

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS**  
**OF ENGLAND AND WALES**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**  
**FINANCIAL LIST**

Claim No. FL-2020-000018

**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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**SECOND DEFENDANT'S DEFENCE AND COUNTERCLAIM**

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**A. INTRODUCTION**

1. This is the Defence and Counterclaim of the Second Defendant, Argenta Syndicate Management Limited ("**Argenta**"). In this Defence and Counterclaim, unless otherwise stated:
- (1) references to paragraph numbers are references to paragraphs of the Particulars of Claim, dated 9 June 2020; and
- (2) Argenta adopts, where appropriate, the headings, abbreviations and definitions used in the Particulars of Claim for convenience only and no admissions are to be inferred therefrom.

2. This Defence and Counterclaim responds only to the parts of the Particulars of Claim that relate directly to Argenta:
  - (1) Section B sets out Argenta’s case concerning the Argenta policy wordings that have been included in the ‘Representative Sample of Policy Wordings’.
  - (2) In Section C, Argenta responds, where appropriate, to the allegations set out in the body of the Particulars of Claim that relate directly to Argenta.
  - (3) As noted below, Argenta adopts paragraphs 21 to 28 of the Defence of the Seventh Defendant, Royal & Sun Alliance Insurance Plc (“**RSA**”), which responds to allegations in the Particulars of Claim concerning the prevalence of Covid-19 in the UK.
3. Save as aforesaid, and save as expressly admitted or not admitted herein, each and every allegation contained in the Particulars of Claim is denied insofar as those allegations relate to Argenta.
4. In summary, Argenta’s relevant policy wordings do not respond to the claims in issue because the only insured peril that the Claimant (the “**FCA**”) alleges to be engaged, namely, an occurrence of a ‘Notifiable Human Disease’ within 25 miles of the insured’s premises, is not a cause (still less a proximate cause) of any of the alleged loss in almost all cases. Even if there was an occurrence of Covid-19 within 25 miles of the relevant premises (which Argenta accepts will be the case for most policyholders), in all or substantially all cases that event is not a cause in fact or in law of any of the claimed loss.

## **B. THE ARGENTA POLICIES**

### *i. The relevant policy wordings*

5. Argenta is the managing agent for Argenta Syndicate 2121 at Lloyd’s. Only two policy wordings issued by Argenta have been included in the ‘Representative Sample of Policy Wordings’, namely:
  - (1) the ‘HIUA Guest House and B&B Insurance’ policy wording (the “**Argenta Lead Policy**”); and

- (2) the ‘HIUA Holiday Homes and Self-Catering Accommodation’ policy wording (the “**Holiday Homes Policy**”).
6. The business interruption (“**BI**”) section of these two policy wordings is materially identical,<sup>1</sup> and the Argenta Lead Policy has been selected as the ‘lead’ policy wording for the purposes of these proceedings. This Defence and Counterclaim is drafted by reference to the Argenta Lead Policy, but all references to that policy wording herein apply equally to the Holiday Homes Policy (subject to the minor differences in language noted at footnote 1).
7. The aforesaid policies provide cover for: (i) businesses that operate a guest house or bed and breakfast (the Argenta Lead Policy); or (ii) businesses that operate holiday homes or other self-catering accommodation (the Holiday Homes Policy). The only category in the ‘Assumed Facts’ which is relevant to Argenta is therefore category 6 (‘hotel or other holiday accommodation’): see paragraph 19.6.
8. The BI section of the Argenta Lead Policy provides cover primarily for loss sustained through an interruption in business as a result of property damage. The FCA has not included the primary insuring clause in the BI section of the Argenta Lead Policy within the scope of this test case. Argenta assumes that the FCA accepts that that clause does not respond to claims based on Covid-19.
9. The only insuring clause in the Argenta Lead Policy which the FCA contends does respond to claims based on Covid-19 is extension 4(d) in the BI section (“**Extension 4(d)**”), which provides as follows:

“The **COMPANY** will also indemnify the **INSURED** as provided in The Insurance of this Section for such interruption as a result of

...

**4. Defective Sanitation NOTIFIABLE HUMAN DISEASE Murder or Suicide**

...

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<sup>1</sup> Save that the basis of settlement clause in the Argenta Lead Policy refers to “*the amount by which the GROSS INCOME during the INDEMNITY PERIOD falls short of the STANDARD GROSS INCOME due to the DAMAGE*”, whereas the same clause in the Holiday Homes Policy refers to “*the amount by which the ACCOMMODATION CHARGES during the INDEMNITY PERIOD falls short of the STANDARD ACCOMMODATION CHARGES in consequence of the DAMAGE*”.

- (d) any occurrence of a **NOTIFIABLE HUMAN DISEASE** within a radius of 25 miles of the **PREMISES ...**

10. The cover provided by Extension 4(d) is subject to the following specific exclusions (in addition to the general exclusions set out in the policy wording):

“The **COMPANY** will not be liable for

...

- (i) for any amount in excess of £25,000
- (ii) for any costs incurred in the cleaning repair replacement recall or checking of the property
- (iii) for any loss arising from those **PREMISES** that are not directly affected by the occurrence ...”

11. The FCA has not suggested that any of those exclusions are ineffective for any reason.

12. The term ‘Notifiable Human Disease’ is defined in the Argenta Lead Policy as:

“illness sustained by any person resulting from

...

- (b) any human infectious or human contagious disease an outbreak of which the competent local authority has stipulated shall be notified to them excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition”

13. The term ‘Premises’ is defined as:

“the **BUILDINGS** and land used for the **BUSINESS** and situate as stated in the Schedule”

14. It is admitted that, in relation to England, as from 5 March 2020, Covid-19 was added to the list of notifiable diseases set out in Schedule 1 to the Health Protection (Notification) Regulations 2010 (S.I. 2010/659) and became a ‘Notifiable Human Disease’ as defined in the Argenta Lead Policy.<sup>2</sup>

15. The basis of settlement clause and other relevant definitions contained in the Argenta Lead Policy are set out at pages 4 to 6 of the FCA’s ‘Representative Sample of Policy

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<sup>2</sup> As a result of reg. 2(2) of the Health Protection (Notification) (Amendment) Regulations 2020 (S.I. 2020/237). Argenta also accepts that Covid-19 became a ‘Notifiable Human Disease’ for the purposes of Extension 4(d) in relation to other parts of the UK as follows: (i) on 22 February 2020 in Scotland; (ii) on 29 February 2020 in Northern Ireland; and (iii) 6 March 2020 in Wales.

Wordings'. For the avoidance of doubt, Argenta will rely on the Argenta Lead Policy for its full terms and true effect.

*ii. The relevant causal test*

16. The extensions in the BI section of the Argenta Lead Policy, including Extension 4(d), provide cover for loss sustained through business interruption “*as a result of*” a number of specific insured perils. In order to make a successful claim under any of those extensions, a policyholder is required to demonstrate that the insured peril identified in the relevant extension is a proximate cause of the loss claimed.
17. The insured peril identified in Extension 4(d) is, for the purposes of these proceedings, “*any occurrence of [Covid-19] within a radius of 25 miles of the PREMISES*”. The insured peril is not a global or national pandemic, or a notifiable disease as such. Rather, the insured peril is the occurrence of a notifiable disease in a particular locality, namely within 25 miles of the policyholder’s premises.
18. 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.
19. The FCA has relied on the fact that the Argenta Lead Policy does not include an exclusion for loss caused by a ‘pandemic’ (see, for example, paragraphs 4.2 and 33<sup>3</sup>). Such an exclusion is unnecessary, because the policy wording provides cover only for specific insured perils – which do not include a global or national pandemic. In any event, as noted below, there is a specific exclusion attached to Extension 4(d) that excludes any loss arising from Premises which have not been “*directly affected*” by a local occurrence of an infectious disease.
20. The FCA contends (for example, at paragraphs 4.5 and 54.1) that the 25-mile limit in Extension 4(d) serves a more limited function; the FCA asserts that the Argenta Lead

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<sup>3</sup> The FCA relies on the presence of exclusions relating to pandemics elsewhere in two other Defendants’ policy wordings. There is, however, no such exclusion in any part of the Argenta Lead Policy.

Policy “*provide[s] cover for losses caused by a disease ... occurring over a wide area providing it was not solely remote but instead (as in the case of COVID-19) extended in its manifestation to the specified locale as well as its occurrence further afield*”. However, that again ignores the fact that the only insured peril within the scope of Extension 4(d) is a local occurrence of an infectious disease (i.e. within 25 miles of the insured Premises).

21. Argenta agrees that if there is a local occurrence of the disease, a policyholder can in principle recover loss directly caused by that local occurrence regardless of: (i) whether there are other occurrences of the disease in other locations; and (ii) whether a customer who made (or would have made) a booking to stay at the policyholder’s guest house or other accommodation resides within 25 miles of that property.
22. However, and contrary to the FCA’s position, the Argenta Lead Policy does not provide BI cover for loss caused by occurrences of Covid-19 in any other geographical location(s), or the response of the UK Government (or any other public authority) to such occurrences. In all cases, the policyholder must establish that the loss claimed has been sustained “*as a result of*” the occurrence of Covid-19 within the relevant 25-mile zone, which requirement is not satisfied by showing that such loss is a result of any other cause (such as the global or national Covid-19 pandemic, and/or governmental responses to that pandemic and/or the public response to that pandemic).
23. Insofar as any loss has been caused by advice given and/or restrictions imposed by the UK Government (or the devolved administrations) in response to the Covid-19 pandemic (such as the matters referred to in paragraph 18), such loss has not been sustained “*as a result of*” an occurrence of Covid-19 within 25 miles of the policyholder’s insured premises. Rather, such loss has been sustained “*as a result of*” national measures taken to combat a global or national pandemic, and/or the public response to a global or national pandemic. That is not sufficient to bring such loss within the scope of Extension 4(d).
24. This is confirmed by the exclusion attached to Extension 4(d) referred to above, which expressly excludes any loss arising from premises that are “*not directly affected*” by the occurrence of Covid-19 within 25 miles. In other words, loss that is not directly caused by a local occurrence of Covid-19 (such as loss caused by the wider global or national

Covid-19 pandemic and/or governmental responses to that pandemic and/or the public response to that pandemic) is not covered by Extension 4(d).

25. Further, and in any event, the trends clause contained in the definition of ‘Standard Gross Income’ in the Argenta Lead Policy: (i) confirms that the specific insured peril referred to above (i.e. a local occurrence of an infectious disease within 25 miles of the policyholder’s premises) must be a proximate cause of any loss claimed under Extension 4(d); and (ii) expressly states that a policyholder is only entitled to recover loss that would not have been suffered “*but for*” that specific insured peril:

“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 obtained during the relative period after the **DAMAGE**.”

26. The term ‘Damage’ in that definition reflects the fact that the BI section of the Argenta Lead Policy is primarily intended to cover loss sustained through business interruption caused by property damage. When applied to a claim under Extension 4(d), which does not require property damage, the meaning of the term ‘Damage’ is the insured peril which has caused the relevant business interruption.
27. In relation to a claim based on Covid-19 made under Extension 4(d), therefore, the term ‘Damage’ in the definition of ‘Standard Gross Income’ should be read as ‘an occurrence of Covid-19 within 25 miles of the Premises’.
28. Applying that definition, it is clear that “*but for*” the insured peril (i.e. an occurrence of Covid-19 within 25 miles of the relevant premises) policyholders would in all or almost all cases have suffered the same or substantially the same loss in any event, irrespective of any local occurrence of the disease, as a result of:
- (1) the global or national Covid-19 pandemic (i.e. occurrences of Covid-19 in other locations);

- (2) the advice given and/or the restrictions imposed by the UK Government (and/or the devolved administrations and/or any relevant foreign governments<sup>4</sup>) in response to that global or national pandemic; and/or
  - (3) the public response to that global or national pandemic in the UK and/or elsewhere.
29. Further, even if (which is denied) the definition of ‘Standard Gross Income’ is somehow inapplicable to claims made under Extension 4(d), the test referred to in paragraphs 25 to 28 above is applicable in any event as a result of general principles of causation and the requirement that an occurrence of Covid-19 within the relevant 25-mile zone must be a proximate cause of any loss claimed under Extension 4(d).
30. The correct counterfactual scenario should ignore only the insured peril (i.e. a local occurrence of the disease), not any other facts or circumstances – such as a remote cause of that insured peril (i.e. the global or national pandemic), the response of the UK Government (or any other public authority) to occurrences of Covid-19 elsewhere, or public responses to such occurrences. The FCA seeks to adopt a counterfactual scenario which disregards the policy wording and the need to identify loss caused directly by a specific insured peril, namely a local occurrence of an infectious disease within 25 miles of the policyholder’s premises.
31. In the alternative to the above case:
  - (1) If and insofar as Extension 4(d) does respond to any claims based on Covid-19, a policyholder whose premises are located in England can recover only in respect of loss sustained after 5 March 2020, when Covid-19 became a ‘Notifiable Human Disease’ (and this date is to be modified in respect of policyholders in other parts of the UK as set out in footnote 2 above).
  - (2) Even if a local occurrence of Covid-19 was a proximate cause of any loss in any particular case:
    - (a) Extension 4(d) does not provide cover for any loss that would have been sustained in any event as a result of anyone complying with the

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<sup>4</sup> In relation to customers who reside outside the UK.

government advice given on 16 March 2020 (when the Prime Minister announced that everyone in the UK should stop non-essential contact with others and stop all unnecessary travel, as pleaded at paragraph 18.9); and

- (b) Extension 4(d) does not provide cover for any loss based on Covid-19 sustained after 26 March 2020<sup>5</sup> (when businesses providing holiday accommodation in England were required to close their premises pursuant to the 26 March Regulations, as defined at paragraph 59 below), because such loss would have been sustained in any event. This date is to be modified in respect of policyholders in other parts of the UK as set out at paragraph 59(3) below.
- (3) Even if (which is denied) it is appropriate for the counterfactual scenario to ignore the advice of and/or restrictions imposed by the UK Government (and/or the devolved administrations) in response to the national Covid-19 pandemic, it is inappropriate to ignore the presence of Covid-19 outside the relevant 25-mile zone. There would have been a very significant reduction in consumer demand for guesthouses and other holiday accommodation in the UK in any event as a result of:
- (a) the public response to Covid-19 in the UK, even in the absence of any governmental advice and/or restrictions; and/or
  - (b) a reduction in foreign visitors to the UK, as a result of (i) foreign governmental advice and/or restrictions, and/or (ii) the public response to Covid-19 in the UK and elsewhere.

### **C. ARGENTA'S RESPONSE TO THE CLAIM**

32. This section contains a response to the paragraphs of the main body of the Particulars of Claim that relate directly to Argenta.

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<sup>5</sup> Save insofar as the policyholder is able to prove that an occurrence of Covid-19 within 25 miles of their premises has prevented them earning revenue after 26 March 2020 by providing accommodation to any individuals within the exceptions set out in regulation 5(4) of the 26 March Regulations.

33. Argenta does not plead to the summary of the FCA's case set out in paragraphs 1 to 4, but responds instead to the substance of the FCA's allegations below.

***i. Introduction and the parties***

34. Paragraph 5 is noted. Paragraphs 6-8 are admitted.

35. As to paragraph 9, it is admitted that Argenta is authorised to manage the underwriting capacity of a Lloyd's syndicate. Paragraph 5 above is repeated.

36. Paragraph 10 and Annexe 1 to the Particulars of Claim are noted.

***ii. The policy wordings and applicable law***

37. As to paragraphs 11 and 12, it is admitted that Argenta issued policies on the wordings contained in the Argenta Lead Policy and the Holiday Homes Policy which provide cover in accordance with their terms for matters occurring in late 2019 and early 2020. Subject to footnote 1 above, it is admitted that Extension 4(d) in the BI section of each of those two policy wordings are materially identical.

38. Paragraphs 13 and 14 are noted. Argenta repeats paragraph 6 above.

39. Paragraph 15 is noted. The 'Questions for Determination' and the 'Issues Matrix' will be superseded by the Parties' statements of case and an agreed list of issues.

40. As to paragraph 16, it is admitted that the Argenta Lead Policy is governed by English law (pursuant to general condition 20).

***iii. Covid-19 and the response to it***

41. Paragraph 17 is admitted, subject to paragraphs 58 to 60 below.

42. Paragraph 18 is admitted as a broadly accurate summary of the core events relating to Covid-19 and the response of UK public authorities to it.<sup>6</sup> The matters set out in paragraph 18 will be dealt with in a chronology which is in the process of being agreed by all the Parties. Further, sub-paragraphs 18.11 and 18.12 (and footnote 2, which is not

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<sup>6</sup> Subject to the date on which Covid-19 became a 'Notifiable Human Disease' in Wales: see footnote 2 above.

admitted) are irrelevant to the claim against Argenta, which was not involved in (or represented during) any of the meetings and/or discussions with the UK Government referred to by the Chancellor of the Exchequer and the FCA.

43. As to paragraph 19, the only category of business relevant to the claim against Argenta is category 6. Paragraph 19.6 is admitted.

*iv. Policyholder claims*

44. As to paragraph 20, it is admitted that a number of policyholders have made BI claims based on Covid-19 under the Argenta Lead Policy (and the Holiday Homes Policy). It is admitted that, prior to 1 June 2020, Argenta declined most of those claims on the basis that the loss claimed did not fall within the scope of the cover provided by the relevant policy. Argenta has identified a small number of BI claims in respect of which some loss may have been caused by a local occurrence of Covid-19, and Argenta is seeking clarification from the relevant policyholders in relation to that loss, including when and how it is said to have been sustained. To the extent that such claims may be covered on the basis of the interpretation of the Argenta Lead Policy set out in this Defence and Counterclaim, those claims are not referred to further below.

*v. Prevalence of Covid-19 in the UK*

45. It is denied that the FCA has a 'right' to rely on any expert evidence as asserted in paragraph 21. Pursuant to the order made by Mr Justice Butcher at the CMC on 16 June 2020, the FCA is not entitled to rely on any expert evidence at the trial listed to commence on 20 July 2020 in relation to the issue of the prevalence of Covid-19 in the UK.
46. Paragraph 22 is admitted insofar as it relates to Extension 4(d), which identifies the insured peril as an occurrence of an infectious disease within 25 miles of the policyholder's premises.
47. As to paragraphs 23 to 28, Argenta adopts paragraphs 21 to 28 of RSA's Defence. In the premises, it is denied that the FCA is entitled to the declarations sought in subparagraph 28.2 to 28.4.

*vi. Assumed facts*

48. Paragraphs 29 and 30 are noted as a statement of the FCA's position. Argenta considers that the FCA's 'Assumed Facts' are too abstract to be of any real assistance to the Court and should be replaced by a number of simple assumed factual scenarios. Argenta intends to make submissions with reference to a draft factual scenario for category 6 businesses, which Argenta will seek to agree with the FCA and the other Defendants.

*vii. Policy intention*

49. Paragraph 31 is admitted. The subjective motives, intentions and/or expectations of individual policyholders is similarly irrelevant and inadmissible. Further:

(1) In all cases, cover under the Argenta Lead Policy (or the Holiday Homes Policy) was sold via brokers acting on behalf of policyholders; no such cover was sold by Argenta directly to individual policyholders.

(2) For all such policies, the parties must be taken to have contracted against a background which included previous decisions of the Courts of England and Wales as to the construction of similar contracts.

50. Paragraph 32 is denied. The Argenta Lead Policy is to be interpreted according to ordinary principles of contractual interpretation, under which the size of a policyholder's business is not relevant. Further, the Argenta Lead Policy must be construed as a whole, and independently of the language used in different policy wordings issued by other insurers.

51. As to paragraph 33:

(1) No section of the Argenta Lead Policy contains an exclusion relating to 'epidemics' or 'pandemics'. As stated at paragraph 19 above, such an exclusion is unnecessary in respect of the cover provided by Extension 4(d), which is limited to cover relating to a specific insured peril, namely: a local occurrence of an infectious disease within 25 miles of the policyholder's premises.

(2) Further, Argenta accepts that the Argenta Lead Policy would cover a business interruption directly caused by a local occurrence of a notifiable disease, even if

that local occurrence was in turn caused by a wider outbreak, and even if that wider outbreak could be characterised as an epidemic or pandemic. For this reason, an exclusion relating to ‘pandemics’ would narrow the cover beyond that for which Argenta contends in these proceedings. That demonstrates that the omission of such an exclusion is entirely consistent with Argenta’s case.

(3) Further, and in any event, there is a specific exclusion attached to Extension 4(d) which excludes any loss arising otherwise than by the direct effect on the insured Premises of an occurrence of Covid-19 within 25 miles of such Premises

52. As to paragraph 34, Argenta repeats paragraph 19 above. The final sentence of paragraph 34 is admitted. Further, Argenta notes that policies of insurance providing BI cover do not generally provide cover for all losses consequent upon pandemics; as such, if the parties had intended the Argenta Lead Policy to provide cover for all losses consequent upon pandemics, clear language to that effect would have been used. No such language is contained in Extension 4(d), or anywhere else in the Argenta Lead Policy.

53. As to paragraph 35, it is denied that the meaning and effect of Extension 4(d) and/or any related provisions contained in the Argenta Lead Policy are ambiguous. In the premises, it is denied that the *contra proferentem* principle, to the extent that it survives, has any application or relevance.

**viii. A ‘Notifiable Human Disease’**

54. As to paragraph 36, it is admitted that Covid-19 became a ‘Notifiable Human Disease’ for the purposes of Extension 4(d) as from 5 March 2020, in relation to England and Wales. Paragraph 14 above is repeated.

**ix. An occurrence of Covid-19 within 25 miles**

55. As to paragraph 41:

(1) It is admitted that the requirement in Extension 4(d) of an ‘occurrence’ of Covid-19 within 25 miles requires the policyholder to prove that there has been at least one person within the relevant 25-mile zone who has contracted Covid-19 such that it is diagnosable (whether or not it has been verified by medical testing or a

medical professional and/or formally confirmed or reported to Public Health England, and whether or not it is symptomatic).

- (2) As to the FCA's assertions concerning the prevalence of Covid-19 in the UK, paragraph 47 above is repeated. Without prejudice to the aforesaid, no admissions are made as to the evidence that will suffice to prove such an 'occurrence' of Covid-19 in any particular case if the matter is disputed; that is not an issue of law which can or should be determined in this test case.
  - (3) An occurrence of Covid-19 within 25 miles of the insured premises is a necessary, but not a sufficient, condition for triggering cover under the Argenta Lead Policy. As stated above, the policyholder must also prove that such an occurrence was a proximate cause of the loss claimed.
  - (4) Save as aforesaid, and subject to paragraph 47 above, no admissions are made as to paragraph 41 insofar as it relates to Argenta.
56. The first sentence of paragraph 42 is admitted and averred. It is noted that the FCA has not suggested that any of the advice given and/or restrictions imposed by the UK Government (or any of the devolved administrations) were caused by any particular local occurrence of Covid-19. As stated at paragraph 17 above, Extension 4(d) of the Argenta Lead Policy does not provide cover for loss arising as a result of a "*nationwide pandemic*"; it provides cover for loss as a result of a specific insured peril, namely an occurrence of Covid-19 within 25 miles of the insured's premises. The final sentence of paragraph 42 is admitted, save that no admissions are made as to whether (and, if so, to what extent, or on what date) any particular region of the UK was "*considered to be at risk*" of Covid-19.
57. Paragraphs 43 to 45 are not relevant to the claim against Argenta, because the Argenta Lead Policy does not contain any clause providing cover for loss sustained through an interruption caused by a nationwide 'emergency' which could endanger life or any of the perils listed at paragraph 43, nor for an interruption caused by government actions or any of the perils listed at paragraph 44. It is noted that the FCA does not allege the contrary in paragraphs 43 to 45, and it is averred that the absence of such cover confirms that the proper interpretation of the Argenta Lead Policy is as set out in this Defence and Counterclaim.

*x. An ‘interruption’*

58. Subject to paragraph 60 below, it is admitted that the advice, instructions and/or announcements referred to in paragraphs 46 and 49 were capable of causing an ‘interruption’ to the business of policyholders for the purposes of Extension 4(d). Whether or not they did in fact cause such an ‘interruption’ (and, if so, on what date) for each policyholder is a question of fact in each particular case, which cannot be determined in these proceedings.
59. As to paragraph 47, in relation to the Argenta Lead Policy, and subject to paragraph 60 below, it is admitted that:
- (1) the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (S.I. 2020/327), which came into force on 21 March 2020 (the “**21 March Regulations**”), were capable of causing an ‘interruption’ to the business of policyholders located in England, insofar as those policyholders operated a bar and/or restaurant in their accommodation and insofar as such business was otherwise continuing; and
  - (2) the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (S.I. 2020/350), which came into force on 26 March 2020 (the “**26 March Regulations**”), caused an ‘interruption’ to the business of policyholders located in England insofar as such business was otherwise continuing;<sup>7</sup> and
  - (3) the equivalent regulations in Wales and Scotland (which came into force on 26 March) and Northern Ireland (which came into force on 28 March 2020) caused an ‘interruption’ to the business of policyholders located in those parts of the UK respectively insofar as such business was otherwise continuing.
60. The existence of such an ‘interruption’ is irrelevant to coverage because such interruption was not caused by the insured peril identified in Extension 4(d), as to which paragraph 17 above is repeated.
61. As to paragraph 48, Argenta repeats paragraph 42 above.

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<sup>7</sup> Subject to the limited exceptions set out in regulation 5(4) of the 26 March Regulations.

*x. Exclusions*

62. As to paragraph 50, Argenta relies on the specific exclusions attached to Exclusion 4(d), which are set out at paragraph 10 above. Even if the Argenta Lead Policy otherwise responds to Covid-19 BI claims, it does not cover such claims for any amount in excess of £25,000, nor for any costs incurred in the cleaning, repair, replacement, recall or checking of the property and does not cover any loss arising from Premises that are not directly affected by the occurrence of Covid-19 within 25 miles of the Premises.

*xi. Causation*

63. As to paragraphs 53 to 59:

- (1) The words “*as a result of*” in the Argenta Lead Policy require the insured peril identified in Extension 4(d) to be a proximate cause of the loss claimed.
- (2) The meaning of the term “*assumed losses*” in paragraph 53.1 is unexplained and is not understood. Further, it is denied (if it is alleged) that the loss claimed by policyholders as a result of Covid-19 is in all cases unitary and indivisible, or that all such loss has in all cases a single proximate cause.
- (3) In respect of policyholders who have made a claim to recover loss under Extension 4(d) based on Covid-19, the causes of all or substantially all such loss include:
  - (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<sup>8</sup>) in response to that global or national pandemic; and
  - (c) the public response in the UK and/or elsewhere to that global or national pandemic.
- (4) Further, Argenta adopts paragraph 17 of the RSA Defence, which states that any loss sustained by policyholders as a result of the global or national Covid-19

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<sup>8</sup> In relation to customers who reside outside the UK.

pandemic was caused, at least in part, by factors other than the steps taken by UK public authorities in response to that pandemic (including, for example, a reduction in consumer demand).

- (5) In all cases, the causes of all or substantially all the loss claimed by the policyholder do not include, let alone as a proximate cause, an occurrence of Covid-19 within 25 miles of their premises.
- (6) Extension 4(d) provides cover only for loss sustained “*as a result of*” a specific insured peril, namely a local occurrence of an infectious disease (within 25 miles of the policyholder’s premises); it does not provide cover for loss sustained “*as a result of*”:
  - (a) a global or national pandemic (i.e. occurrences of Covid-19 in other locations);
  - (b) the response of the UK Government (and/or any other public authority) to that global or national pandemic; and/or
  - (c) the public response to that global or national pandemic in the UK and/or elsewhere. Paragraphs 16 to 24 above are repeated.
- (7) It is denied that it is impossible or inappropriate to treat the global or national Covid-19 pandemic as separate and distinct from any particular local occurrence of that disease when assessing claims made under the Argenta Lead Policy. That exercise is expressly required by the wording of Extension 4(d) and the specific exclusion attached to it.
- (8) As to paragraphs 54.2 and 58, loss caused by occurrences of Covid-19 that do not directly affect the insured premises, including occurrences of the disease outside the relevant 25-mile zone, are expressly excluded by the specific exclusion attached to Extension 4(d) (which excludes “*loss arising from the PREMISES that are not directly affected by the occurrence*”). Further, and in any event, the absence of a general exclusion relating to ‘pandemics’ or ‘epidemics’ is irrelevant; such an exclusion is unnecessary for the reasons stated at paragraph 19 above.

- (9) Further, and in any event, the trends clause in the definition of ‘Standard Gross Income’ makes it clear that a policyholder can only recover loss that would not have been suffered “*but for*” the relevant insured peril.
  - (10) As stated at paragraphs 25 to 31 above, even if a proximate cause of any loss claimed by a policyholder is an occurrence of Covid-19 within 25 miles of their premises, the same or substantially the same loss would have been sustained by the policyholder in any event but for that local occurrence.
  - (11) Save as aforesaid, paragraphs 53 to 59 are denied insofar as they relate to Argenta.
64. Paragraphs 62 to 66 are not relevant to the claim against Argenta.
65. As to paragraphs 67, 68 and 71, Argenta repeats paragraphs 16 to 24 above:
- (1) As stated above, in respect of all claims by policyholders to recover loss under Extension 4(d) based on Covid-19, the proximate causes of all or substantially all the loss claimed by the policyholder do not include an occurrence of Covid-19 within 25 miles of their premises.
  - (2) The specific exclusion attached to Extension 4(d) referred to above expressly excludes any loss arising from premises that are “*not directly affected*” by the occurrence of Covid-19 within 25 miles, i.e. the local occurrence of that disease.
  - (3) As to the prevalence of Covid-19 within the UK, paragraph 47 above is repeated.
  - (4) The required causal link for a claim under Extension 4(d) is not ‘unexpressed’ as alleged in paragraph 71. The Argenta Lead Policy makes it clear that any loss claimed under Extension 4(d) must have been sustained “*as a result of*” the relevant insured peril, i.e. an occurrence of Covid-19 within 25 miles. That is an express reference to the ordinary concept of proximate, legal or substantial causation.
  - (5) Save as aforesaid, paragraphs 67, 68 and 71 are denied insofar as they relate to Argenta.
66. Paragraph 74 contains submissions to which Argenta will respond in due course. Without prejudice to the aforesaid:

- (1) The first sentence of paragraph 74 is misconceived; Argenta does not contend that there are two or more causes of the loss claimed by policyholders which ‘cancel each other out’. As stated above, Argenta contends that all or substantially all of the loss claimed by policyholders has been caused by the national or global Covid-19 pandemic – i.e. occurrences of Covid-19 elsewhere (which are not within the scope of Extension 4(d)) – and/or responses to that national or global pandemic, rather than by any local occurrence of that disease.
- (2) As to the appropriate counterfactual scenario, Argenta repeats paragraphs 25 to 31 above. The counterfactual scenario should exclude only the insured peril, i.e. the occurrence of Covid-19 within 25 miles of the insured’s premises. It is not appropriate to exclude other facts which would still have existed even if Covid-19 had not occurred within 25 miles of a given Premises, such as the global or national pandemic, or the response of the UK Government (or any other public authority) to such pandemic, or the public response to that pandemic.
- (3) Save as aforesaid, paragraph 74 is denied insofar as it relates to Argenta.

67. As to paragraphs 75 to 79, Argenta repeats paragraphs 25 to 31 above:

- (1) The trends clause in the definition of ‘Standard Gross Income’ makes it clear that an insured can only recover loss that would not have been suffered “*but for*” the relevant insured peril. The FCA appears to accept that this clause applies to claims made under Extension 4(d) (see sub-paragraphs 75.5 and 75.6<sup>9</sup>), as it clearly does.
- (2) The allegations concerning the appropriate counterfactual scenario in paragraphs 77 and 78 are specifically denied; the appropriate counterfactual scenario excludes only the insured peril, i.e. the occurrence of Covid-19 within 25 miles of the policyholder’s premises. It does not require or permit any other facts or circumstances to be excluded.
- (3) The appropriate counterfactual scenario is therefore the gross income that would have been earned by the policyholder if there had been no occurrence of Covid-

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<sup>9</sup> Argenta notes the contradiction between these sub-paragraphs and Schedule 2.

19 within 25 miles of their property, but assuming that the Covid-19 pandemic still existed.

- (4) It is admitted that paragraph 79 reflects the appropriate counterfactual scenario referred to above insofar as it assumes that: (i) there would have been no occurrences of Covid-19 within the relevant 25-mile zone; but (ii) occurrences of Covid-19 would have continued outside that zone.
- (5) Paragraph 79 is, however, denied insofar as it suggests that it is appropriate to ignore the effect within that 25-mile zone of advice given and/or restrictions imposed by the UK Government (or any other public authority) in respect of the pandemic, and/or the public response to that pandemic. Such an approach assumes that governmental advice and/or restrictions and/or the public response to the global or national pandemic are insured perils under Extension 4(d), which is incorrect.
- (6) As stated at paragraphs 25 to 31 and 63(10) above, even if a proximate cause of any loss claimed by a policyholder is an occurrence of Covid-19 within 25 miles of their premises, the same or substantially the same loss would have been sustained by the policyholder in any event but for that local occurrence.
- (7) Save as aforesaid, paragraphs 75 to 79 are denied insofar as they relate to Argenta.

***xiii. Relief sought***

68. In the premises:

- (1) paragraph 80 is denied insofar as it relates to Argenta;
- (2) the matters stated in paragraphs 1, 5, 6, 7(a) of the prayer for relief, and paragraph 1 of Schedule 2, are admitted insofar as they relate to Argenta (save that Covid-19 became a ‘Notifiable Human Disease’ in Wales on 6 March 2020);
- (3) the other matters of fact in paragraph 7 of the prayer for relief are not appropriate for declarations in these proceedings (paragraph 47 above is repeated);
- (4) as to paragraphs 11(h) and 13 of the prayer for relief, these are not appropriate matters for declaratory relief in these proceedings, but (as noted at paragraph 58

above) it is admitted that the advice, instructions and/or announcements referred to in paragraphs 46 and 49 of the Particulars of Claim were capable of causing an ‘interruption’ to the business of policyholders for the purposes of Extension 4(d);

- (5) as to paragraph 12 of the prayer for relief, it is admitted that there was an ‘interruption’ insofar as policyholders were required to close their premises as a result of the 26 March Regulations and insofar as such business was otherwise continuing<sup>10</sup> (without prejudice to paragraph 60 above);
- (6) for the reasons stated above, it is denied that the FCA is entitled to the other declarations sought in the prayer for relief (insofar as they relate to Argenta); and
- (7) it is denied that the FCA is entitled to the other declarations sought against Argenta in paragraphs 2 to 4 of Schedule 2.

### **COUNTERCLAIM**

69. Paragraphs 1 to 68 above are repeated.
70. In the premises, Argenta seeks the following declarations in relation to Covid-19 business interruption claims made under the Argenta Lead Policy:
  - (1) Extension 4(d) provides cover if and insofar as a proximate cause of the loss claimed by the policyholder is an occurrence of Covid-19 within 25-miles of their premises.
  - (2) Extension 4(d) is subject to a valid and applicable exclusion of any loss arising otherwise than by the direct effect on the insured Premises of an occurrence of Covid-19 within 25 miles of such Premises.
  - (3) Extension 4(d) is subject to a valid and applicable exclusion of any loss in excess of £25,000.
  - (4) Extension 4(d) does not provide cover on the basis that the proximate causes of any loss include:

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<sup>10</sup> Subject to the limited exceptions set out in regulation 5(4) of the 26 March Regulations.

- (a) the Covid-19 pandemic or epidemic; and/or
  - (b) an occurrence (or occurrences) of Covid-19 in other locations, i.e. other than within 25 miles of the policyholder's premises; and/or
  - (c) the response of the UK Government (and/or the devolved administrations and/or any foreign government) to the Covid-19 pandemic or epidemic; and/or
  - (d) the response of the public in the UK and/or elsewhere to the Covid-19 pandemic or epidemic.
- (5) Extension 4(d) does not provide cover for loss that would have been sustained by a policyholder in any event but for an occurrence of Covid-19 within 25 miles of the policyholder's premises (including as a result of any of the matters stated in sub-paragraph (4) above).

23 June 2020

**SIMON SALZEDO Q.C.**  
**MICHAEL BOLDING**

Brick Court Chambers

Statement of Truth

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

I am duly authorised by the Second Defendant to sign this statement.

Signed:



Full name: David J. Thompson

Position held: Claims Director

Date: 23 June 2020

Served this 23<sup>rd</sup> day of June 2020 by **Simmons + Simmons LLP** of Citypoint, 1 Ropemaker Street, London, EC2Y 9SS.