations of disease because it includes an exclusion for “*any interruption or interference with your business because of outbreaks of either foot & mouth disease or avian flu*”. The exclusion of only a sub-set of diseases shows that public authority action following any other diseases is covered, provided the ‘threat or risk of... injury’ that the disease gives rise to includes a threat or risk of injury in the vicinity of the premises.
791. Again, the use of the words ‘because of’, ‘following’ and ‘which will’ in the connections in the chain of trigger events did not intend any particular technical test, save that ‘following’ imports a loose connection required between the threat/risk in the vicinity and the action (see further paragraphs 325.3 and 386 above, and the discussion of MSAmlin1). The selection of that link in the chain (between the threat in the vicinity and action) is significant and indicates that there is no intention to assess to what extent the public authority action was also caused by the threat or risk outside the vicinity. That test is satisfied here: the UK COVID-19 outbreak is the threat or risk, which was in the vicinity just as it was everywhere in the UK (see paragraphs 610 and 657ff above), the action was (and expressly) a response to and so ‘following’ that threat.
792. The other tests (‘did’ the action prevent/hinder access/use, was the prevention/hindrance ‘because of’ the Government action) are similarly satisfied.
793. As to the counterfactual, see further the discussion immediately above in relation to MSAmlin1-2.

The quantification machinery: MSAmlin1-3

794. Using MSAmlin1 for page numbers, although materially the same arises in MSAmlin2-3, Section 6 (p59) provides cover for business interruption. After giving definitions, it provides

cover for loss resulting from property damage, stating under the heading “Insuring Clause” (on p60) that it provides cover for interruption or interference resulting from damage to property used at the premises. Next, the bases of settlement clauses A to D (on p60-62) provide that the insurer will pay for loss of gross profit, additional cost of working, rent receivable, book debts and accountants’ charges. The loss of gross profit clause provides that the insurer will pay for reduction in turnover, being the amount by which the turnover in the indemnity period “*will following the **damage** fall short of the **standard turnover***”. Standard turnover is itself defined as being

“The **turnover** during that period in the 12 months immediately before the date of the **damage** which corresponds with the **indemnity period** to which adjustments will be made as necessary to provide for the trend of the **business** and for variations in or other circumstances affecting the **business** had the **damage** not occurred, so that the figures adjusted represent as nearly as may be reasonably practicable the results which but for the **damage** would have been obtained during the relative period after the **damage**” (p59).

795. The policy then goes on to state, under the heading “*Additional cover – provided as standard*” (on p66), that “*We will pay you for*” 13 items, which include the DoA and disease extensions.

796. Importantly, while this is “*additional cover*” for which the insurer will “*pay*”, there is no reference to the application of the basis of settlement clause (which in terms only applies to property damage), nor do the PoA or disease clauses include any such reference back. Absent such a reference to that quantification machinery, and given that that machinery in its terms does not apply to the non-damage extensions, the extensions are self-contained. Where necessary, the extensions provide for their own quantification machinery (*e.g.* extension 5 Lottery win, extension 8 Professional accountants).

797. The same is true in MSAmIn2 of extension 5 Lottery win, extension 10 Rent of residential property, and extension 15 Tronc payments. Indeed, that final extension (on p49) insures against a reduction in tronc payments (pay arrangements used to distribute tips, gratuities and service charges), and expressly provides its own trends clause:

The amount we will pay will be based on the estimated reduction of tronc payments during the **indemnity period** including adjustments 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 **damage** or which would have affected the **business** had the damage not occurred, so that the figures adjusted represent as nearly as may be reasonably practicable the results which but for the **damage** would have been obtained during the relative period after the **damage**

798. There is no need or licence to read the primary cover quantification machinery and trends clauses as applying to the extensions (whether be rewriting ‘damage’ or otherwise).<sup>673</sup>
799. This leaves as to the quantification machinery:
- 799.1. for the PoA clause in MSAm1in1 the words “*loss resulting from interruption or interference with the business following*” up to £50,000 and 12 weeks;
- 799.2. for the disease clause in MSAm1in1 the words “*consequential loss as a result of interruption or interference following*” up to £100,000;
- 799.3. for the PoA clause in MSAm1in2 the words “*financial losses and other items specified in the schedule, resulting solely and directly from an interruption caused by*” up to £250,000; and
- 799.4. for the disease clause in MSAm1in2 the words “*consequential loss following*” with no sub-limit.
800. The disease clauses respond to ‘consequential loss’, a defined term requiring property damage (p.12). It is accepted that this clause cannot be intended to require property damage. No such need to manipulate the words used arises under the PoA clause as the merely refers to undefined ‘loss’ or ‘financial losses’.<sup>674</sup>
801. The quantification of loss/financial loss ‘resulting from’ or ‘as a result of’ or ‘following’ the interruption or interference is at large. The £50,000 / £100,000 limited-clauses are intended to be satisfied merely by proof of the amount by which the revenue of the business when uninterrupted was greater than the revenue during the period which was interrupted/interfered with, or access prevented. It is not possible to import a but for test by reference to the insured peril or any other particular concept other than, perhaps, the interruption or interference itself. This points towards a counterfactual without technical excisions of any part of the insured event, but rather removing the entire event, danger/disturbance, action, prevention and all.
802. The same applies to the DoA clause in MSAm1in2 with the ‘solely and directly’ wording, discussed above in relation to Hiscox at paragraphs 387ff above.

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<sup>673</sup> Contrary to MSAm1in Def paras 116.1 {A/9/42}, 122 {A/9/44}, 126 {A/9/45}, 130 {A/9/46}

<sup>674</sup> The disease clauses also provide as a Condition that the insurer will only be liable for the loss arising at those premises “*which are directly affected by the loss, discovery or accident*”. The meaning of these words is discussed below in relation to Argenta at paragraphs 931ff.

803. Even if the trends clauses do in fact apply, there are two answers to the counterfactual raised by insurers:

803.1. First, the Court needs to interpret what events are to be captured in the (underlined) words ‘trend of the business and... variations in or other circumstances affecting the business’ (contained in MSAm1in1 and MSAm1in2 (Leisure) and MSAm1in2 (Retail)). MSAm1in argues this is every conceivable event. That is not right: ‘circumstances’ takes its meaning from its surrounding words, ‘trend’ and ‘variation’, both of which are narrow and refer to ordinary business vicissitudes. ‘Circumstance’ needs to be read in that context, *i.e.* as encompassing only ordinary business vicissitudes.

803.2. Second, MSAm1in2 (Offices & Surgeries) uses a different trends clause (on p.41): “*We will adjust the figures as necessary to provide for trends or special circumstances affecting the business before or after the damage or which would have affected the business had the damage not occurred*”. Elsewhere, in the ‘basis of settlement (A)’, this policy uses the words “*trends...and any other factors*” (p42). The words ‘trends or special circumstances’ clearly do not encompass every event under the Sun – that gives the words ‘trend’ and ‘special’ no meaning at all. The phrase ‘any other factors’ also has to take its meaning from its collocation with the word ‘trends’. All these words mean, as above, ordinary business vicissitudes.

803.3. Third, and in any case, the flaws in MSAm1in’s approach are apparent when considering the situation where there is cover under both the disease and PoA clauses. MSAm1in argues that (i) the appropriate counterfactual under the disease clause assumes a PoA,<sup>675</sup> and (ii) the appropriate counterfactual under the PoA clause assumes disease.<sup>676</sup> This is self-evidently absurd. Assume a hypothetical policy in which every possible cause of a policyholder’s losses due to COVID-19 was an express but separate peril. MSAm1in would argue that the application of the trends clause would mean that there was no recovery: but for the disease there would have been advice, but for the advice there would have been adverse consumer behaviour, but for the adverse consumer behaviour there would have been travel restrictions, *etc.* This is not what would have been intended. In fact, what was intended was the peril(s) and fortuities explicitly or implicitly contemplated by the insuring provision did not occur.

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<sup>675</sup> MSAm1in Def para115.2 {A/9/41}

<sup>676</sup> MSAm1in Def para119.2-119.3 {A/9/43}



### **MSAmlin1 - Assumed Facts Example (Category 3)**

A hardware store Business CC operates from a city centre. CC's customer base consists of local residents, businesses and commuters from the suburbs. The appropriate vicinity is the city and its suburbs. There was an upturn in business between 1 March 2020 and 17 March 2020 – people were keen to stock up on DIY essentials. CC suffered a sharp downturn from 17 March principally because of the PM's work from home guidance of 16 March. Turnover virtually halted after 26 March. It closed on 13 April to cut its costs. No customers could access the premises (other than for necessities) from 26 March due to the lockdown on non-essential travel – although in substance numbers had dropped substantially since the 16 March guidance. The city had its first reported COVID-19 case on 3 March 2020.

Cover under MSAmlin1 is triggered from 17 March on basis that:

- There was a danger of SARS-Cov-2 and/or COVID-19 in the vicinity.
- There was government action following that danger which applied in the vicinity (and nationwide).
- Customers followed the government's advice by staying home (from 16 March) and (from 26 March) could not access the shop save in exceptional circumstances due to the effect of Regulation 6 of the 26 March Regulations, albeit the shop was permitted to stay open. Access was thus prevented.
- Losses are recoverable subject to the £50,000 limit and 12 week indemnity period, with no "but for" trends reduction.

## 10) SPECIFIC WORDINGS 2: DISEASE CLAUSES

### I. QBE1-3 disease wording, 25 mile/1 mile provision

804. It is agreed that the seven QBE wordings (four under QBE1, two under QBE2, one under QBE3) were all standard form wordings sold through brokers to SMEs (and others).<sup>677</sup> QBE avers that the types of wordings are designed for “*particular commercial circumstances and/or industries (e.g. for nightclub owners/operators)*”,<sup>678</sup> and the names and some of the terms would suggest that some were aimed at a wide range of businesses,<sup>679</sup> some for office-based professional businesses which may be predominantly Category 5 (which were not ordered to close but affected by work-from-home orders etc),<sup>680</sup> and some for Category 2 leisure businesses such as nightclubs (which were all closed),<sup>681</sup> but QBE (unlike Arch<sup>682</sup>) has not sought to specify what categories wrote policies on which Wordings and accordingly it must be assumed that all Categories are affected.<sup>683</sup>
805. The three QBE Wording types each contain a disease clause by way of an extension for ‘Murder, suicide or disease’ (QBE1), ‘Infectious disease, murder or suicide, food or drink or poisoning’ (QBE 2), or ‘Notifiable disease, murder or suicide, food or drink poisoning’ (QBE 3) (the only cover clause relied on by the FCA for this Wording type). The wording varies in small but material ways.

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<sup>677</sup> QBE Def 41.1-3 {**A/11/10-11**}, Agreed Facts 9 para 7 {**C/15/2**}

<sup>678</sup> QBE Def 41.3 {**A/11/10-11**}

<sup>679</sup> QBE1: \*PBCC040120 Business Combined {**B/13**}, PBCC170619 Business Combined {**B/74**}, QBE3: \*PCCP010420 Commercial Combined Insurance Policy {**B/15**}

<sup>680</sup> QBE1: POFF180120 Office {**B/75**}, POFP040120 Office {**B/76**}

<sup>681</sup> QBE2: \*PNML01019 NDML Nightclub and Late Night Venue Policy {**B/14**}, PLSP0101119 Leisure Combined Insurance (inc Personal Accident) {**B/77**}

<sup>682</sup> Agreed Facts 9 paras 1-3 {**C/15/2**}

<sup>683</sup> In particular, QBE did not, in pleading back to PoC para 47 fn 11 {**A/2/32**}, seek to contend that any of its wordings were unavailable to businesses in Categories 1, 2, 4, 6 and 7.

806. QBE1 provides<sup>684</sup>:

**7.3.9 Murder, suicide or disease**

interruption of or interference with the business arising from:

- a) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the **premises** or within a twenty five (25) mile radius of it;
- b) actual or suspected murder, suicide or sexual assault at the **premises**;
- c) injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided in the **premises**;
- d) vermin or pests in the premises;
- e) the closing of the whole or part of the **premises** by order of a competent public authority consequent upon defect in the drains or other sanitary arrangements at the **premises**.

The insurance by this clause shall only apply for the period beginning with the occurrence of the loss and ending not later than three (3) months thereafter during which the results of the **business** shall be affected in consequence of the damage.

807. QBE 2 introduces the concept of ‘an occurrence’ but is otherwise very similar: “*Loss resulting from interruption of or interference with the business in consequence of any of the following events:...c) any occurrence of a **notifiable disease** within a radius of 25 [(twenty five)] miles of the **premises***”.<sup>685</sup>

808. QBE 3 is very similar to QBE2 but the geographical area is a 1 mile radius instead of a 25 mile radius and provides the following optional extension “*Loss resulting from interruption of or interference with the **business** covered by this **section** in consequence of any of the following events:... c) an occurrence of a notifiable disease within a radius of one (1) mile of the **premises***”.<sup>686</sup>

809. Both QBE2 and 3 also cover “*a) any occurrence of a notifiable disease at the **premises** or attributable to food or drink supplied from the **premises**; b) any discovery of any organism at the **premises** likely to result in the occurrence of a notifiable disease*”,<sup>687</sup> although the limited additional issues raised by those wordings over the 25 mile/1 mile wordings (essentially whether the ‘in consequence of’ causal connector applies differently where the disease is at the premises rather than e.g. within 1 mile) are not being expressly considered in this Claim.

810. As to further exclusions and related provisions: QBE1 has a three month maximum indemnity period, and QBE2-3 exclude the costs of clean-up.

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<sup>684</sup> QBE1 p. 31 cl 7.3.9 {B/13/31}

<sup>685</sup> QBE2 p. 29 cl 3.2.4 {B/14/29}

<sup>686</sup> QBE3 p. 22 cl 3.4.8 {B/15/22}

<sup>687</sup> QBE2 p. 29 cl 3.2.4 {B/14/29} and QBE 3 p. 22 cl 3.4.8 {B/15/22}

811. The provisions contain the following requirements for coverage: (i) disease (as defined), (ii) QBE1: ‘manifested by any person’ within 25 miles or QBE2-3: ‘an occurrence’ within 25 miles/1 mile, (iii) ‘interruption or interference’ ‘arising from’/ ‘caused by’/ ‘in consequence of’ the disease, (iv) QBE2-3: ‘resulting’ in loss.
812. On their clear words, these cover clauses apply.
813. The cover issues are considered first, then the causal connectors ( ‘arising from’ / ‘caused by’ / ‘in consequence of’, ‘resulting from’) and causation issues thereafter.

### Cover

*‘a notifiable disease’ etc*

814. It is not disputed that COVID-19 qualified as a notifiable disease under the different wordings from 5 March 2020 in England and 6 March 2020 in Wales.<sup>688</sup> Further, QBE does not seek to rely in relation to the disease clause and this Claim on the Microorganism exclusion (which is expressly disapplied to the disease clause)<sup>689</sup> or Pollution and contamination exclusions in QBE1-QBE3.<sup>690</sup>

*‘manifested by any person’ within 25 miles; ‘an occurrence’ within 25 miles/ 1 mile*

815. The FCA’s case is that whenever (the policyholder can prove that) a person had contracted COVID-19 such that it was diagnosable (whether or not in fact medically verified or confirmed or reported or symptomatic) then COVID-19 was ‘manifested by any person’ in a particular place or there was an ‘occurrence’ of the illness resulting from COVID-19.<sup>691</sup> Issues of evidence and the approach to proof arise in relation to this question, as the Court is aware, but if the policyholder could prove that then COVID-19 occurred/was manifested.
816. QBE takes a broadly sensible although insufficiently clear approach to this issue, pleading “*in certain circumstances an occurrence or manifestation of COVID-19 for the purposes of QBE’s wording could be said to have occurred at the insured premises or within the relevant policy area*” when someone

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<sup>688</sup> QBE Def 45-6 {A/11/12}

<sup>689</sup> QBE1 p. 47 cl 12.14 (PBCC040120) {B/13/47}, QBE3 p. 54 cl 12.11 {B/15/54}

<sup>690</sup> QBE1 p. 47 cl 12.14 {B/13/47}, QBE 2 p. 41 cl 4.19 {B/14/41}, QBE3 p. 54 cl 12.14 {B/15/54}, QBE Def 53 {A/11/14}

<sup>691</sup> QBE1 requires that the “disease” is manifested {B/13/31}. QBE2-3 require an occurrence of the ‘notifiable disease’ as defined as “*illness sustained by any person resulting from... any human infectious or human contagious disease*” or “*any diseases that may be notifiable*” {B/14/100}, {B/15/23}

contracted it and it was asymptomatic, and that would be an “*occurrence and/or manifestation*”, but the question “*will be determined on the facts of each particular case*”.<sup>692</sup> This must be taken as an indirect admission of the FCA’s case as to what the words ‘manifested’ or ‘occurrence’ mean in this case, QBE instead focussing on whether the interruption or interference was or could be in consequence of such a manifestation or occurrence in a particular case.<sup>693</sup> If an asymptomatic case is an occurrence or manifestation “*in some circumstances*”, it must be in all circumstances—QBE does not explain what else it could turn on.

*‘interruption’ or ‘interference’*

817. QBE contends that the question of ‘interruption or interference’ is a question of fact in each case, although accepts that social distancing measures, closure measures and other human action “*could, in principle, cause*” interference with the insured business, and merely not admits (rather than denying) the FCA’s case in PoC paragraphs 46-7.<sup>694</sup>

818. This is unhelpful. Plainly, for example, it cannot be denied that a business that was open and then ordered to close and which did close was interrupted or in any event interfered with.

819. Nevertheless, QBE’s stance in not disputing this issue reflects the undisputedly broad meaning of ‘interference’—and it is to be noted that elsewhere in the Wordings the parties have chosen to restrict themselves to ‘interruption’ without ‘interference’<sup>695</sup>, indicating the significance in these Wordings of including the wider ‘interference’.

820. In any event, the FCA’s case in relation to these terms is set out above at section 6H.

The causal connectors: QBE1-3: interference or interruption ‘arising from’ ‘caused by’ or ‘in consequence of’ the disease manifestation within 25 miles; QBE2-3: loss ‘resulting from’ the interruption or interference; and the ‘but for’ test

821. There are four policies within QBE1, each containing the disease clause. PBCC040120 and PBCC170619 provide cover for interruption of or interference with the business *arising from* the notifiable human infectious or human contagious disease manifested by any person whilst in the premises or within a 25 mile radius. POFF180120 and POFP040120 provide similar

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<sup>692</sup> QBE Def 47.3-4 {A/11/13}

<sup>693</sup> QBE Def 47.2-3 {A/11/13}. This issue is considered below at paragraphs 821ff.

<sup>694</sup> QBE Def 51.1-2 {A/11/13-14}

<sup>695</sup> QBE1 p. 32 cl 7.3.12 {B/13/32} covers damage “*that interrupts the current research and development programme*” but, by implication, not that which merely interferes with it.

cover for interruption of or interference with the business *caused by* such a disease manifested at the premises or within a 25 mile radius. QBE2-3 require that the interruption or interference was *in consequence of* the disease within a 25 mile/1 mile radius.

822. Although words such as ‘in consequence of’ and ‘arising from’ are capable of signifying a looser causal test and it is understood that the HIGA Interveners will address that point. However, for present purposes, the FCA addresses the issue on the premise that these causal connectors all require something in the nature of a proximate cause test, but applied as a servant and by reference to the proper construction of the Wordings. On their proper construction, for the purposes of the disease clauses, there was only a single indivisible proximate and ‘but for’ cause—the single national COVID-19 outbreak—of which each local outbreak formed an integral part, alternatively there were concurrent causes but the local disease remains a proximate cause and all the causes must be excised from the counterfactual when applying any ‘but for’ test. By further alternative, the local outbreak was a proximate and ‘but for’ cause of the interruption or interference (in that QBE has not shown and cannot show that the *same* interruption or interference would have occurred without it).

823. QBE’s case is that:

823.1. *“neither the implementation of social distancing measures, nor closure measures, nor indeed any other form of human action and/or intervention, were caused by the presence of COVID-19 within any specific geographical area. The social distancing measures, closure measures and the other forms of human action and/or intervention were responses to an actual or feared nationwide and/or worldwide pandemic”*.<sup>696</sup> Elsewhere QBE refers to the national response not being *“in response to”* the local occurrence or manifestation.<sup>697</sup>

823.2. *“any particular local manifestation(s) of COVID-19”* is a separate and, distinct, or independent potential cause from *“the nationwide (or worldwide...) occurrence of that disease”*.<sup>698</sup>

823.3. That said, as to the final stage, the loss did ‘result from’ the interruption or interference within QBE2-3.<sup>699</sup> (And QBE does not argue that but for the interruption the loss

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<sup>696</sup> QBE Def 51.3 {A/11/14}, 66.1 {A/11/22}

<sup>697</sup> QBE Def 13 {A/11/5}

<sup>698</sup> QBE Def 57.1 {A/11/16}, 58.1 {A/11/18}, 60.1 {A/11/19}

<sup>699</sup> QBE Def 68.1 {A/11/23}

would not have occurred.) However, the loss was not but for caused by the insured peril of the local occurrence of COVID-19.<sup>700</sup>

823.4. The but for test must be applied,<sup>701</sup> at each stage of the chain and by virtue of the words ‘arising from’, ‘in consequence of’ etc<sup>702</sup>, without modification even when there are independent concurrent causes,<sup>703</sup> and in most cases the interruption or interference would have occurred but for the nationwide COVID-19 and related human action or intervention.<sup>704</sup>

824. QBE also seeks to argue at the start of its Defence that non-damage extensions are all ‘insured premises-related’<sup>705</sup>, as support for the case that “*They do not provide, and were not intended to provide, cover in respect of a national pandemic or the Government response to an actual or feared national pandemic*”.<sup>706</sup> As to that particular argument:

824.1. The elegant scheme described in paragraph 4 of the Defence does not accurately describe the Wordings in question. In reality, the truth is rather messier. Taking QBE1<sup>707</sup>: There are clauses dealing with physical damage to the premises (extensions 7.3.1 ‘Additional increased cost of working’ and 7.3.12 ‘Research and development’), physical damage with a vicinity limit (extensions 7.3.4 ‘Denial of Access’ and 7.3.7 ‘Loss of attraction’), physical damage to property or premises anywhere in the country/EEA/world (extensions 7.3.2 ‘Contract sites and transit’, 7.3.3 ‘Customers and suppliers premises’, 7.3.6 ‘Exhibitions’, 7.3.10 ‘Patterns’, 7.3.11 ‘Property stored’ and 7.3.13 ‘Utilities supply’), non-damage cover at the premises (much of extension 7.3.9 ‘Murder, suicide or disease’, including (a) - disease at the premises), non-damage cover with a vicinity limit (extensions 7.3.5 ‘Denial of access (non-damage)’, the disease 25 mile clause in 7.3.9(a)), non-damage cover with no vicinity limit but a different nexus to the premises (extensions 7.3.8 ‘Lottery winners increased costs’ and injury or illness traceable to food or drink provided in the premises in 7.3.9(c)).

824.2. The reality is that each extension defines its own nexus. Damage to ‘Utilities supply’ (extension 7.3.13) is covered without vicinity limit because the nexus is built in: it must

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<sup>700</sup> QBE Def 68.2 {A/11/23}

<sup>701</sup> QBE Def 60.2 {A/11/19}, 62.4 {A/11/21}

<sup>702</sup> QBE Def 62.2 {A/11/20}

<sup>703</sup> QBE Def 61.1-2 {A/11/20}

<sup>704</sup> QBE Def 60.1 {A/11/19}

<sup>705</sup> QBE Def 4-8 {A/11/2-3}, 57.4 {A/11/17}

<sup>706</sup> QBE Def 8 {A/11/3}

<sup>707</sup> QBE1 p. 29-32 {B/13/29-32}

be a utility supplier that supplies the insured business but the location of the damage to the utility supplier's property can be anywhere. The cost of recruiting a replaced lottery winning employee (extension 7.3.8) has the nexus to the business of the winner being an employee. And the disease clause (extension 7.3.9) deliberately provides for disease at the premises or within 25 miles.

824.3. It is correct that the other parts of the disease clause relate to events at the premises. But the cover we are concerned with expressly and unequivocally does not.

824.4. Accordingly, nothing can change the words of the disease clause to prevent it covering diseases anywhere within 25 miles of the premises. Seeking to label it an 'insured premises-related extension'<sup>708</sup> changes nothing. The extension trigger is related to the insured premises in that the disease must occur within 25 miles, but that is not disputed. It cannot imply that the disease must *only* occur within 25 miles, for example.

824.5. QBE2 does put a number of the extensions (not including the disease extension) under the heading at 3.3 'Additional business interruption cover away from premises' but otherwise a similar variety obtains.<sup>709</sup>

825. More generally, first, and this is the jigsaw point referred to above at paragraph 240 above, the Government and indeed members of the public were responding to the accumulated totality of events relating to COVID-19 up to the date of each of their actions. Government action was a response to the presence of COVID-19 across the country. It was a response to the danger around the country, and the presence of COVID-19 around the country. If there was a case of COVID-19 within 25 miles or 1 mile of the premises then that was part of what the Government was responding to. And this is even truer of any voluntary or fearful behaviour by individuals, who plainly were responding to the local disease not the national one.

826. Taking all of this together, on any common sense reading of the words, the interruption or interference was 'arising from' or 'caused by' or 'in consequence of' COVID-19 within the specified locale. Here there is no specified intermediate cause of public authority action—the required link is between the disease and the interruption or interference, although the response of the authorities to the disease will be a natural part of that link and will not break the causal chain. QBE seems to accept the jigsaw point, but then to say that even if the nationwide government and human response did react to all the local occurrences, no one of them was a

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<sup>708</sup> QBE Def 8-9, {A/11/3-4} Reply 8.4(c) {A/14/6}

<sup>709</sup> QBE2 p. 30-32 {B/14/30-32}

‘direct’ cause<sup>710</sup>—showing the absurdity of QBE’s position.<sup>711</sup> (Similarly, its case on independent concurrent causes<sup>712</sup> has no answer if both causes were insured perils—neither would respond.)

827. QBE makes a further, narrower point, that “*it is difficult to see any circumstances in which it could be said that that [sic] an undetected and/or undiagnosed occurrence and/or manifestation would cause interruption to or interference with the insured business.*”<sup>713</sup> But undiagnosed or asymptomatic COVID-19 too was part of the cause of the Government activity and of individual behaviour,<sup>714</sup> because it was known that much COVID-19 was undiagnosed or (at least for a time) asymptomatic—if all cases were diagnosed there would be little risk. People and the Government were responding to the undiagnosed cases around the country including in the area. They knew they were there, just not exactly who had COVID-19. It simply makes no sense to say, for example, that the Government and individuals were not reacting to the ‘occurrence’ or ‘manifestation’ of COVID-19 within a town or city unless there was a diagnosed case.

828. Second, this is cover that contemplates the occurrence of wider area disease. Generally, it contemplates a disease that could cause interruption or interference even if 25 miles away, i.e. if anywhere in a 2,000 square mile circle. And it only relates to statutorily notifiable ‘infectious’ or ‘contagious’ diseases (what is notifiable is the ‘outbreak’ of such diseases, as the QBE wordings expressly state). These are diseases designated as such under Regulations which were enacted to control “*epidemic, endemic or infectious diseases*”,<sup>715</sup> including SARS. Other non-notifiable diseases are not covered (save for food poisoning which is covered by sub-clause (c) of the disease clauses, relating to food traceable to the premises, whereas it is clear that the disease in (a) need not have occurred at the premises at all). QBE1 also has a three-month indemnity period—this shows an intention to cap liability that is unremarkable, but also contemplation that the peril insured might otherwise lead to interruption or interference of more than three months, which would only arise for severe outbreaks.

829. Therefore, prima facie not only does it cover outbreaks of infectious diseases, *that is all it covers*. And the central case of an outbreak of such a disease occurring 25 miles away (or 20, or 15) which interrupts or interferes with the business is one that is spreading or likely to spread. The same is true for one even 1 mile away. For an infectious disease a mile away to interrupt a

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<sup>710</sup> QBE Def 66.2 {A/11/23}

<sup>711</sup> Reply 59 {A/14/31}

<sup>712</sup> QBE Def 61.1 {A/11/20}

<sup>713</sup> QBE Def 47.3 {A/11/13}

<sup>714</sup> Reply 47.2 {A/11/13}

<sup>715</sup> Agreed Facts 5 {C/9}

business clearly encompasses a situation in which there is a significant spreading of the disease or a fear of the same. And therefore public authorities or individuals (including the business owner) are reacting to fear of that spread of infection.<sup>716</sup> And if a disease 25 miles away or 1 mile away could spread 25 miles or 1 mile towards the premises (which fact is the likely basis for the interruption or interference and in any event inherent in it being an outbreak of a notifiable infectious disease), then it can obviously spread in the other direction outside the circle, if it has not already done so or, equally likely, come from outside the circle.

830. Thus the most likely case of cover contemplated by the disease clause is of a disease both inside and outside the circle, a circle that has been drawn deliberately wide. 25 miles is intentionally large- contrast the 25 mile disease clauses in QBE1 and QBE2 with the ‘Loss of attraction’ cover in QBE1 which responds to such loss following property damage within 1 mile<sup>717</sup>, or the denial of access cover in QBE1-2 for acts of terrorism causing property damage within 1 mile<sup>718</sup>. Even 1 mile in QBE3 is a long way—contrast the property denial of access cover in that same wording which has a 250 metre limit.<sup>719</sup>
831. Thus the central case in which the insured peril will arise is that of a trigger disease both within and without the circle.
832. In those circumstances, if the parties intended QBE to be able to argue that either the causal connectors (‘arising from’, ‘caused by’ or ‘in consequence of’) or a ‘but for’ test or both would defeat a claim where the disease within and without were both causes of interruption or interference, then QBE would have been expected to say so in clear terms in the cover (as with e.g. War and Terrorism). It would have been hard to explain (infectious disease cover, but only where the infection stays local only) and it has not done so e.g. by saying ‘solely caused by’ disease within 25 miles or expressly excluding loss resulting from a broader epidemic. Elsewhere in the Wordings, the parties specify “*resulting directly*” where they want to emphasise the causal link,<sup>720</sup> or make sure to exclude loss if an excluded peril is present even if an insured peril “*contribut[es] concurrently or in any sequence*”<sup>721</sup> or “*regardless of any other cause or event contributing*

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<sup>716</sup> QBE does not dispute this, merely arguing that it is not *inevitable* that a disease triggering the clause will give rise to government or public authority action: QBE Def 58.2 {**A/11/18**}

<sup>717</sup> QBE1 p. 30 cl 7.3.7 {**B/13/30**}

<sup>718</sup> QBE1 p. 102 {**B/13/102**}, QBE2 p. 105 {**B/14/105**}

<sup>719</sup> QBE3 p. 22 cl 3.4.3 {**B/15/22**}

<sup>720</sup> QBE1 p. 27 cl 7.1.1 {**B/13/27**}, p. 36 cl 8.2.1(ii) {**B/13/36**}, QBE2 p. 10 cl 2.3.2(c), {**B/14/10**}; QBE3 p. 11 cl 2.3.10(d) {**B/15/11**} and p. 19 cl 3.1.1 {**B/15/19**}

<sup>721</sup> The Micro-organism exclusion at QBE1 cl 12.11 p47 {**B/13/47**} and QBE3 p. 54 cl 12.11 {**B/15/54**}, and Electronic risks in QBE2 p. 40 cl 4.12 {**B/14/40**}

*concurrently or in any other sequence*<sup>722</sup>. No such wording is used here to bring about the result QBE contends for.

833. Further, the parties had obviously considered wide-area damage generally, because the aggregation clause refers to aggregating as a single occurrence riot and civil commotion losses to those “*within the limits of one (1) borough, city, town or village*”.<sup>723</sup> Yet there is no wording seeking to distinguish as separate occurrences (for aggregation) or, more pertinently, separate causes, the disease within 25 miles/1 mile and without.
834. Accordingly, QBE’s assertion now that the Wordings are not intended to respond to national pandemics<sup>724</sup> runs contrary to the words used and common sense.<sup>725</sup>
835. The Wordings in fact contemplate just such a peril and in those circumstances the parties must be taken to have intended the cover to respond even where the disease extended beyond the circle, which is merely the extra requirement specified because the Wordings do not respond to remote *only* diseases.
836. Similarly, QBE’s assertion that the words demonstrate “*an objective intention... not to provide cover for losses caused by other matters, including worldwide, international, foreign or nationwide pandemics or epidemics and the responses to such matters*”<sup>726</sup> shows how far QBE has to go. It has to show that there is some sort of implication that a disease within 25 miles is not covered if it is also a disease beyond 25 miles. That is because if it just says that there is cover for the ‘local part’ of a pandemic (an approach that runs contrary to the line that pandemics are not covered at all, but that QBE does toy with in its Defence at paragraph 57.5, also 65.5), it has to acknowledge that such cover is illusory because there will always be a concurrent non-local part. In other words, the cover appears to be insuring a peril but actually that peril (infectious diseases with a local manifestation) will almost never be covered.
837. Once that unpleaded implication has failed, the extent of the disease is irrelevant (save that a ‘foreign’ disease, if purely foreign and remaining so, plainly is not covered). The disease occurring outside the 25 miles is not an ‘other matter’, it is the same disease as occurred within

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<sup>722</sup> War and terrorism in QBE1 p. 84 cl 21.4.1 {B/13/84}, QBE2 p. 42 cl 4.22 {B/14/42}, QBE3 p. 132 cl 22.7.1 {B/15/132}

<sup>723</sup> QBE1 p. 22 cl 4.7.14(b) {B/13/22}, QBE3 p. 145 cl 24.22.3 {B/15/145}

<sup>724</sup> QBE Def 8 {A/11/3}

<sup>725</sup> And of minor interest is that in the ‘Personal accident and Business Travel’ section, QBE3 provides cover for expenses due to evacuation from an “*epidemic*” P83-4 cl 16.31-4 {B/15/83-84}. Epidemic is defined as “*an outbreak of a disease which is covered by the World Health Organisations Epidemic and Pandemic Alert and Response regulations, which is severe and as a direct result of which the recognised local government declares a state of emergency*”- p. 159 cl. 25.56 {B/15/159}

<sup>726</sup> QBE Def 43 {A/11/12}

the 25 miles. (And it is no part of QBE's case that there was a separate outbreak in each location that is somehow distinct so as to be an 'other matter' in any sense.)

838. Thus the answer to the 'but for' questions in QBE's Defence paragraph 12 are that (i) but for the disease within the relevant policy area there would have been no COVID-19, but also (ii) even on QBE's case, it is simply wrong to assert that but for the insured peril the interruption or interference would have occurred in any event.
839. For the causation to not be satisfied on a 'but for' basis, QBE would have to prove—and the burden is on QBE (see paragraphs 249ff above)—that with no disease within the policy area there would have been *exactly the same interruption or interference* or *exactly the same loss*. Otherwise, the interruption or interference, or the loss, was 'but for' caused by the disease within the local area. But it cannot satisfy that burden in any case, whether for 25 miles or 1 mile. It cannot prove for businesses that were ordered to close, that the Government would still have imposed the same national lockdown. Even if it could, QBE cannot prove that people would have applied social distancing or stayed at home to the same extent if they had not heard of a single case within the 2,000 square mile (25 mile radius) or 3.14 square mile (1 mile radius) area around the business, as in the real world when they knew of and read about people nearby contracting and dying of COVID-19, perhaps in their hundreds. QBE itself accepts that in some cases the interruption or interference may have been different.<sup>727</sup>
840. Third, the COVID-19 within 25 miles or 1 mile was part of a single national pandemic. One cannot and cannot be intended to excise only part of that single outbreak for the purposes of the 'but for' test; it would be unrealistic and impractical to attempt to do so (having to model a world in which there was an island of disease-free businesses); and it would lead to an unintended windfall of popular businesses with no disease, no public authority action, no fear etc.
841. This latter windfall profit point is even stronger in the case of disease clauses than public authority clauses, because there is no opportunity for the insurer to argue that even without the public authority action there would still have been a disease in the area—in disease clauses the peril is the disease and so it is or should be common ground that the but for test must excise at least the disease within the area. QBE's position is that the correct counterfactual is

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<sup>727</sup> QBE Def 60.1, emphasis added: "*In most if not all cases, the assumed interruption or interference would have occurred 'but for' the former...*" {A/11/19}

*“what loss would have been suffered if the insured peril, i.e. the occurrence or manifestation of the notifiable disease at or within the relevant policy area of the insured premises, had not occurred.”*<sup>728</sup>

842. Accordingly, any ‘but for’ test would have to exclude the entire insured event—the disease outbreak everywhere, not merely within the 25 mile/1 mile zone.
843. Contrary to QBE’s contention to the contrary,<sup>729</sup> by means of their disease wording, they did agree to provide cover for BI losses to the particular business by reason of a single local, regional, national, or worldwide outbreak of COVID-19 providing it was actually present within 25 miles or 1 mile of the premises.
844. See further Section 6J above.

### The QBE1 and QBE3 quantification machinery and trends clauses

#### *QBE1: Wordings PBCC040120 and PBCC170619*

845. In Wordings PBCC040120 (the lead wording for QBE1) and PBCC170619, the BI section begins with a general insuring clause responding to interruption or interference resulting directly from ‘**damage to property**’<sup>730</sup>. Bases of settlement are then provided for ‘Insurable gross profit’, ‘Gross fees’, ‘Gross revenue’, ‘Increased cost of working’, ‘Rent receivable’, and ‘Book debts’, together with charges of ‘Professional accountants’ under a Costs and expenses section. All of these refer to ‘**damage**’.
846. These bases of settlement include adjustment language in their definitions. For example, the cover for reduction in gross revenue is the amount by which the gross revenue during the indemnity period will, in consequence of the damage, fall short of the standard gross revenue (clause 7.1.4). The standard gross revenue is defined as being the gross revenue ‘trend adjusted’ during the prior 12 months<sup>731</sup>. ‘Trend adjusted’ is defined in the following way, again by reference to ‘**damage**’:

Trend adjusted means adjustments will be made to figures as may be necessary to provide for the trend of the **business** and for variations in or circumstances affecting the **business** either before or after the **damage** or which would have affected the **business** had the **damage** not occurred, so that the figures thus adjusted will represent as nearly as may be reasonably

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<sup>728</sup> QBE Def 22 {A/11/6}

<sup>729</sup> QBE Def 69.2 {A/11/24}

<sup>730</sup> PBCC040120 p27 cl 7.1.1 {B/13/27} and definition of ‘damage’ p93 {B/13/93}: “Damage means: 23.25.1 loss of, destruction of or damage to tangible property; 23.25.2 in respect of the ‘Public liability’ **section** and the ‘Products liability’ **section** loss of use of tangible property that has been lost destroyed or damaged.”

<sup>731</sup> PBCC040120 p. 102 cl 23.97 {B/13/102}

practicable the results which but for the **damage** would have been obtained during the relative period after the **damage**.<sup>732</sup>

847. These policies then turn in a separate part to the “Extensions applicable to this section”<sup>733</sup>. The introductory words to the Extensions part provide: “*This **section** is extended to include the following additional coverages, provided that **our** liability shall not exceed any applicable **sub-limit**. Unless expressly stated to the contrary, these extensions do not increase the **sum(s) insured** and any **sub-limits** stated form of and are not additional to the **sum(s) insured**. We will indemnify you for...*” followed by the extensions (in the case of the disease clause “*interruption of or interference with the business arising from*” murder, suicide or disease). That must be read as providing an indemnity for *loss* resulting from that interruption or interference, in a similar way to that provided in many of the other extensions which explicitly mention ‘loss’ (e.g. extension 7.3.2 ‘Contract sites and transit’, extension 7.3.3 ‘Customers and suppliers premises’, extensions 7.3.4-6, 7.3.10-11 and 7.3.13).
848. As set out above, the bases of settlement in their terms only apply to property damage. And the disease extension 7.3.9 does not refer back to those bases of settlement (nor the trends clauses within them). (This contrasts with, for example, extension 7.3.7 which provides cover for “*loss as covered by this **section** in consequence of*” loss of attraction, which probably does refer back to and incorporate the bases of settlement and the trends clauses within them which would, if that is right, have to be made to work despite their reference to property damage). The disease extension therefore provides a simple indemnity for loss arising from interruption or interference with the business.
849. Accordingly, there is nothing in the quantification machinery that alters the conclusions in relation to the ‘but for’ test or meaning of ‘resulting from’ set out above.
850. QBE acknowledges that “*Wordings contain no mechanism for quantifying the value of a ‘non-damage’ business interruption claim*” but argues that the defined term ‘damage’ must be read as intended to go beyond the definition and to include ‘insured contingency or incident’.<sup>734</sup> In support of this:
- 850.1. QBE relies on the definition of **sub-limits** as “*the maximum liability of the insurer under a specified **section**, clause or other part of this policy*”. It argues that the inclusion of this word in the introductory wording to the extensions means that all the ‘limits’ within the BI

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<sup>732</sup> PBCC040120 p. 105 cl 23.117 {B/13/105}

<sup>733</sup> PBCC040120 p. 29 ff {B/13/29}

<sup>734</sup> QBE Def 70.7 {A/11/27}

section as a whole – including the trends clauses – are incorporated into the extensions.<sup>735</sup> This is wrong. The phrase is not ‘sub-limit’ but ‘sub-limits stated’ (with the introductory wording referring to ‘any applicable sub-limit’). All the phrase is doing is referring the sub-limits within the individual clauses that follow (such as extension 7.3.5 ‘Denial of access (non-damage)’ which has a sub-limit of £100,000 or 10% of the sum insured under the BI section<sup>736</sup>).<sup>737</sup>

850.2. QBE also argues (for every wording) that it would be “*contrary to commercial common sense and inconsistent within each of the QBE wordings*” for the quantification machinery to apply only in part.<sup>738</sup> The latter point is not understood—QBE accepts that its interpretation, not the FCA’s, is inconsistent with the express wordings (and their reference to ‘damage’ as defined).<sup>739</sup> The former point is also denied. As this case shows and is common knowledge, some BI wordings involve machinery of ‘standard turnover’ in the previous year as adjusted, but some do not. Some include trends clauses and some do not. Some have specific machinery for different extensions or for different parts of the primary cover (e.g. income versus book debts). There is nothing ‘contrary to common sense’ about the result achieved from applying the words (including defined terms) as they are written, especially as the parties may well have determined that the full machinery is too cumbersome for extensions with small limits.

### *QBE3*

851. The structure of the quantification machinery here is similar to that with in QBE1 Wordings PBCC040120 and PBCC170619 (see immediately above). The BI section is within Section 3 and begins with the core damage induced BI insuring clause in clause 3.1.1 (p19). Next, clause 3.2 contains the basis of settlement clauses, which contain trends language through their definitions, the definition of ‘trend adjusted’ (p177) being materially the same as it is in those QBE1 Wordings above.

852. As with those QBE1 Wordings, the extensions including the disease extension 3.4.8 appear in their own section 3.4 with its own insuring clause “*The **insurer** shall indemnify the **insured** for the following...*”<sup>740</sup>, the extensions being optional (“*if shown as insured in the **schedule***”).

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<sup>735</sup> QBE Def 70.7.1 {A/11/27}

<sup>736</sup> PBCC040120 p30 cl 7.3.5 {B/13/30}

<sup>737</sup> Reply 64.1 {A/14/33}

<sup>738</sup> QBE Def 70.7.3. {A/11/28}

<sup>739</sup> Reply 64.3 {A/14/33}

<sup>740</sup> QBE3 p. 21 {B/15/21}

853. However, several extensions, including the disease clause, begin with the words “*loss resulting from interruption of or interference with the **business** as covered by this **section** in consequence of...*”
854. Although the point could be far clearer, the statement that is “*as covered by this **section***” probably provides sufficient cross-reference to the main Cover clause to incorporate the quantification machinery set out there. It does require some adaptation, given the indemnity requires calculation of the loss “*due to the damage*” or by reference to the period “*immediately before the damage*”; and the trends clause also refers to the damage, but this explicit reference back to the general insurance under the section is accepted to bring in the machinery and require application of the trends clause.
855. The points made above in relation to Arch1 at paragraphs 467ff apply here too. The additional point arises that the ‘but for the damage’ position is to be achieved ‘as nearly as practicable’. An adjustment to remodel the world without COVID-19 within 25 miles/1 mile but with COVID-19 elsewhere (including asking what government action would have been taken) is not ‘reasonably practicable’, in addition to it not being intended for the reasons set out in those paragraphs.

*QBE1: POFF180120*

856. POFF180120 is similar. In Section E Business interruption, clause 8.1.1 provides the core damage cover clause and the bases of settlement being ‘loss of gross revenue’ and ‘increased cost of working’,<sup>741</sup> all also referring to “*damage to the property insured*”.<sup>742</sup> It then has the trends clause 8.1.2: “*In adjusting the amount paid all variations or special circumstances before and after the **damage** affecting the business shall be taken into account in order that the amount paid shall represent as nearly as practicable the results which would have been expected if the **damage** had not occurred*”. Clause 8.2 provides the cover extensions, including in 8.2.5 the disease clause, preceded by the words: “*We shall indemnify you in respect of interruption of or interference with the **business** as insured by this **section** caused by...*”
857. The FCA therefore does not dispute that the trends clause applies, and the position is the same as set out in paragraph 851 above.

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<sup>741</sup> POFF180120 p. 28 {B/75/28}

<sup>742</sup> POFF180120 p. 68 {B/75/68}: “*Damage means: 17.10.1 In respect of Section E – Business interruption (a) loss of destruction of or damage caused by an insured peril as set in the Coverage-insured perils clauses of Section A Contents and Section C –Buildings (b) glass breakage*”

858. POFP040120 is similar to POFF180120, in that it refers to an indemnity being provided “*as insured by this **section***” (which probably provides sufficient cross-reference to the contractual machinery). However, while its definitions of standard gross fees and standard gross revenue say that they are “***trend adjusted***”<sup>743</sup> – the bold said to signify a definition<sup>744</sup> that term is never in fact defined in the policy. There is no trends clause here, just a reference to an adjustment.
859. The mere words ‘trend adjusted’ are insufficiently clear to provide any workable adjustment process save perhaps for the simplest of seasonal trends. It clearly does not permit the construction of a complex counterfactual.
860. QBE argues that the “*concept of trends language and/or clauses in business interruption insurance is widely and sufficiently understood that the methodology set out in the trends clauses in the other QBE1 policy wordings should therefore be operated in any event*”.<sup>745</sup> The truth is that it neglected to include the definition. The Court cannot rewrite the parties’ contract. In any case, it is obviously wrong that there is some widely understood meaning of this term given (i) QBE felt it necessary to include a precise definition in its other policies, (ii) the trends clauses differ materially between insurers – referring variously to ‘trends’, ‘circumstances’, ‘variations’, ‘special circumstances’ etc – QBE has not sought to lead evidence or plead that there is a single trends wording which is customary or market standard; (iii) different insurers argue that the trends clause should be applied differently (as is apparent in this Claim), again showing plainly that there is not one approach.
861. QBE also argues – thereby demonstrating the flaw in its own case – that “*how any given insured’s figures should be “trend adjusted” would be a matter of contractual interpretation in the particular circumstances of each individual case, and the policy in question may, depending on the particular facts, be interpreted in line with and/or rectified so as to include the sort of trends language and/or clauses set out in the other QBE Wordings*”.<sup>746</sup> This is hopelessly speculative. The term must have a fixed meaning across all users of this standard form insurance policy, as the reasonable person would understand it to, not be a matter to be re-constructed for each insured, and QBE has advanced no rectification case.<sup>747</sup>

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<sup>743</sup> POFP040120 p. 85-86 {B/76/85-86}

<sup>744</sup> POFP040120 p. 3 cl 1.2 {B/76/3}

<sup>745</sup> QBE Def 71.2 {A/11/29}

<sup>746</sup> QBE Def 71.3 {A/11/29}

<sup>747</sup> Reply 64.4 {A/14/34}

862. Thus, again, the trends clause lends no weight to QBE’s arguments, and the proper approach to the ‘but for’ test and ‘resulting from’ language is as set out above in paragraphs 821ff, prior to discussion of the machinery and trends clause.

#### The QBE2 quantification machinery and trends clause

863. These policies contain their primary (property damage) BI cover in clause 3, ‘Insured section B’. This begins with a damage cover clause<sup>748</sup> which deals with loss after a property is “**damaged**”<sup>749</sup> and provides that “*the insurer will pay in respect of each item of Business interruption insurance stated in the schedule...*”.

864. The ‘items in the schedule’ comprise ‘gross profit’ (item 1), ‘gross revenue’ (item 2), etc (up to item 6), as set out in the bases of settlement clauses 3.4.5-3.4.10 under the heading in clause 3.4 of ‘Business interruption limitations and exclusions’.<sup>750</sup> These are drafted by reference to ‘damage’ (i.e. property damage) and, as in other policies, incorporate trends clauses through the definitions of terms such as ‘annual turnover’ and ‘annual gross revenue’,<sup>751</sup> the trends clause being the same as that in PBCC040120 and PBCC170619 and quoted at paragraph 846 above.

865. Clause 3.2 is headed ‘Additional business interruption costs and expenses’<sup>752</sup>. Clause 3.2.1 then provides that alternative trading revenues made off-premises must still be brought into account for calculating ‘turnover’ during the ‘indemnity period’, and clause 3.2.2 provides that professional accountant fees are recoverable to produce the figures required by insurers.

866. Clause 3.2.3 then provides for the recoverability of expenditure after interruption to the business’s current research and development programme by ‘damage’, and 3.2.4 is the ‘Infectious disease, murder or suicide, food or drink poisoning’ additional peril. Clause 3.2.5 includes an extension to 3.2.4 to deal with clean up costs. The remainder of the insured perils are in a separate clause, 3.3, ‘Additional business interruption cover away from the premises’.

867. There is nothing in disease clause 3.2.4 linking that “*Additional*” (quoting the heading to clause 3.2) peril to the primary property damage quantification machinery and trends clauses. It is correct that clause 3.2.4 does not contain a cover clause (it starts “*Loss resulting from interruption*

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<sup>748</sup> PNML010119 p28 cl 3.1.1 {B/14/28}

<sup>749</sup> Defined on p94 {B/14/94} in materially identical terms the definition for PBCC040120 above

<sup>750</sup> PNML010119 p. 32 {B/14/32}

<sup>751</sup> PNML010119 p. 91 {B/14/91}

<sup>752</sup> PNML010119 p. 28 {B/14/28}

*of or interference with the business...*” ’ and does not include the “*We [will / shall] indemnify you*” wording in QBE 1 or the “*The insurer shall indemnify*” wording in QBE 3) but given that the quantification machinery and trends clauses are all defined by reference to property damage, the better reading is simply that it is implied that the insurer will pay for ‘Loss’ under clause 3.2.4 without seeking to rewrite so as to incorporate (without any express cross-reference) the quantification machinery and trends clauses. Accordingly, the disease clause simply provides indemnity for loss resulting from interruption of or interference with the business in consequence of the relevant disease. This should hardly be surprising given QBE’s sub-limit for clause 3.2.4 is the lesser of £100,000 or 15% of the sum insured.

868. QBE argues that because the quantification machinery is under the heading “*limitations and exclusions*” it thereby must apply to the extensions (and not just the primary cover clause).<sup>753</sup> This is wrong, and simply begs the question of whether those bases of settlement do in fact apply to the extensions. That machinery expressly states that it applies to ‘damage’, so far more would be needed to imply its application to the disease extension also.<sup>754</sup>
869. If the proper indemnity is loss resulting from interruption of or interference with the business in consequence of the relevant disease (as the FCA argues), then any quantification machinery is irrelevant, however it is described.

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<sup>753</sup> QBE Def 70.7.2 {A/11/27}

<sup>754</sup> Reply 64.2 {A/14/33}

### **QBE2 - Assumed Facts Example (Category 2)**

Business BB is a nightclub located in a city centre, insured under QBE2. Some of the youthful crowd who frequented the nightclub were concerned about being in large crowds. There was a downturn in business from 1 March, resulting in the Nightclub opening on Fridays and Saturdays only from 6 March. It was closed altogether on 21 March in compliance with the 21 March Regulations. It has not reopened since, and the few remaining staff are furloughed. The first reported COVID-19 case in the city occurred before the club reduced its opening times.

- The disease clause in QBE2 is triggered:
- There was an occurrence of a notifiable disease within a radius of 25 miles of the premises.
- There was an interruption of or interference with the business in consequence of the outbreak (as reflected in the reduced opening days from 6 March). Fears of the spread of COVID-19 and the increasingly prominent Government advice led to people staying away from nightclubs, particularly after 16 March.
- On any view the business was interrupted from 21 March when it closed its doors. From then, the club continued to incur costs, but generated no income, which is unsustainable.
- The loss of income was caused by the occurrences of COVID-19 within the 2,000 square mile area around the club.

## J. MSAmlin1-2 disease clause, 25 mile provision

870. MSAmlin1 and MSAmlin2 wordings contain similar disease clauses.

871. MSAmlin1 is a Commercial Combined policy and includes (as standard additional cover) an indemnity in the following terms: “*We will pay you for:*”

### 6. **Notifiable disease, vermin, defective sanitary arrangements, murder and suicide**

**Consequential loss** as a result of interruption of or interference with the **business** carried on by **you** at the **premises** following:

- a)
  - i. any **notifiable disease** at the **premises** or due to food or drink supplied from the **premises**;
  - ii. any discovery of an organism at the **premises** likely to result in the event of a **notifiable disease**;
  - iii. any **notifiable disease** within a radius of twenty five miles of the **premises**;
- b) the discovery of vermin or pests at the **premises** which causes restrictions on the use of the **premises** on the order of the competent local authority;
- c) 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 of the competent local authority; or
4. any murder or suicide at the **premises**.

The maximum **we** will pay for any one loss will not exceed **£100,000**.

### **Conditions**

1. For the purpose of this additional cover **premises** will mean only those locations stated in the **premises** definition. If this policy includes an additional cover which deems **damage** at other locations to be insured, the additional cover will not apply to this additional cover.
2. **We** will not be liable for any costs incurred in the cleaning, repair, replacement, recall or checking of property.
3. **We** will only be liable for the loss arising at those **premises** which are directly affected by the loss, discovery or accident.

872. As set out, this has a sub-limit of £100,000 for any one loss and no indemnity period is specified.

873. MSAmlin states that this wording is found predominantly but not exclusively in policies insuring businesses “*which were never required to close pursuant to any government legislation or regulations*” (understood to be Category 3 businesses).<sup>755</sup> However, it is a general commercial combined policy and appears to have covered policyholders in at least Category 3 or 4. This is

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<sup>755</sup> MSAmlin Def para 43 {A/9/19}

clear from the name of the wording (“Commercial Combined”) and indeed several of the clauses indicate classes of business outside Category 3 (e.g. the public and products liability section provides additional cover for liability for the items of guests/visitors left on cloakrooms (page 84)).

874. MSAmli2 comprises three policies: (i) Retail, (ii) Leisure, and (iii) Office and Surgery. These all include (as automatic additional cover) a “*Notifiable disease, vermin, defective sanitary arrangements, murder and suicide*” clause which provides the following indemnity:

6. **Notifiable disease, vermin, defective sanitary arrangements, murder and suicide**

**consequential loss** following:

- a)
  - i. any occurrence of a **notifiable disease** at the **premises** or due to food or drink supplied from the **premises**;
  - ii. any discovery of an organism at the **premises** likely to result in the event of a **notifiable disease**;
  - iii. any **notifiable disease** within a radius of twenty five miles of the **premises**;
- b) the discovery of vermin or pests at the **premises** which causes restrictions on the use of the **premises** on the order of the competent local authority;
- c) 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 of the competent local authority; or
- d) any murder or suicide at the **premises**.

**Conditions**

- 1. For the purpose of this additional cover **premises** will mean only those locations stated in the **premises** definition. If this policy includes an additional cover which deems **damage** at other locations to be insured, the additional cover will not apply to this additional cover.
- 2. **We** will not be liable for any costs incurred in the cleaning, repair, replacement, recall or checking of property.
- 3. **We** will only be liable for the loss arising at those **premises** which are directly affected by the loss, discovery or accident.

875. Such cover under the Retail and Leisure wordings contain no reference to sub-limits in the policy schedule or indemnity periods, but the Office and Surgery wording does limit cover for any one loss to the amount specified in the schedule for an indemnity period of 3 months.

876. MSAmli1 state that MSAmli2 was issued to businesses which were “*required to close pursuant to government legislation or regulations*” as well as those which were not,<sup>756</sup> as indicated by the different forms of this wording to suit Retail (Categories 3 and 4), Leisure (Categories 1 and 2) and Office and Surgery (Category 3).

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<sup>756</sup> MSAmli1 Def, para 73 {A/9/29}

877. It is common ground that COVID-19 became a notifiable disease on 5 March 2020 in England and 6 March 2020 in Wales.<sup>757</sup> These disease clauses are accordingly the simplest forms of such clause to be considered in this claim. Their only requirements are for (i) loss ‘resulting from’ or ‘as a result of’ interruption of or interference with the business (ii) ‘following’ any COVID-19 within 25 miles of the premises.

### Cover

*MSAmlin1-2: “any notifiable disease within a radius of twenty five miles of the premises”*

878. It is the FCA’s case that whenever a person or persons had contracted COVID-19 such that it was diagnosable within 25 miles of the premises, there was a notifiable disease within a radius of 25 miles of the premises whether or not it was in fact verified by medical testing or a medical professional, and whether or not it was formally confirmed or reported to the UK Department of Health and Social Care and Public Health England, and whether or not it was symptomatic.<sup>758</sup>

879. MSAmlin has not set out its case in response on this point. However, unlike other clauses which require a disease to “*occur*” or to be “*manifested*”, MSAmlin1-2 only require that there is a disease. As to how a policyholder can prove such a disease within a 25-mile radius of their premises, Section 7 above on prevalence is repeated.

880. MSAmlin asserts that the premises must be “*directly affected*” by the notifiable disease.<sup>759</sup> MSAmlin does not elaborate on what this requires. As to the additional requirement that the loss arises “*at those premises which are directly affected by the loss, discovery or accident*”, this is addressed below.

*MSAmlin1: Interruption or interference with the business*

881. As set out above, MSAmlin1 covers Consequential loss as a result of interruption or interference.

882. However, MSAmlin2 covers consequential loss following an occurrence of a disease. There is no requirement of interruption or interference, just the disease, with the loss following.

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<sup>757</sup> MSAmlin Def, paras 65 to 67 {A/9/26-27}

<sup>758</sup> PoC 41 {A/2/26}

<sup>759</sup> MSAmlin Def para 64 {A/9/25-26} and para 82 {A/9/32}

883. MSAm1in1 and MSAm1in2 include the same definition of Consequential Loss: “*Loss resulting from interruption of or interference with the business carried on by you at the premises in consequence of damage to property used by you at the premises for the purpose of the business.*” This definition applies only to damage to property. The MSAm1in2 cover clause clearly sets out the chain required, and it does not include interruption or interference. Accordingly, the following discussion applies only to MSAm1in1, which principally although not only covered Category 3 businesses (those permitted to stay open) as set out above.
884. MSAm1in1 pleads that “interruption” requires “*a complete cessation of the business conducted at the premises*”.<sup>760</sup> As to “interference”, MSAm1in1 does not plead a meaning, save that “interruption” is “*distinct from mere interference*”.<sup>761</sup> It appears to accept that businesses did suffer interruption or interference from the Government action.<sup>762</sup>
885. As for the meaning of “interruption” and “interference”, paragraph 158ff above are repeated. These terms do not require a complete cessation of the business conducted at the premises, although no doubt that test would be met in many instances. The FCA’s case is that such interruption or interference took place from 16 March 2020 onwards (given the advice, instructions and/or announcements on self-isolation, staying at home etc) for all business; and (to the extent MSAm1in1 covers businesses in Category 4 or other Categories) from the relevant date between 20-26 March 2020 due to requirements to close or cease the business.<sup>763</sup>
886. However, irrespective of the fact that the business might not have been expressly required to close by the 21 March or 26 March Regulations, they still suffered interruption or interference: the reason they had operated from premises (to allow customers to attend) had fallen away because those customers and employees were (in the case of Category 3) not permitted to attend and/or had been strongly discouraged from doing so save where essential.
887. It should be self-evident that the government advice, announcements, instructions, regulations and legislation relied on in this case gave rise to interruption of or interference with the operation of businesses. In the context of, for example, a hardware or DIY store, the businesses would be subject to the fact that, from 16 March 2020, its *entire* customer base

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<sup>760</sup> MSAm1in1 Def, para 75.3 {A/9/30}

<sup>761</sup> MSAm1in1 Def, para 75.3 {A/9/30}

<sup>762</sup> See MSAm1in1 Def paras 69-70 {A/9/28} and not setting out a positive case on interruption or interference as regards the MSAm1in1 disease clause.

<sup>763</sup> PoC 46-47 {A/2/30-33}

that would usually attend the premises had been instructed to “stay at home”: they had been told not to shop at the business, even for essentials, unless necessary. And from the date of the 26 March Regulations the customer base was subject to possible fines for not complying with the requirement to “stay at home” save for essential trips.<sup>764</sup>

888. Even if the hardware/DIY shop decided to remain open it would have to comply with all of the various instructions and guidance. The court will recall the queues that resulted at supermarkets and similar in order to comply with social-distancing requirements; they were onerous indeed. If businesses did not comply then they would run the risk of third party liability, employee liability, enforcement by the local authority<sup>765</sup> and indeed breaching obligations in their own insurance policies.<sup>766</sup> On any analysis, too this amounts to interruption and/or interference.
889. The position in relation to other types of insured covered by the Wordings, such as pubs, leisure facilities and attractions and public houses and restaurants (i.e. those in Category 1 and 2) is even clearer because of the express prohibitions in the 21 March and 26 March Regulations.
890. The dispute as to trigger appears therefore to be what is needed to prove COVID-19 (MSAmlin1-2); and whether and when there was interference or interruption (MSAmlin2 only). The principal points of dispute raised by MSAmlin appear to concern causation, the counterfactual, and quantum.

#### Causal connectors and counterfactual

891. The disease clause in MSAmlin1 requires consequential loss *as a result of* interruption of or interference with the business *following* any notifiable disease within a radius of twenty five miles of the premises. That in MSAmlin2 only involves the second link, requiring consequential loss *following* any notifiable disease within a radius of twenty five miles of the premises.
892. It is important to note that on the disease wordings in MSAmlin1 and MSAmlin2, there is a direct link from disease to interruption. In MSAmlin2 there is a direct link all the way from

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<sup>764</sup> See Agreed Facts 4 {C/7} and {C/8} for the number of fines imposed per days and over time for transgressions.

<sup>765</sup> See Agreed Facts 4 {C/7} and {C/8}

<sup>766</sup> See Maintenance and reasonable precautions condition requiring the Insured to, *inter alia*, “cease any activity which may give rise to liability under this policy” and “comply with all statutory requirements and other safety regulations imposed by any authority” (MSAmlin1 General Condition 6 {B/10/17}; MSAmlin2 General Condition 7 {B/11/19}; MSAmlin3 General Condition 6 {B/12/17}).

disease to loss. Unlike the denial of access wordings in these policies, there is no expressed or required element of public authority action (although plainly that may be the means by which the interruption or loss results from/follows the disease ). Indeed unlike some other wordings there is no intermediate step, such as a reference to “occurrence”.

*Following’*

893. MSAmliin assert that, in respect of prevention of access clauses, “following” means proximately caused by, alternatively having a significant causal connection with.<sup>767</sup> The latter is closer to the correct position, which is that there must be a temporal connection and a causal connection looser than proximate cause: see paragraphs 325.3 and 385 above. The ‘jigsaw’ idea—that the Government was responding to all actual and anticipated cases of COVID-19 in the country—is sufficient for these purposes to link the case within 25 miles to the interruption or loss.
894. A circle with radius of 25 miles has an area of around 2,000 square miles. That is ¼ the size of Wales, and larger than Essex, Sussex, Somerset, Dorset, and the vast majority of other English counties, Cornwall being a rare exception.<sup>768</sup> It is almost equivalent, therefore, to saying ‘following any notifiable disease within your county’ (and sometimes ‘or the neighbouring county’). In *New World Harbourview*, the entirety of Hong Kong was included. The Wording deliberately allows for cover if interruption/loss follows illness resulting from a notifiable disease (including COVID-19) anywhere within an area that size. The insurer chose 25 miles as the radius (50 miles as the diameter).
895. Far from there being an exclusion of pandemics or wide area disease (and there is not), such a clause directly contemplates a pandemic or wide area disease—that being one of, if not the, most likely type of disease that could interrupt a business 25 miles away (i.e. anywhere in a 2,000 square mile circle). And it only relates to statutorily notifiable “*infectious*” or “*contagious*” diseases. These are diseases designated as such under Regulations which were enacted to control “*epidemic, endemic or infectious diseases*”,<sup>769</sup> including SARS.
896. Therefore, prima facie the disease clauses only cover outbreaks of infectious diseases. As such the central case is of an outbreak of such a disease occurring 25 miles away (or 20, or 15 miles away) which interrupts or interferes with the business. Such a disease will be

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<sup>767</sup> MSAmliin Def para 53 {A/9/22}

<sup>768</sup> See the plan in Agreed Facts 3. Note: Agreed Facts 3 not yet fully agreed at the date of this skeleton {C/5} and {C/6}

<sup>769</sup> Agreed Facts 5 {C/9}

spreading or likely to spread and public authorities or individuals (including the business owner) are reacting to fear of this spread. In such circumstances it follows that if a disease 25 miles away could spread 25 miles towards the premises (which fact is the basis for the interruption or interference at the premises and in any event inherent in it being an outbreak of an infectious disease), then it can obviously spread in the other direction outside the circle, if it has not already done so.

897. MSAmclin’s position on causation is:

897.1. The Insured must prove the case or cases of disease within 25 miles of the premises was the proximate cause of the ‘interruption or interference’,<sup>770</sup> and is not entitled to any indemnity in respect of loss arising at any premises if such loss is attributable to any notifiable disease beyond twenty five miles.<sup>771</sup> Thus there can be no claim where the action by the Insured or public authority was ‘in ignorance of’ or ‘not as a result of’ confirmed cases within 25 miles of the premises, and/or not taken pursuant to government guidance attributable specifically to at least one confirmed case within 25 miles.<sup>772</sup>

897.2. On the facts, COVID-19 nationally and internationally and/or the response by the public and businesses to it was the sole proximate cause of all loss,<sup>773</sup> and the insured peril (being a notifiable disease within 25-miles of the premises) cannot constitute the proximate cause.

897.3. The counterfactual to be applied is no person sustaining illness resulting from a notifiable diseases with the relevant area, but for the disease the interruption and interference would have occurred anyway for as long as COVID-19 remains in the UK or globally (even if the Government does not issue advice and/or instructions).<sup>774</sup>

897.4. MSAmclin also pleads that “*A general countryside threat or risk of injury, or even the existence generally of notifiable disease, attracting countryside central government action with no reference to or reliance upon a specific case or cases of notifiable disease within the Relevant Area is not covered*”,<sup>775</sup> and that its policies only cover “*localised events*”.<sup>776</sup>

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<sup>770</sup> MSAmclin Def, para 68.3 {A/9/27}

<sup>771</sup> MSAmclin Def para 64.3 {A/9/26}

<sup>772</sup> MSAmclin Def para 70.2(a) {A/9/28}

<sup>773</sup> MSAmclin Def, para 100.1 and 100.2 {A/9/36}

<sup>774</sup> MSAmclin Def, para 107 {A/9/37}, 109-110 {A/9/39}, 113.2 {A/9/40}, 115 {A/9/41}

<sup>775</sup> MSAmclin Def, para 68.3 {A/9/27}

<sup>776</sup> MSAmclin Def, para 102 {A/9/37}

898. Addressing these points in turn:
899. MS Amlin does not ascribe any adequate weight to the word “*following*”, which on any analysis makes expressly clear that a “but for” test is not required in this case. There is no wording to state that the disease must be the only cause (i.e. excluding the causal effect of events taking place outside 25-miles); further it does not say that there needs to be a causal effect at all. The reason for this is self-evident: a disease that could spread around a 2,000 square mile area can also clearly spread beyond it; to take away cover in that instance would be nonsensical.
900. Lest it be thought the absence of a ‘but for’ requirement could open up MS Amlin to unacceptable exposure, it has two safeguards. First, the premises must be directly affected by the “loss”. The word “loss” here naturally refers to the earlier reference in the clause to “consequential loss” (i.e. the claim can only be made for premises in respect of which loss has been suffered). This requirement avoids a situation where all interruption following disease is covered without any need for any nexus at all between the loss and the premises, for example (a) where the interruption is coincidental and arises because of an unrelated fire that happens to have followed an incidence of disease, or (b) where there are multiple locations which are insured under the policy, only one of which is within the 25 mile area, and the insured argues it can claim in respect of premises outside the 25 mile area. Second, the sub-limits under the policy limit recovery to £100,000 for any one loss (for Amlin1).
901. If, contrary to the FCA's case, any ‘but for’ test did apply then the jigsaw analysis referred to above at paragraph 241 applies. In short, on their proper construction, there was only a single indivisible proximate and ‘but for’ cause—the single national (and international) COVID-19 outbreak—of which each local outbreak formed an integral part, else there were concurrent causes but the local disease remains a proximate cause and all the causes must be excised from the counterfactual when applying any ‘but for’ test.
902. The Government and indeed members of the public were responding to the accumulated totality of events relating to COVID-19 up to the date of each of their actions. Government action was a response to the presence of COVID-19 across the country. It was a response to the danger around the country, and the presence of COVID-19 around the country. If there was a case of COVID-19 within 25 miles then that was part of what the Government was responding to. This is even truer of any voluntary or fearful behaviour by individuals, who plainly were responding to the local disease.

903. The counterfactual proposed by MS Amlin is unrealistic. This is a clause with a £100,000 limit (for Amlin1). There is no intention to require or authorise an investigation into an unreal and incalculable world of what would have happened had the disease spread throughout the country but left an impregnable bubble 50 miles wide and centred on the premises. Would the Government still have imposed restrictions in that area? What would the fear of the disease entering the bubble have done to business use? These questions are not practically answerable (especially in the context of the size of the limit) and are not questions the policy requires or authorises the insurer, loss adjuster or court to ask.
904. In any case, clearly the vast majority of losses would still have been suffered anyway for most businesses even on the basis of a counterfactual of an impregnable 50-mile-wide safe haven centred on the premises. They may have even earned an increase in revenue during the time that the rest of the country was in complete lockdown and unable to trade; it is obvious that the country would have flocked to this 50-mile-wide safe haven, or travelled in to conduct business not permitted outside, or if the counterfactual is such that those inside the 50-mile-wide safe haven would have had to remain within it there would have been a captive customer base for the business there.
905. Finally, there are many difficulties with the suggestion these policies only cover ‘localised events’. First, the Wording does not include the words which would be required to make this position good. In particular: Nowhere in the policy does it say anything about not covering wide-scale Government action (or indeed action at all). Nowhere in the Wording does it refer to any exclusion for any disease outside the 25 mile radius or for epidemics or pandemics.
906. MS Amlin asserts that that all of the analysis which applies to MS Amlin1 as to proximate cause applies in the same way to MS Amlin2.<sup>777</sup> The additional difficulty MS Amlin has is that there are even fewer words to support its arguments. There is no requirement in MS Amlin2 for “*interruption or interference*” at all. Unless serious surgery is done to transplant a modified form of the property damage-related ‘consequential loss’ definition; all that is required is loss (such loss directly affecting the premises as set out above) following the notifiable disease. That is where it begins and ends. The DIY store which closes post 16 March or in April because its customers have been told to “stay at home” suffers loss following proven COVID-19, and that loss is insured.

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<sup>777</sup> MS Amlin Def para 82 {A/9/32}

907. MSAmclin pleads that government guidance or requirements cannot be relied upon to the extent that they pre-date the first confirmed case of COVID-19 in the Relevant Area.<sup>778</sup> The FCA accepts that the word ‘following’ necessarily only provides cover to the extent that the interruption or interference takes place after the first incidence of COVID-19 within 25-miles of the premises. This is a matter of fact in each case; the methods of proving an incidence of COVID-19 are considered in Section 7 above..
908. This position that seems to peg causation to “confirmed” cases is inconsistent with the FCA’s case (which MSAmclin have not addressed) that diagnosable cases (and not just those diagnosed and reported) are sufficient for cover under the Policy. The fact that there are many cases which are either not reported or indeed asymptomatic is set out in Agreed Facts 2<sup>779</sup>. In addition, government guidance or requirements are a continuum that continue to apply on an on-going daily basis; even if the government guidance did pre-date any particular confirmed case, it will apply in full force after the confirmed case.
909. See further the discussion in relation to the PoA clause in Section 9H above.

#### Quantification machinery

910. The quantification machinery for these clauses has been addressed at paragraphs 794ff above.

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<sup>778</sup> MSAmclin Def para 70.2(b) {A/9/28}

<sup>779</sup> Close to agreed at the date of this Skeleton {C/3} and {C/4}

**K. Argenta disease clause, 25 mile provision, only Category 6 policyholders**

Introduction

911. Argenta1 includes two Wordings containing a ‘Defective Sanitation NOTIFIABLE HUMAN DISEASE Murder or Suicide’ extension 4(d) (p58)<sup>780</sup> such that it will “*indemnify the INSURED... for such interruption as a result of... (d) any occurrence of a NOTIFIABLE HUMAN DISEASE within a radius of 25 miles of the PREMISES*” (p58).

<p><b>4. Defective Sanitation NOTIFIABLE HUMAN DISEASE Murder or Suicide</b></p> <p>(a) closure or restriction on the use of the <b>PREMISES</b> by order of a Public Authority consequent upon vermin pests defects in drains or defective sanitation at the <b>PREMISES</b></p> <p>(b) any occurrence of a <b>NOTIFIABLE HUMAN DISEASE</b> at the <b>PREMISES</b> or attributable to food or drink supplied from the <b>PREMISES</b></p> <p>(c) any discovery of an organism at the <b>PREMISES</b> likely to result in the occurrence of a <b>NOTIFIABLE HUMAN DISEASE</b></p> <p>(d) any occurrence of a <b>NOTIFIABLE HUMAN DISEASE</b> within a radius of 25 miles of the <b>PREMISES</b></p> <p>(e) any occurrence of murder or suicide at the <b>PREMISES</b></p>	<p>(i) for any amount in excess of £25,000</p> <p>(ii) for any costs incurred in the cleaning repair replacement recall or checking of the property</p> <p>(iii) for any loss arising from those <b>PREMISES</b> that are not directly affected by the occurrence discovery or accident</p>
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912. Accordingly, the Wording requires (i) interruption, (ii) as a result of an occurrence, (iii) of a notifiable human disease, (iv) within 25 miles of the premises.

913. Argenta’s policyholders under its first Wording (HUIA Guest House and B&B Insurance) are guest houses and bed and breakfasts, i.e. largely catered accommodation. Its policyholders under its second materially identical Wording (HIUA Holiday Homes and Self-Catering Accommodation) are holiday homes and other self-catering accommodation.<sup>781</sup> Accordingly, it is understood (from Argenta) that all of its policyholders fall into Category 6.<sup>782</sup> It is likely, however, that the businesses would also be caught by legislation applying to Categories 1 and 2, as the lead Wordings makes clear that (as is not surprising for guest houses) they apply to the provision of “*catering services and leisure facilities*”<sup>783</sup> which suggests they may possibly also fall within Categories 1 and 2 for the purposes of the legislation closing “*any premises, or part of any*

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<sup>780</sup> {B/3/59}  
<sup>781</sup> Argenta Def 7 {A/8/3}  
<sup>782</sup> Argenta Def 7 {A/8/3}  
<sup>783</sup> Definition of Business on p55 {B/3/56}

*premises, in which food or drink are sold for consumption on those premises*<sup>784</sup> and prohibiting the carrying on of any listed leisure business, although the Regulations expressly exclude food or drink sold as part of room service from that prohibition.<sup>785</sup>

914. It is not likely to be disputed that businesses in this sector have been severely affected during the COVID-19 pandemic, with the cancellation of holidays, conferences, weddings and other events, and most travel of any sort.
915. The disease clause includes a £25,000 sub-limit, and excludes cleaning repair etc costs, as well as loss arising from premises not directly affected by the occurrence.<sup>786</sup>

## Cover

### *A Notifiable Human Disease*

916. It is not in dispute that Covid-19 was a ‘notifiable human disease’ as defined in the Wording (p55) from 5 March 2020 in England and 6 March 2020 in Wales,<sup>787</sup> it being one of the infectious human diseases listed in the relevant legislation from that date, an outbreak of which was required by law to be notified.

*“Any occurrence [of COVID-19] within a radius of 25 miles of the premises”*

917. This is the critical trigger in the disease extension. COVID-19 must occur within 25 miles (and, note not ‘at the premises or within 25 miles of the premises’, just ‘within 25 miles of the premises’).
918. The FCA’s case is that COVID-19 had ‘occurred’ within 25 miles when (the policyholder can prove that) there was at least one person within the area with a radius of 25 miles who has contracted COVID-19 such that it is diagnosable (whether or not it has been medically verified or reported, and whether or not it is symptomatic).<sup>788</sup> Argenta admits this reading of ‘occurrence’<sup>789</sup> (in contrast with the approach taken by Hiscox).

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<sup>784</sup> Reg (2)(a)(i) of the 21 March Regulations **{J/15}** and Reg 4(1)(a)(i) of the 26 March Regulations **{J/16}**

<sup>785</sup> Reg 2(1)-(2) of the 21 March Regulations and Reg 4(1)-(2) of the 26 March Regulations

<sup>786</sup> p58 **{B/3/59}**

<sup>787</sup> See Argenta Def paras 14 **{A/8/4}** and 54 **{A/8/13}**

<sup>788</sup> PoC para 41 **{A/2/26}**

<sup>789</sup> Argenta Def para 55(1) **{A/8/13-14}**

919. Of course, and this is not believed to be disputed, the disease occurrence within the 25 mile radius does not stop with the first case but extends to all subsequent cases within the circle, i.e. there is no suggestion that the causal connection (discussed below) must be between the *first* case of COVID-19 within the circle and the interruption. The occurrence is the totality of the outbreak within 25 miles.

*“Within a radius of 25 miles of the premises”*

920. The vicinity requirement in the Argenta policy is a defined area with a radius of 25 miles of the insured premises. Argenta repeatedly refer to this area in the course of their Defence as “local”. Instances of Covid-19 within the area are termed a “local occurrence” and admissions as to the area or instances of Covid-19 within the area are couched in those terms.<sup>790</sup>

921. However, this is a very wide area of peril indeed. It is not “local” in the sense we might colloquially understand it and Argenta’s frequent use of the phrase elides two distinct concepts. First is the notion of a neighbourhood – this evokes a street, the postmaster, the corner shop owner’s daughter, individuals who may even be known to the policyholder. This is not the sense which is intended by the policy, though it is the sense which is implicitly relied on by Argenta in their Defence. Second, there is the much wider idea of locality as defined by the specified size of the policy area. In this case, it is an area with a 25-mile radius or 1963.5 square miles. A radius, as noted above, which would encompass the entirety of Greater London and beyond. For a guesthouse based in the middle of Central London, any occurrence of Covid-19 in Dagenham, Knightsbridge, Slough or Hampstead Garden Suburb would fall within the policy area. The policy envisages an occurrence of a notifiable disease in Slough being capable of resulting in interruption to a guesthouse in Mayfair. It is this wider sense which is intended by the policy. This wide policy area also reinforces the wider understanding of the term occurrence.

*“Interruption”*

922. The extension refers to “*such interruption*” and must therefore be a reference to the interruption in the primary (damage) BI insuring clause, which refers to “*BUSINESS at the PREMISES is interrupted*” (p56)<sup>791</sup>. Business is defined as “*the provision of Guest House accommodation, catering*

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<sup>790</sup> See for example Argenta Def para 21 {A/8/6}. It is also worth noting that Argenta also refer to the area as the 25-mile zone (Argenta Def para 22), this is also inaccurate, the zone in question as noted above has an area of 1963.5 square miles.

<sup>791</sup> {B/3/57}

*services and leisure facilities at the PREMISES*” (p55) or “*the provision of self-catering holiday accommodation*” (p50 of Holiday Home) in the two Wordings.

923. Argenta accept that each of:

923.1. the 21 March Regulations and 26 March Regulations (and equivalent Regulations elsewhere in the UK), and

923.2. the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working on 16 March 2020 and subsequently, including the advice to close accommodation for commercial use as quickly as possible on 24 March 2020

“*were capable of causing*” ‘interruption’ to the business of its accommodation-providing policyholders.<sup>792</sup>

924. Thus Argenta does not take any points of principle as to what may amount to interruption.

925. However, Argenta refuses to respond to the plea<sup>793</sup> that there was interruption even where a Category 6 business was permitted to provide a limited range of services (hosting those who were stranded, moving house, attending a funeral, homeless<sup>794</sup>), and generally pleads that although the various activities were ‘capable’ of causing interruption, whether or not there was interruption on a particular date for a particular policyholder “*is a question of fact in each particular case, which cannot be determined in these proceedings*”.<sup>795</sup>

926. Whether ‘interruption’ within the Wording is satisfied is a question of fact (or rather, a mixed question of fact and law) in each case, but that does not mean that the Court cannot (i) conclude that there was interruption for all accommodation businesses in certain factual situations (for example, if they were ordered to close and previously continuing), (ii) make declarations and findings in relation to the meaning of ‘interruption’ in the context of these Wordings and these agreed (including in Agreed Facts 1) nationwide events. Argenta does not, for example, argue that any insured businesses fell outside the scope of the Regulations.

927. The FCA will turn to the causal connector and other causation questions below, but its case, not seriously disputed, is that all Category 6 businesses were interrupted from 16 March 2020

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<sup>792</sup> Argenta Def paras 58-9 {A/8/15}

<sup>793</sup> PoC para 47 {A/2/32}

<sup>794</sup> Reg 5(4) of the 26 March Regulations {J/16}

<sup>795</sup> Argenta Def 58 {A/8/15}

by their customers being told to “*stop all unnecessary travel*”, stay at home (etc), and the various pronouncements and legislation thereafter. The key events include:

927.1. Agreed Facts 1 row 32: 16 March 2020 social distancing guidance including to stop all unnecessary travel

927.2. Agreed Facts 1 row 48: 21 March Regulations closing holiday accommodation

927.3. Agreed Facts 1 row 55: 24 March 2020 statement on holiday accommodation closure

927.4. Agreed Facts 1 row 49: 26 March Regulations closing holiday accommodation

928. It is difficult to see how Argenta seeks to dispute that the accommodation businesses were (where otherwise continuing) interrupted in all cases within England and Wales by *any* of the above, even the Regulations (which made it unlawful to remain open save for very limited circumstances<sup>796</sup>). The only basis could be if Argenta contends that staying open for the limited permitted purposes set out immediately below<sup>797</sup> means the business was not interrupted:

**(4) A person referred to in paragraph (3) may continue to carry on their business and keep any premises used in that business open—**

- (a) to provide accommodation for any person, who—**
  - (i) is unable to return to their main residence;**
  - (ii) uses that accommodation as their main residence;**
  - (iii) needs accommodation while moving house;**
  - (iv) needs accommodation to attend a funeral;**
- (b) to provide accommodation or support services for the homeless,**
- (c) to host blood donation sessions, or**
- (d) for any purpose requested by the Secretary of State, or a local authority.**

929. But, for the reasons set out above in paragraphs 158ff and at 378ff, that cannot be right.

929.1. The Category 6 business is interrupted if it closes even though it is permitted to continue to stay open for those limited purposes.

929.2. It is also interrupted even to the extent that it chooses or is requested to stay open for these other purposes. (c) to (d) are obviously not the ‘Business’ as defined.

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<sup>796</sup> And the Wordings expressly require the insured to “*take all reasonable measures to observe and fulfil the requirements of all statutory obligations and regulations*”: General Condition 2 on p88 of the lead wording **{B/3/89}** and General Condition 2 on page 80 of the non-lead wording **{B/25/81}**

<sup>797</sup> Reg 5(4) of the 26 March Regulations **{J/16}**

929.3. But even to the limited extent it remains open for (a) to (b) (and it can only be the most unusual of policyholders that remained open without interruption to serve these exceptional circumstances), which on their face are within the ‘Business’ as defined, a commercial reading of ‘interruption’ must allow for the nature of the Business as it was. (If the guesthouse was ordered to accommodate stray dogs, that would still be the provision of Guest House accommodation but not the insured business.) Supplying accommodation to a miniscule fraction of the ordinary public by way of the exceptional case is still an interruption, and any revenue taken from the exceptional accommodation provision will reduce the amount of the indemnity.<sup>798</sup>

930. The business, as defined, is interrupted if the vast majority of its customers cannot come. Or to put it another way, when it is ordered to close other than for the purposes of a new, very much more limited, business, which is obviously true for non-accommodation purposes (blood donations) or when not charging ordinary customers on an ordinary basis (homeless accommodation) but is also true when the business has been ordered to close.

“The premises not directly affected” exclusion

931. Argenta rely on the exclusion in the disease clause of “(iii) any loss arising from those premises that are not directly affected by the occurrence discovery or accident”.

932. The purpose and effect of this clause is clear from its words: the loss calculation in the Basis of Settlement clause relates to the drop in Gross Income of the Business, not of the premises. Accordingly, without this clause, once the cover is triggered because of business *at the premises* being interrupted as a result of occurrence of a disease within 25 miles *of the premises*, the insured could then recover for all losses to the entire business (which might include a number of guesthouses or rental cottages around the country, many of them hundreds of miles from the disease)—even the trends clause only adjusts by reference to the *business* not the premises.

933. This clause deals with that by excluding losses to the *business* from other premises not directly affected by the occurrence of the disease.<sup>799</sup> It restricts losses to those ‘arising from’ the impacted property. Thus if a public authority’s concerns due to a disease or vermin or food poisoning at a particular property lead it to impose closure or other restrictions at other properties (for example, due to concerns as to the business *operator’s* hygiene or sanitation

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<sup>798</sup> All actual turnover during the indemnity period—the period when the results of the business are ‘affected’ (definition of Indemnity Period, p55 {B/3/56})—is taken into account.

<sup>799</sup> As set out in Reply para 54 {A/14/27}

levels, or that the disease might have spread through staff to the other guest houses/cottages). The present Claim (and all the Assumed Facts) all relate to premises directly affected by the relevant peril.<sup>800</sup>

934. Argenta claim that the exclusion is for “*any loss arising from Premises which have not been ‘directly affected’ by a local occurrence of an infectious disease*”.<sup>801</sup> Their paraphrase is correct (subject to one reading the tendentious addition ‘local’ as just meaning ‘within 25 miles’, which is what the Wording actually says). However, the exclusion does not provide any support for the case that losses concurrently attributable to the disease occurring outside the premises/outside 25 miles are excluded (as in paragraph 63(8) of the Defence).
935. The exclusion excludes losses to premises more than 25 miles away from the disease, not losses to premises less than 25 miles away from the disease.

The causal connector “interruption as a result of... any occurrence” of COVID-19 within 25 miles

936. The relevant causal connector is that there must be an interruption *as a result of* any occurrence of a Notifiable Human Disease within a radius of 25 miles of the premises. Any loss must be *as a result of* that occurrence.
937. Before turning to that issue, it is important to note that this is a direct link from disease to interruption. There is no expressed or required element of public authority action (although plainly that may be the means by which the disease results in the interruption). For Argenta to dispute this, it must do so by saying that the disease within 25 miles was not a proximate or ‘but for’ cause of the interruption.
938. Argenta does say that. It says that losses were caused by the following supposedly rival causes:
- (a) the global or national Covid-19 pandemic;
  - (b) the advice given and/or restrictions imposed by the UK Government (and/or the devolved administrations and/or relevant foreign governments) in response to that global or national pandemic; and/or
  - (c) the public response in the UK and/or elsewhere to that global or national pandemic.<sup>802</sup>
939. Argenta further says that the ‘local’ pandemic (by which it means COVID-19 within the 2,000 square mile circle) is separate and distinct from the global or national pandemic,<sup>803</sup> not a

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<sup>800</sup> The Defendants have looked to rely on some issues outside the premises, for example in Category 5.

<sup>801</sup> In paras 19 {A/8/5} and 51(1) {A/8/12} of their Def

<sup>802</sup> Argenta Def para 63(3)-(4) {A/8/16-17}, also 22-3 {A/8/6}

<sup>803</sup> Argenta Def para 63(7) {A/8/17}, 66(1) {A/8/19}

proximate cause,<sup>804</sup> and even if that occurrence is a proximate cause ‘but for’ that area of COVID-19 “*the same or substantially the same loss would have been sustained*”.<sup>805</sup>

940. The FCA’s case is set out in detail above in relation to a similar argument in a similar clause of QBE (see paragraphs 821ff), and those points are repeated. But the point is thrown into relief by Argenta’s attempt to draw a distinction between “an occurrence of” the disease Covid-19, and the global or national pandemic.

“A pandemic may be a cause of local occurrences of the disease. But each individual local occurrence is not a cause of the pandemic. There is therefore no basis on which a single local occurrence can be treated as a cause of the pandemic, or of the governmental response to the pandemic, or of the public response to the pandemic, or of the further consequences of such responses. All of these things have a common cause in the pandemic itself, but not in the occurrence of cases within a specific locality.”<sup>806</sup>

941. The pandemic is not the cause of occurrences within 25 miles of different premises, the pandemic is comprised of them. Without those occurrences there is no pandemic (and, of course, no governmental or public response to it).

942. This means that the pandemic is indivisible, including on a proper construction of the policy and what is intended by a disease clause with a 25-mile limit. Accordingly, (i) the interruption was ‘a result of’ the occurrence of COVID-19 within 25 miles (including by the means of the government and public response), (ii) any counterfactual to a ‘but for’ test must exclude COVID-19 (otherwise *no occurrences anywhere* of COVID-19 caused the government response and any resulting interruption).

943. Returning to the particular context of holiday accommodation, it is as obvious as can be that when deciding where to go on holiday, whether the accommodation is in a 2,000 square mile area with no COVID-19, or on the contrary whether there is a potentially fatal infectious disease in that area, is important if not determinative. This is true whether or not the disease was present outside that area.

944. Accordingly, had there been no government action closing down such accommodation, it is self-evident that the disease (with the inherent risk that it would have continued to spread) would have caused an interruption. Argenta’s argument is therefore that cover that would otherwise have arisen, is defeated by the Government’s decision to prohibit conduct that

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<sup>804</sup> Argenta Def para 66(1) {A/8/19}

<sup>805</sup> Argenta Def para 63(10) {A/8/18}, 67(5) {A/8/20}

<sup>806</sup> Argenta Def para 18 {A/8/5}

people would voluntarily have foregone, which national response trumps the 'local' disease by virtue of being the true proximate cause and/or concurrent independent 'but for' cause.

945. Given that the Government's actions were a response to this very disease nationally including within 25 miles of the premises, that simply cannot be right as a matter of construction or causation.

#### The quantification machinery

946. The Basis of Settlement in the BI section states that the insurer will “*pay as indemnity the*” fall in gross income from the standard gross income, and increased cost of working, and the cost of alternative accommodation for guests (p59)<sup>807</sup>.

947. As the insuring clause for the Extensions refers to the indemnification being “*as provided in The Insurance of this Section for such interruption as a result of...*” (p57), and the primary (damage) insuring clause provides that the indemnity is for “*the amount of loss as stated in the Basis of Settlement*”, then the basis of indemnity for the Extensions must necessarily be as stated in the Basis of Settlement. That Basis of Settlement (p59) expressly refers to and requires “**DAMAGE**”, defined by reference to property damage (p10<sup>808</sup>), but unless one proceeds on the premise that the peril in each Extension (if it does not involve Damage) is to be treated as if it was damage for the purposes of the policy, there is no indemnification provision. This cannot be right nor intended by the parties, and the FCA accepts that the trends clause within the definition of gross income (but not increased cost of working) prima facie applies in this case.

948. Standard Gross Income is defined in the following way (p55):

the **GROSS INCOME** during that period in the twelve months immediately before the date of the **DAMAGE** which corresponds with the **INDEMNITY PERIOD** to which such adjustments will be made as necessary to take account of the trend of the **BUSINESS** and of the variations in or other circumstances affecting the **BUSINESS** either before or after the **DAMAGE** or which would have affected the **BUSINESS** had the **DAMAGE** not occurred so that the figures thus adjusted will represent as nearly as may be practicable the results which but for the **DAMAGE** would have been obtained during the relative period after the **DAMAGE**

949. However, whilst the FCA accepts that the quantum machinery must be made to work here, that does not mean that DAMAGE can be replaced by something overly narrow. The insured peril is indeed an occurrence of a disease within 25 miles of the premises,<sup>809</sup> but it cannot be

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<sup>807</sup> {B/3/60}

<sup>808</sup> “accidental loss damage or destruction”

<sup>809</sup> As Argenta alleges: Argenta Def para 26 {A/8/7}, 67(2) {A/8/19}

intended that the counterfactual should exclude anything or everything which is inextricably tied up with those diseases, including the Government restrictions.

950. Paragraphs 474ff above are repeated here. The appropriate counterfactual is of no COVID-19, alternatively a world with no COVID-19 within the 25 mile radius circle around the premises.

#### **Argenta – Assumed Facts Example (Category 6)**

Business FF is a holiday lettings company which has short term let holiday cottages in rural locations. Cottage 1 continued to be let until mandated to close on 26 March. There were reported COVID-19 cases within 25 miles of the premises by 15 March 2020. Loss of revenue was suffered as a result of the cancellation/termination of bookings due to commence on or after 26 March 2020.

Argenta's disease clause is triggered:

- There has been an interruption to FF's business in the form of closure and there has been an occurrence of a notifiable human disease within a radius of 25 miles of the premises (The FCA understands this to be common ground).
- Losses resulting from cancellation/termination of bookings due to commence on or after 26 March 2020 at Cottage 1 are recoverable.
- The loss of income was the result of the occurrences of COVID-19 within the 2,000 square mile area around the club, whether viewed as a part of a single outbreak (the national pandemic), or, alternatively as a concurrent cause within the jigsaw of causes to which the Government responded.
- All the causes relating to the pandemic (including the emergency responses of the Government) must be excised from the counter-factual when applying any 'but for' test.

**L. RSA1, 3 and 4 disease clause, 25 mile/Vicinity provision**

Introduction

951. RSA1 provides cover for the following:

**2 Disease, Murder, Suicide, Vermin and Pests**

Loss as a result of

- A) closure or restrictions placed on the **Premises** as a result of a notifiable human disease manifesting itself at the **Premises** or within a radius of 25 miles of the **Premises**.

It is common ground here (and in relation to the other clauses below) that COVID-19 was a notifiable disease from 5 March 2020 (in England) and 6 March 2020 (in Wales). The clause therefore requires establishing (i) closure or restrictions placed on the premises (ii) as a result of COVID-19 manifesting itself within 25-miles (iii) resulting in loss.

952. RSA3 provides:

**vii. Infectious Diseases**

We shall indemnify You in respect of interruption of or interference with the **Business** during the **Indemnity Period** following:

- a. any:
  - i. occurrence of a Notifiable Disease (as defined below) at the **Premises** or attributable to food or drink supplied from the **Premises**;
  - ii. discovery of an organism at the **Premises** likely to result in the occurrence of a Notifiable Disease;
  - iii. occurrence of a Notifiable Disease within a radius of 25 miles of the **Premises**;
- b. the discovery of vermin or pests at the **Premises** which causes restrictions on the use of the **Premises** on the order or advice of the competent local authority;
- c. 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; or
- d. any occurrence of murder or suicide at the **Premises**

The clause therefore requires (i) interruption or interference (ii) following an occurrence of COVID-19 within 25-miles of the Premises. RSA relies on a pollution and contamination exclusion.

953. Finally, RSA4 includes a disease provision with cover for :

69. **Notifiable Diseases & Other Incidents** means:

i. one of the following tabulated diseases and/or illnesses:

Acute encephalitis	Infectious bloody diarrhea	Rubella
Acute infectious hepatitis	Invasive group A streptococcal disease	Scarlet fever
Acute meningitis	Legionnaires Disease	Severe Acute Respiratory Syndrome (SARS)
Acute poliomyelitis	Leprosy	Smallpox
Anthrax	Malaria	Tetanus
Botulism	Measles	Tuberculosis
Brucellosis	Meningitis	Typhus
Cholera	Meningococcal septicemia	Viral hepatitis
Diphtheria	Mumps	Viral haemorrhagic fever (VHF)
Enteric Fever (typhoid or paratyphoid fever)	Plague	Whooping cough
Food poisoning	Rabies	Yellow fever

ii. any additional diseases notifiable under the Health Protection Regulations (2010), where a disease occurs and is subsequently classified under the Health Protection Regulations (2010) such disease will be deemed to be notifiable from its initial outbreak;

Accordingly, this requires (i) interruption or interference to the Insured’s Business (ii) as a result of COVID-19 occurring within the Vicinity of an Insured Location”. (See also paragraphs 559ff above where the other RSA4 clauses are considered).

954. The RSA wordings are standard forms and indeed RSA2.1-2 and 3 provide “*The Policy wording is a standard contract form which details in various sections the cover selected, exclusions to the cover...*”.

## RSA1 - Cover

955. RSA1 (“*Cottagesure*”) is primarily directed at holiday cottage owners (Category 6). There is no separate requirement for interruption or interference – provided the closure or restrictions result in loss, the claim is within the scope of cover.
956. There is a sub-limit of £250,000 and an indemnity period of 12 months. Each of the requirements for cover are considered in turn. These are relatively high limits for disease provisions, which probably reflects the importance of these heads of cover to those operating in the tourism industry. Limits are typically significantly lower, reflecting the potential for heavy losses to be incurred by insurers under such covers.

### *“closure or restrictions placed on the Premises”*

957. It appears to be common ground that the requirement for “*closure or restrictions placed on the Premises*” was satisfied from at least 26 March 2020, when Category 6 businesses were required to close by the 26 March Regulations.<sup>810</sup> RSA’s case appears to be a non-admission as to whether there was such a closure or restrictions as a result of the Government announcement on 24 March 2020 (telling accommodation providers that by now they should have taken steps to close for commercial use and providing further detail as to closure requirements).<sup>811</sup>
958. The FCA assumes that the issue between the parties is whether there was ‘closure or restrictions’ before 26 March 2020, for example by reason of the stay-at-home and social distancing guidance given on 16 March 2020 (and on many occasions since then).<sup>812</sup> RSA fails to plead a positive case on why there was not closure or restrictions before this date.<sup>813</sup> There plainly was:
- 958.1. There is no requirement for a closure to originate from any authority, official or otherwise. The only issue is a question of fact as to whether what occurred amounted to a closure or a restriction.
- 958.2. The meaning of ‘closure’ is considered above at paragraphs 569ff; it means prevention of access, total or partial. In the case of ‘restrictions’, this would include any measure

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<sup>810</sup> See RSA ADef para 68 {A/12/24}.

<sup>811</sup> See RSA ADef para 52 which pleads a non-admission (the 24 March 2020 direction not appearing to be a “Social Distancing Measure” or a “Closure Measure” within RSA’s categorisation) {A/12/21}.

<sup>812</sup> As pleaded in PoC paras 46 {A/2/30} and 49 {A/2/33}, as to which see RSA ADef paras 49(c)(i) {A/12/20}, 52(b) {A/12/21}, 69 {A/12/25}.

<sup>813</sup> See the bare denial at RSA ADef para 49(c)(i) {A/12/20}.

which hindered or prevented (directly or indirectly) access to or use of the Premises. These must be ‘placed upon’ the premises but that can be indirect as well as direct, *i.e.* including a *de facto* restriction arising from circumstances.

958.3. The Government’s announcements from 16 March 2020 restricted the country’s citizens from travelling freely, including to visit an insured cottage. The restrictions from 16 March 2020 were all pervading. The clientele of any cottage rental businesses could not travel on an unnecessary holiday without contravening the government’s imperative advice and (from 26 March 2020) without the risk of criminal sanction. The unprecedented measures taken was about as extreme a restriction and closure of holiday cottages businesses as could be imagined.

958.4. To the extent that RSA suggests that compliance with health and safety guidance was voluntary, the policyholders were subject to General Condition 10, which provided that “*You must at Your own expense take all reasonable steps to prevent or minimise any Damage or any Injury to Employees or the public.*” Policyholders could not have ignored government advice and guidance without risking breach of this term.

*“as a result of [COVID-19] manifesting itself”*

959. The FCA’s case is that whenever the policyholder can prove that a person had contracted COVID-19 such that it was diagnosable (whether or not in fact medically verified or confirmed or reported or symptomatic) then COVID-19 was ‘manifested by any person’ in a particular place.

960. Taking into account the commercial purpose of the cover, if a disease is sufficiently manifest to justify government or health authorities taking protective measures then this generally ought to be sufficient to trigger cover under the policy. This is consistent with the commercial purpose of the cover. The cover would be expected to respond in circumstances including whenever a conclusion could be reached by civil authorities that disease had spread to the area concerned and that closure or restrictions on premises were accordingly required to tackle it.<sup>814</sup>

961. The evidence for occurrence of COVID-19 within the required vicinity is considered in relation to the submissions on prevalence above.

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<sup>814</sup> If justification is required for such a construction by reference to the obvious commercial purpose of the contract it is provided by the Supreme Court’s decision in *BAI (Run Off) Ltd (Lead Case 1) (above ref) v Durham* [2012] UKSC 14 {J/113}.

962. The FCA’s case is therefore that whenever after 5/6 March 2020 a person or persons had contracted COVID-19 such that it was diagnosable and was/were within 25 miles of the premises, this requirement of the cover is satisfied.
963. RSA claims that COVID-19 only ‘manifests’ itself when it is actually diagnosed, and anything less is insufficient to establish manifestation.<sup>815</sup> That argument is (i) wrong as a matter of principle – COVID-19 manifests itself whenever it occurs, not merely whenever it is actually diagnosed; and (ii) insofar as it is raising hurdles on the balance of proof, it underestimates the ability of the Court to make inferences of fact – as to which see Section 7 above.

*“within a radius of 25 miles of the Premises”*

964. The submissions previously made at paragraphs 920 to 921 above about the extent and purpose of a 25 mile radius are repeated. Such a large zone is perhaps particularly suited to operators in the tourist trade, who could be expected to suffer business interruption losses from even more remote outbreaks of disease, with which their business (or more likely tourist destination of which their business is part) might become associated. It is perhaps with that in mind that RSA added a requirement to this cover that it only be triggered if there was some form of closure or restriction placed on the insured premises.
965. As stated above, the Disease, Murder, Suicide, Vermin & Pests provision covers perils which are a special threat for operators in the tourist trade. RSA1 includes other provisions tailored to operators in the tourist trade, specifically a pollution of beach cover. This covers *“Loss that is solely attributable to sudden or accidental pollution of any beach within a ten mile radius of the Premises”*. It has a £75,000 sub-limit. This provides a useful test of the Defendants’ arguments concerning the proper construction of vicinity clauses in the context of insuring unitary potentially “wide-area” perils:
- 965.1. Take Sea View cottages, situated 7 miles from Chesil Beach in Dorset. Most of its summer custom is from beach loving families, who flock to Chesil beach summer after summer. They relish visiting every inch of the beach’s 18-mile stretch. On 1 August 2020 a devastating oil spill ruins the entirety of Chesil beach and the surrounding coastline. All of Sea View cottages’ clients cancel their holidays for the remainder of 2020, citing the oil spill.

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<sup>815</sup> RSA ADef para 40 {A/12/16}.

- 965.2. Sea View lodges its claim with RSA. It has lost over £80,000 of bookings for its cottages. What does RSA's adjuster decide should be paid? The answer ought to be plain, he pays the limit of the pollution of beach cover under RSA1 of £75,000.
- 965.3. Any other answer would be patently absurd. The beach was within a 10 mile radius of the cottage, because part of it was. It can be no defence for the insurer to say that it did not intend to cover beaches or pollution which extended further than 10 miles away. Chesil beach is one beach, and any division would be artificial and have to be clearly mandated by the provision.
- 965.4. Nor could it seek to argue that Sea View cottage's clients would not have come anyway, because even if the 3 miles stretch of Chesil beach within the 10 mile vicinity had been pristine, none of its clients would have come because the rest of coastline was devastated and all the other beach-related facilities in the region were closed.
- 965.5. Yet that is the implication of RSA's argument. The flaw in its argument is that it confuses the consequences of damage in a case like *Orient-Express* with the consequences of a unitary peril, like pollution or infectious disease, for which it has agreed to provide insurance. Unless the scope of a unitary peril is clearly and expressly restricted by exclusions or other careful (and clear) drafting, the insurer must indemnify on the basis that the unitary peril has occurred. It must compensate for the loss arising from that peril, which it has not excluded from cover. It is no defence that the scale of the peril was far greater than the insurer had anticipated. The transference of unexpected loss to insurers for the payment of premium is the essence of an insurance contract.

### Cover - RSA3

966. RSA3 is a combined commercial policy. RSA states that it was taken out by "*a variety of businesses including building contractors, landscape gardeners and manufacturers and wholesalers of electronics, fabrics and metal goods*";<sup>816</sup> it appears therefore that the relevant businesses categories are Categories 3-5.

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<sup>816</sup> RSA ADef para 5(d) {A/12/2}.

967. The FCA relies on the ‘Infectious Diseases’ clause, which provides that “*We shall indemnify You in respect of interruption of or interference with the Business during the Indemnity Period following... iii. occurrence of a Notifiable Disease within a radius of 25 miles of the Premises;*”
968. It is common ground that COVID-19 was a Notifiable Disease as defined from 5 March 2020 in England and 6 March 2020 in Wales.
969. The coverage arguments for this clause are identical to submissions already made. In brief:
- 969.1. There was *interruption of or interference* for the reasons stated in Section H above.
- 969.2. As for the requirement of COVID-19 within a radius of 25 miles of the Premises, see paragraph 964.
970. This is therefore a straightforward cover, that on any reasonable reading is triggered if there is interruption or interference with the business that has some causal connection to the occurrence of COVID-19 within 25-miles of the premises (including as part of the national pandemic). It is difficult to conceive of an insured whose business was impacted by COVID-19 in the UK that wouldn’t have satisfied that criteria.
971. RSA3 also includes a cover for under Extension xi for ‘Prevention of Access – Public Emergency’. This is not relied upon by the FCA. Unlike in RSA2.1, the exclusion in this extension in RSA3 is effective because full cover is provided for newly notifiable diseases under the Infectious Disease cover.
- “Pollution/contamination exclusion”*
972. RSA3 contains a general exclusion (applicable to all sections other than employers’/public liability sections) which states:

L Applicable to all sections other than Section 5 – Employers’ Liability and Section 6 – Public Liability Contamination or Pollution Clause

- a) The insurance by this Policy does not cover any loss or Damage due to contamination pollution soot deposition impairment with dust chemical precipitation adulteration poisoning impurity epidemic and disease or due to any limitation or prevention of the use of objects because of hazards to health.
- b) This exclusion does not apply if such loss or Damage arises out of one or more of the following Perils:
  - Fire, Lightning, Explosion, Impact of Aircraft
  - Vehicle Impact Sonic Boom
  - Accidental Escape of Water from any tank apparatus or pipe Riot, Civil Commotion, Malicious Damage
  - Storm, Hail Flood Inundation Earthquake
  - Landslide Subsidence Pressure of Snow, Avalanche Volcanic Eruption
- a) If a Peril not excluded from this Policy arises directly from Pollution and/or Contamination any loss or Damage arising directly from that Peril shall be covered.
- b) All other terms and conditions of this Policy shall be unaltered and especially the exclusions shall not be superseded by this clause.

973. The FCA accepts that the COVID-19 pandemic falls within the words ‘epidemic and disease’. But the exclusion does not eliminate cover under the disease clause in this case.

973.1. If the exclusion applied, it would negate a substantial part of the cover that the disease clause purports to give: loss arising under the disease clause would always be loss “due to...disease” falling within the exclusion. This cannot have been intended.<sup>817</sup> On its proper construction, therefore, this exclusion (as a whole) cannot have been intended to apply to loss under the disease clause.

973.2. RSA accepts this and contends that “poisoning impurity epidemic and disease...” should be read as “poisoning impurity (disease) epidemics...”<sup>818</sup> But the reasonable person who, as RSA accepts, would conclude that the exclusion cannot be intended to apply in accordance with its express terms would not understand the wording to be rewritten in this way (a rather precise surgery that is not salient as an obvious intended outcome) but would rather understand that the exclusion is not intended to apply to the disease cover clause.

973.3. This is especially the case because this is expressly provided for (although would be implied if it were not). The penultimate sub-paragraph (labelled (c) in some wordings and as a second (a) in others) provides a carve out for loss arising directly from any Peril not excluded from the Policy if the Peril arises directly from Pollution and/or Contamination. The terms “Peril” and “Pollution and/or Contamination” are not

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<sup>817</sup> See paragraphs 92ff above in relation to the principle of contra proferentem.

<sup>818</sup> RSA Def para 55(c)(i) {A/12/22}.

defined, but it is clear from the context what they are intended to be.<sup>819</sup> ‘Peril’ is simply a reference to any insured peril under the policy, which includes the disease clause. ‘Pollution and/or Contamination’ is a reference back to the first sub-paragraph of the clause (*i.e.* that under the heading “**Contamination or Pollution Clause**”). Thus, to similar effect to provision (b), the exclusion does not apply where pollution/contamination (including disease and epidemic) arises directly from a peril, or the peril directly from the pollution/contamination, indicating that the exclusion is not intended to cut back perils it directly overlaps with, as in the case of the disease clause and the present claim.

973.4. This is, of course, a common technique in drafting insurance policies, and even if the express wording were to be construed so as not to apply here, the technique of disapplying an exclusion to a cover clause where the otherwise covered peril is causally related to an excluded event points out to the reasonable person the solution that must have been intended here (rather than the surgery on ‘disease and epidemic’ to write out the word ‘disease’), and is justified on the basis that “something has gone wrong with the language” and it is clear what is meant: see the reference to *Chartbrook v Permisson*<sup>820</sup> above at paragraph 86.

973.5. Finally, the exclusion is, at best, ambiguous, and should be construed narrowly, both by applying the *contra proferentem* approach and because this is the more commercially sensible construction.<sup>821</sup>

974. RSA argues that the expression “*Peril not included*” in the final sub-paragraph is a reference to the Perils in sub-paragraph (b).<sup>822</sup> This is wrong. As noted above, both sub-paragraphs (b) and (c) act as ‘saving provisions’, bringing back cover which would otherwise be excluded by sub-paragraph (a). The sub-paragraph (b) perils are ‘saved’ by that sub-paragraph. There is no need for them to be ‘saved’ a second time by sub-paragraph (c). Further, the phrase “a Peril not excluded from this Policy” naturally (and in context) means any Peril throughout the policy, not just the sub-set of perils in sub-paragraph (b).

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<sup>819</sup> While the policy contains a definition of “Defined Peril” (p.17) {B/19/17}, it does not contain a definition of the word “Peril” used in this exclusion.

<sup>820</sup> {J/103}

<sup>821</sup> See *Crowden v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (Comm) at para 65 above {J/135}.

<sup>822</sup> RSA ADef para 55(e) {A/12/22}.

*“Interruption or interference”*

975. Each of the clauses require interruption or interference. The FCA’s case as to the meaning of these terms is set out in Section 6H. In short, COVID-19 and the resulting lockdown, self-isolation, social distancing announcements and the Regulations all caused interruption or interference with insured businesses.
976. RSA’s case on interruption or interference is unclear. RSA admits that the 21 and 26 March Regulations requiring business closures are *“likely to have resulted”* in interruption of or interference with the business within RSA4.<sup>823</sup> RSA does not set out a positive case on the meaning of ‘interruption’ or ‘interference’ and, while it alleges that whether there has been interruption or interference *“will be fact sensitive”*, it does not plead what circumstances would or would not lead to an interruption or interference.<sup>824</sup>
977. As noted elsewhere in these submissions, this does not mean that the Court should not conclude there was an interruption or interference for certain types of business, or make declarations in this context.

*(as a result of) “any diseases notifiable under the Health Protection Regulations (2010) occurring...”*

978. It is common ground that COVID-19 became a notifiable disease on 5 March 2020 in England and 6 March 2020 in Wales within this clause.<sup>825</sup> However, Definition 69.ii backdates the trigger date to the pre-notifiable date of COVID-19 by stating that *“where a disease occurs and is subsequently classified under the Health Protection Regulations (2010) such disease will be deemed to be notifiable from its initial outbreak”*, thereby reversing the decision in *New World Harbourview*<sup>826</sup> for this Wording.
979. There is a question of limited importance as to whether the “initial outbreak” of COVID-19 took place in Wuhan (on 31 December 2019 when the WHO was informed of the first cluster

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<sup>823</sup> RSA ADef para 64(c) {A/12/24}.

<sup>824</sup> RSA ADef para 29(b)(ii) {A/12/12}.

<sup>825</sup> RSA ADef para 37 {A/12/15}.

<sup>826</sup> {J/114}

of cases which were subsequently confirmed to be COVID-19<sup>827</sup>) as the FCA contends or in England (on 31 January 2020) as RSA appears to contend.<sup>828</sup> See paragraph 127 above.

980. This issue goes slightly beyond the question of the appropriate date for the outbreak. The definition in RSA4 is also important in that it treats an ‘outbreak’ of disease as a singular phenomenon. The net effect is that the cover indemnifies against loss resulting from “*interruption or interference to the Insured’s Business as a result of ... Notifiable Disease [COVID-19, which is deemed notifiable from its initial outbreak] ... occurring within the Vicinity of an Insured Location*”.

981. As for “*occurrence*”, RSA argues that only an actual diagnosis of COVID-19 is sufficient.<sup>829</sup> This is wrong: COVID-19 plainly ‘occurs’ whether or not it is diagnosed. See, further, the FCA submissions in this regard in relation to the meaning of ‘occur’ within the Hiscox wordings at paragraphs 343ff above. Insofar as RSA’s case is not that this is the meaning of ‘occurrence’ but that a policyholder can only *prove* an occurrence by reference to an actual diagnosis, this is an issue of prevalence and method of proof and has been addressed Section 7 above.

*(occurring) “within the Vicinity of an Insured Location”*

982. Definition 120 defines “Vicinity” as “*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**”*. This provides a contextual meaning of Vicinity, dependent on the event that occurs and what would reasonably be expected to have “an impact” on the Insured or the Insured’s Business. Cover is provided if an event could reasonably be expected to impact on the Insured’s business. There is no limit to the kind or degree of “impact”.

983. RSA’s case is that the term “Vicinity” requires a “*close spatial proximity having regard to: (1) the nature of the insured’s business; (2) the geographical area in which it is located (include any features peculiar to that area)*”; and “*cannot be construed as including the whole of the United Kingdom or as always including*

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<sup>827</sup> Agreed Facts 2 {C/3} and {C/4}

<sup>828</sup> RSA Def para 39 {A/12/15}. However, if RSA is in fact contending that there should be different dates for the outbreak in each part of the UK, on the grounds that the notification Regulations referred to in the clause are English Regulations, with the start date for cover in Wales not being until 28 February 2020, this would be illogical and should be rejected. The policy chose the Regulations as the reference point for the purposes of the policy in whichever part of the UK the policyholder was situated. The 2019/20 outbreak of COVID-19 was a single outbreak of global proportions. The outbreak in the UK was part of that single outbreak. Further, having regard to the fact that RSA4 was applicable across the UK (see General Condition 2i), applied principally to insured events in the UK (see Definition 48.i), and will apply to businesses operating in more than one home nation, it would be wholly inappropriate artificially to split the single outbreak of disease according to national boundaries.

<sup>829</sup> RSA Def para 40(b) {A/12/16}.

*the same city, town or village*’.<sup>830</sup> This (i) seeks to write in words which are not there (‘close spatial proximity’), (ii) misses the point of the wording (which is flexible, and (iii) is contrary to the express definition given in the policy.

984. The FCA’s primary case is that COVID-19 occurred within the “Vicinity” of all premises in the UK on 31 January 2020 with the first diagnosed COVID-19 cases in the UK.<sup>831</sup> As a notifiable disease with a national impact, COVID-19 had been demonstrated to have the nationwide impact in other countries and was being monitored in the UK by reference to a national risk level. In the case of contagious diseases which had already become national epidemics in other countries, the occurrence of COVID-19 anywhere in the UK could reasonably be expected to have led to a national response that might include closures or other restrictions nationwide. All businesses in the UK would reasonably be expected to be impacted by such measures. This would not be true of all types of trigger event—Vicinity is deliberately variable rather than an absolute limit, that allows for different events to have a different range for their possible effects.
985. The definition of ‘Vicinity’ contemplates a surrounding or adjacent area whose size is determined by reference to whether an event in that area could reasonably be expected to impact on the Insured or the Insured’s business. The UK plainly surrounds Insureds’ and their businesses in the UK, and therefore if events within the UK would reasonably be expected to have an impact on any such insured or its business, then that nationwide geographical area meets the definition of ‘Vicinity’.
986. This is also supported by other clauses in RSA4. Definition 69.i defines Notifiable Disease by reference to a list of named diseases. The list included SARS, which is a viral respiratory illness caused by the SARS-CoV coronavirus.<sup>832</sup> Extensive measures were taken by governments in numerous countries to contain a SARS outbreak in 2002 and 2003, which emerged in China (including mass closure of public entertainment venues in Beijing).<sup>833</sup> The inclusion of SARS indicates that RSA was willing to provide cover in respect of potentially highly disruptive and widespread outbreaks of disease.
987. Moreover, in the full range of “incidents” covered by Clause 2.3.viii, the area is large. The events covered include notifiable diseases, notifiable diseases in animals (such as gave rise to

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<sup>830</sup> RSA ADef, para 43(c) {A/12/17}.

<sup>831</sup> PoC para 41.5 {A/2/27}.

<sup>832</sup> Agreed Facts 7, para 9(a) {C/12/5}.

<sup>833</sup> Agreed Facts 7, para 10(b) {C/12/6}.

the national foot and mouth outbreak in 2001) and accidental or malicious deposits of radioactive, biological or chemical materials (such affected a large area of Salisbury; worse scenarios could readily be envisaged). The risks covered by Clause 2.3.viii include several risks which could reasonably be expected to have an impact on an Insured and its business (e.g. through an effect on employees, customers or suppliers or via measures taken by authorities) at remote distances. Thus RSA is wrong to argue that RSA4 displays an objective intention not to provide cover for pandemics: quite the contrary.<sup>834</sup>

988. The FCA's alternative case is that the Vicinity requirement was satisfied when COVID-19 occurred in a more localised area of the insured premises, this being a question of fact to be determined in each individual case.<sup>835</sup> However, (i) an occurrence of COVID-19 within at least the same city, town, village or other development is always likely to be an occurrence within the Vicinity; and in any case (ii) the area involved remains relatively wide. For a business with a chain of national or UK branches this would readily encompass the entire UK. This would also apply to any business with a national clientele or supplier base. For a restaurant whose employees, customers or suppliers extended across an entire city or region, it would be the entire city or region.

989. The FCA notes and adopts the HIGA intervenors further points on this term in their Skeleton.

#### Causal connectors

990. The disease clause in RSA1 (which is the only clause in this Wording relied on) provides cover for loss *as a result of* closure or restrictions placed on the Premises *as a result of* a notifiable human disease manifesting itself at the Premises or within a 25 mile radius of it.

991. This is a disease/public authority clause, similar to Hiscox4 but with a wider vicinity limit. The position is therefore the same as that raised above in relation to Hiscox4 (see paragraphs 727 to 731 above), save that this policy requires only two causal connections – one between the loss and the closure/restrictions, and the second between the closure/restrictions and the disease. As with Hiscox4, (i) there is no requirement that the disease only occur within a 25-mile radius; (ii) by contrast, each of the other insured perils within clause 2 ('Disease, Murder, Suicide, Vermin and Pests') must take place at the Premises, and the beach pollution extension requires a 10-mile radius (Extension 7), reflecting the specific and wide vicinity cover

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<sup>834</sup> RSA Def para 33(a) {A/12/14}.

<sup>835</sup> PoC para 41.5(b) {A/2/27}.

specifically chosen for this clause; (iii) the sub-limits are £250,000 and 12 months: a disease occurring 25-miles away, causing loss for 12 months and of up to £250,000 would very naturally be one occurring within an epidemic or pandemic; but (iv) there is no pandemic exclusion, despite there being a wide range of other exclusions for, for instance, war, radioactivity and terrorism.

992. As above, the parties did not intend any particular causal test through the words ‘as a result of’, other than a proximate cause. That is satisfied here: government actions and advice (which were the closure/restrictions here) were (and expressly) a response to and so ‘as a result of’ the occurrence of COVID-19. The premises could not be used because of what the Government did and said. This caused the loss.

993. The disease clause in RSA3 provides cover for loss in respect of interruption of or interference with the Business during the Indemnity Period *following* any occurrence of a Notifiable Disease within a radius of 25 miles of the Premises. The word ‘following’ envisages only a very loose causal connection. RSA3 also contains a ‘Prevention of Access – Public Emergency’ clause (Extension xi), which has an exclusion for losses ‘as a result of’ the diseases specified in the disease clause. The causal language is different, but clearly the intention was to exclude from the PoA clause any loss caused by those diseases. This shows perhaps most clearly that the precise causal language adopted in this policy is irrelevant, the intention being to provide a proximate cause test.

994. The RSA4 causal connectors are considered above at paragraph 591ff.

### Counterfactual

995. RSA’s case is that:

995.1. There is no cover for loss proximately caused by a disease beyond 25-miles / the Vicinity, cover just applying in respect of loss proximately caused by a disease only manifesting itself within 25-miles / the Vicinity;<sup>836</sup>

995.2. The closure / restrictions placed on the Premises and the interruption / interference did not occur as a result of manifestation of COVID-19 within 25-miles / the vicinity, but were given or imposed in order to limit and contain the future spread of COVID-19; and any manifestation of COVID-19 within 25-miles / the vicinity was neither the

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<sup>836</sup> RSA ADef para 67(a) {A/12/24}, 70 {A/12/25}, 83 {A/12/28}, 90 {A/12/30}, 94 {A/12/32}.

proximate cause nor the cause in fact of the closure or restrictions placed on the premises, or the interruption / interference;<sup>837</sup>

995.3. The correct counterfactual is to assume that there are no cases of COVID-19 within 25-miles / the Vicinity, but that all other government measures remain the same.<sup>838</sup>

996. These points can be addressed relatively briefly, as they have all been covered above:

996.1. It is right that the public authority response was to accumulated totality of COVID-19 cases and events related to them across the country. If there was a case of COVID-19 within 25 miles of the premises then that was part of what the Government was responding to. This is the jigsaw point addressed at paragraph 241 above.

996.2. These covers contemplate wide-area disease (a 25-mile radius being a very large area), and provides cover for all diseases which are notifiable. The listed diseases include SARS, a well-known contagious disease that led to an epidemic or near-epidemic in recent history, as to which the facts are in Agreed Facts 7<sup>839</sup>. RSA1 considers that loss resulting from such a disease could cost the insured more than £250,000 and extend for more than 12 months, leading it to include sub-limits at these levels. The parties contemplated wide area damage, given each of RSA1, RSA3 and RSA4 provides damage cover for riots and civil commotion.

996.3. The most likely scenario in which a disease occurring 25-miles away could cause restrictions on the insured's premises or interruption or interference with the its business is one in which that disease is spreading (within and outside the circle) and is sufficiently serious to generate public authority action leading to closure or restrictions on the premises.

996.4. There is nothing in the wording which requires the disease only to occur within the specified distance from the premises and to exclude cover if the disease also occurs outside the specified radius. Had that been envisaged, clear wording to that effect would have been necessary. Diseases spread in all directions so quite why a policyholder should have cover for a disease 24 miles away but then lose cover if the

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<sup>837</sup> RSA ADef para 67(a) {A/12/24}, 70 {A/12/25}, 83 {A/12/28}, 90 {A/12/30}, 94 {A/12/32}.

<sup>838</sup> RSA ADef para 62 {A/12/23}, 94 {A/12/32}.

<sup>839</sup> {C/12/5}

disease spreads to 26 miles away is unclear. The reality is that the disease is the same whether it occurs within or outside the specific radius.

- 996.5. There is no sense in applying a ‘but for’ test which strips out just the disease in the locality. First, RSA would need to establish that the restriction / interruption would be *identical* despite the particular premises being within a disease-free halo of 2,000 square miles. Second, the local manifestation of the disease is part of the broad and national manifestation. Third, the insured peril in the case of RSA1 also requires closure or restrictions as part of the insured peril: if these need to be proven for the policyholder to establish cover, it makes no sense for them also to be included in the counterfactual.
- 996.6. Thus, contrary to RSA’s case that it did not provide an indemnity against a nationwide pandemic, in fact they did agree to provide cover for BI losses to the particular business by reason of a single local, regional, national, or worldwide outbreak of a notifiable disease, providing it was actually present within 25 miles or the Vicinity of the premises.

### The quantification machinery

#### *RSA1*

997. RSA1 draws a clear distinction between “Events” and “Extensions”. The Property Damage cover provides “**Events**” (such as ‘fire’, ‘smoke’) for which the quantification machinery is set out at p.20 where RSA explains how it settles claims for Damage to Buildings. By contrast, in the Extensions, what is covered is “The costs of” doing something: *e.g.* the costs of refilling fire extinguishers, the costs of replanting trees etc. Accordingly, the Events provide cover for events; the Extensions provide cover for the losses incurred in respect of particular events.
998. The BI insurance similarly splits covers between 13 “**Events**” (p12-15) and a further 8 “**Extensions to Cover**” (p16-19). The “Events” are just that (*e.g.* Event 3 is “Storm or flood”). The Extensions either expressly provide cover for loss or costs (see 1, 2, 4, 7 and 8) or require Damage (see 3 and 5). The clause relied on this in case is the second Extension (p16).
999. The same structure is adopted throughout the policy: Terrorism Insurance (p25) covers “Damage or loss resulting from Damage to the property” – the quantum being the loss resulting from the damage. Similarly, Extensions to Legal Expenses cover (p58) covers ‘loss of income, salary or wages’ and ‘loss of earnings’. The disease clause is an Extension to Cover,

and not an Event. It is also prefaced by the statement “*loss as a result of*”. Accordingly, the indemnity provided by the disease clause is the loss as a result of the closure or restrictions placed on the premises as a result of the disease, with no adjustments for trends.

1000. The contractual machinery on which RSA relies is contained under the headings “*Gross Revenue – how We settle claims*” and “*Gross Revenue – Increased Cost of Working – how We settle claims*”. The first of these states:

If **Damage** by any **Event** covered under this Insurance occurs

1 at the **Premises to Property** Insured by **You** for the purpose of the **Business**

2 anywhere in the world to **Computer Equipment, Ancillary Equipment or Computer Systems Records** whilst temporarily removed from the **Premises** by **You** for the purpose of the **Business**

and causes interruption of or interference with **Your Business** at the **Premises**

**We** will pay **You** the amount of loss resulting from the interruption or interference caused by the **Damage** in accordance with the following

1 in respect of **Gross Revenue**

the amount by which the **Gross Revenue** received during the **Indemnity Period** falls short of the Standard **Gross Revenue** as a result of the **Damage**...

1001. The definition of ‘Loss of Gross Revenue’ is “*the actual amount of the reduction in the **Gross Revenue** received by **You** during the **Indemnity Period** solely as a result of **Damage to Buildings***”.

1002. RSA argues the above machinery is to be construed as limiting RSA’s liability under any non-damage Extension to a loss of gross revenue occurring, incorporating and rewriting the Loss of Gross Revenue definition to read “*solely as a result of the peril insured under that Extension*”.<sup>840</sup> In other words, without explanation, it argues that the definitions of ‘Damage’ and ‘Buildings’ should be ignored, and that the cover for ‘loss’ in the extension should be written out. There is no warrant for that.

1003. RSA’s case also requires far too much damage to be done to the basis of settlement clause itself, which does not merely refer to ‘Damage’ but explicitly provides for settlement in two specified physical damage situations:

If **Damage** by any **Event** covered under this Insurance occurs

1 at the **Premises to Property** Insured by **You** for the purpose of the **Business**

2 anywhere in the world to **Computer Equipment, Ancillary Equipment or Computer Systems Records** whilst temporarily removed from the **Premises** by **You** for the purpose of the **Business**...

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<sup>840</sup> RSA Def para 71(b)(ii)(2) {A/12/26}.

1004. Highly complex and unjustified surgery, that RSA does not begin to set out in its Defence, would be needed to make this work for non-damage extensions.
1005. Further and in any case, this is not equivalent to a trends clause. RSA1 expressly incorporates a trends clause on p23 in the definition of underinsurance; if it wanted to use that trends clause to reduce the amount payable for Gross Revenue, it could easily have done, but doesn't.
1006. The loss under this Extension is just the 'loss as a result of' the closure or restrictions placed on the premises, and the contractual machinery (and trends clause within it) are irrelevant.

#### *RS43*

1007. The primary insuring clause in the Business Interruption section (on p34) provides cover "In the event of **Business Interruption**". This is a defined term meaning loss resulting from interruption of or interference with the business in consequence of property damage (p32-33). The policy then sets out bases of settlement (from p34), which indirectly include adjustment language in their definitions (with the adjustment language itself set out near the top of p34). That trends language is expressed to apply in the event of an **Incident**, which is property damage (p33).
1008. The Extension does not use that defined term "**Business Interruption**". Nor, unlike other extensions such as (iii) Contract Sites and (vi) Failure of Supply, does it use the phrase "*This section includes loss resulting from...*". All it provides is the statement that RSA "*shall indemnify You in respect of interruption of or interference... following*" the relevant disease. Thus, the contractual machinery does not apply to the Extension relied on by the FCA. The relevant indemnity is for loss arising from interruption of or interference with the business arising from the extension, and the contractual bases of settlement (and any trends language within them) are irrelevant.<sup>841</sup>
1009. RSA argues that the term Incident in the trends clause should be construed as a reference to the peril insured.<sup>842</sup> But this ignores the fact that the trends language only applies once you are in the contractual machinery; and, since the Extension does not use the term **Business Interruption** at all, the contractual machinery does not apply at all.

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<sup>841</sup> Contrary to RSA ADef para 85 {A/12/29}.

<sup>842</sup> RSA ADef para 85(b) {A/12/29}.

*RSA4*

1010. The RSA4 quantum machinery is considered above at paragraph 596ff.

## 11) CONCLUSIONS

1011. It is worth reiterating that the purpose of this test case procedure was not and could not be to give a conclusive determination on the facts as to the indemnity to be provided by these insurers to each of their many thousands of policyholders. It was to remove the uncertainty that had been created by the insurers' reliance on reasons for denying cover which were of general application to policyholders under the policies in question and their refusal to even countenance consideration of the claims affected by such reasons on their individual merits. Although these submissions have necessarily had to delve into the detail of the individual policies (and some of them have their own individual quirks which the Court will need to address), what should be clear is that the insurers have been adopting an unduly narrow approach to the application of their insuring clauses and a misguided approach to causation and the application of any relevant "trends" clauses.
1012. The FCA seeks and is entitled to declaratory relief to correct the errors in insurers' approach to the claims against them under the policies being tested in this litigation so that each claim can then be considered and adjusted on its own individual merits free from the inappropriate 'road blocks' that insurers have put in policyholders' way. The Court is asked to have in mind these roadblocks and the reasons given for denial of cover (some of which are quoted in paragraph 3 above) when considering the proposed declarations.
1013. The Court will be alive to the parties' joint desire for certainty and guidance, and that to a large extent will be met by the reasoning of the Court in the Judgment explaining its views on the various issues between the parties, but alongside that, general declarations are sought which can be summarised as follows:
- Declarations 1-2 relate to the disease qualifications and there is limited dispute in relation to them
  - Declaration 3 relates to the particular disease trigger in Hiscox1-3.
  - Declarations 5-7 relate to prevalence and how insureds can go about proving the presence of COVID-19 at a place and time for those many Wordings that require this.
  - Declarations 4, 8 and 10 relate to the interpretation of danger etc wording, and the meaning of vicinity clauses.

- Declaration 9 relates to various trigger words that describe types of public authority, and whether the Government satisfies those terms.
- Declarations 11 to 13 relate to the many issues as to whether particular action of the Government could or could not amount to ‘prevention of access’, ‘hindrance to use’, ‘interruption’ etc.
- Declaration 14 relates to the limited number of exclusions relied upon by the insurers.
- Declarations 15 to 18 seek to establish the basic principles of causation as applicable in this situation with these Wordings, to remove the greatest roadblock of all to the payment of the Claims.

1014. The FCA also seeks specific Declarations tailored to each Defendant and Wording as set out in the Schedules of the Particulars of Claim.

**COLIN EDELMAN QC, Devereux Chambers**  
**LEIGH-ANN MULCAHY QC, Fountain Court Chambers**  
**RICHARD HARRISON, Devereux Chambers**  
**ADAM KRAMER, 3 Verulam Buildings**  
**DEBORAH HOROWITZ, Fountain Court Chambers**  
**MAX EVANS, Fountain Court Chambers**

10 July 2020