

**IN THE HIGH COURT OF JUSTICE**

**Claim No: FL-2020-000018**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**

**COMMERCIAL COURT (QBD)**

**FINANCIAL LIST**

**FINANCIAL MARKETS TEST 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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**DEFENCE OF THE EIGHTH DEFENDANT**

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## **PRELIMINARY**

1. This is the Defence of the Eighth Defendant, Zurich Insurance PLC (“**Zurich**”), to the claim brought by the Financial Conduct Authority (“**FCA**”) to determine whether certain wordings written by the Defendants provide cover in relation to the COVID-19 pandemic by reference to certain agreed facts and assumed facts.
2. In this Defence:
  - (1) References to numbered paragraphs are (save as otherwise appears) references to numbered paragraphs of the Particulars of Claim dated 10 June 2020<sup>1</sup>;
  - (2) Save as is expressly admitted or not admitted herein, each and every allegation made in the Particulars of Claim is denied;
  - (3) In accordance with paragraph 5.1.5 of the Framework Agreement concluded with the FCA on 31 May 2020, Zurich pleads to the Particulars of Claim so far as it concerns the Wordings written by Zurich which are the subject of these proceedings (“**the Zurich Wordings**”). To the extent it is nevertheless appropriate and/or necessary for it to do so, Zurich reserves the right to make submissions at trial on other wordings which it writes (including but not limited to wordings on the same terms as RSA Type 4) and other wordings in which it has a commercial interest;
  - (4) Zurich also reserves the right to adopt any argument or the benefit of any argument advanced by any other Defendant;
  - (5) For the sake of convenience, Zurich adopts certain of the headings and abbreviations used by the FCA, but no admissions are made in relation to them.

### **A. SUMMARY**

3. Paragraphs 1 and 2 are admitted. Paragraph 3 is admitted as a summary of the FCA’s case but not otherwise.

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<sup>1</sup> The FCA issued and served its claim on the evening 9 June 2020, but served a further version of the Particulars of Claim, with corrections, the following morning.

4. For the reasons set out below, paragraph 4 is denied.
5. As to paragraph 4.2, the policies containing the Zurich Wordings provide non-damage business interruption cover for (amongst other things) (a) notifiable diseases (the “**Notifiable Diseases Extension(s)**”) and (b) action(s) by a competent civil authority following a danger or disturbance in the vicinity of the premises whereby access to such premises is prevented (the “**AOCA Extension**”). The Notifiable Diseases Extensions are of no application to COVID-19, and the FCA has (rightly) acknowledged this by not including them in this test case. The policies containing the Zurich 1 Wording only respond to a closed list of diseases which does not include COVID-19, and the policies which include the Zurich 2 Wording contain an exclusion in respect of any infectious disease which is declared a pandemic by the World Health Organisation (including COVID-19).
6. It follows that the Zurich Wordings are not intended to cover losses arising out of pandemics, and a nationwide pandemic is not a “danger” *within the meaning or contemplation of the AOCA Extension* (even though the presence of COVID-19 is otherwise capable in principle of amounting to a “danger”). 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 Diseases Extension.
7. Furthermore, the AOCA Extension only provides cover where “Action by the Police or other competent Local, Civil or Military Authority” *following* a “danger or disturbance” in the “vicinity” of the premises has “prevented” access to such premises and, as a consequence, the business of the policyholder is interrupted or interfered with and, as a result, the policyholder has suffered loss. The causal connector “following” requires the action by the competent authority to be proximately caused by, alternatively have a strong causal connection with, the danger or disturbance in the vicinity of the premises.
8. However, the UK Government is not a “Civil Authority”, and its response pleaded at paragraph 4.1 was not a response to (and, accordingly, it did not “follow”) a specific and localised danger, in the vicinity of any particular premises, 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. Accordingly, such response does not give rise to cover under the AOCA Extension.

9. If (which is denied) the measures adopted by the UK Government comprised “action” by a “Civil Authority” following a danger in the vicinity of any particular premises, none of such measures prevented access to the premises within the meaning of the ACOA Extension. Prevention of access requires entry to the premises to be physically obstructed or otherwise impossible. Measures such as those contained in the Regulations<sup>2</sup> referred to below requiring cessation of a business activity do not prevent access to premises. Alternatively, there was no prevention of access to premises by reason of those Regulations, except where they required the complete cessation of business; and, in relation to many of the categories of business identified by the FCA in its Assumed Facts, neither the Regulations nor any other measure taken by the UK Government required such complete cessation of the business.
10. Even if (which is denied) access to the premises in question has been prevented and such prevention of access has caused interference with, or interruption of, business, policyholders must establish that the prevention of access has caused the claimed business interruption losses (calculated in accordance with the terms of the Zurich Policies). As a minimum, policyholders must show that the prevention of access was a “but for” cause of those losses. However, any losses suffered by policyholders were caused (in whole or part) by the COVID-19 pandemic itself, the public response to the COVID-19 pandemic, and/or the (nationwide) response of the UK Government to COVID-19, and not any prevention of access to the premises.
11. In applying the “but-for” test (the application of which is reinforced by the Trends Clauses<sup>3</sup> contained in the Zurich Policies), it should be assumed that 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).

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<sup>2</sup> As defined at paragraph 24(1) below.

<sup>3</sup> As defined at paragraph 59 below.

12. Applying the above counterfactuals, policyholders would or would be likely to have suffered the same or substantially the same loss in any event.
13. The FCA’s proposed counterfactual of a world in which there is no COVID-19 and no Government response is not the correct counterfactual. Paragraph 4.3 is, therefore, denied.
14. For the reasons identified above (and pleaded more fully below), paragraphs 4.4 and 4.5 are denied.
15. Accordingly, the FCA is not entitled to any of the declarations which it seeks in respect of the Zurich Wordings and/or the Zurich Policies.

**B. INTRODUCTION**

16. Paragraphs 5, 6 and 7 are admitted. The Order of Butcher J dated 16 June 2020 provides for the application of the Financial Markets Test Case Scheme to the claim.
17. Paragraphs 8 and 9 are admitted. Paragraph 10 is noted.

**C. POLICY WORDINGS AND APPLICABLE LAW**

18. Seven Zurich policies (which contain the Zurich Wordings) are the subject of this test case (the “**Zurich Policies**”). These policies are identified in Schedule 8 of the Particulars of Claim as being Zurich’s Combined All Risks Policy ZCYP36, five Commercial Combined Policies (applying to different business sectors) and its Contractors Combined Policy. Zurich will rely on the text of the Zurich Policies for their full effect and meaning at trial.
19. In so far as they relate to Zurich, paragraphs 11 and 12 are admitted.
20. The Zurich wordings which are to be tested in these proceedings are:
  - (1) An endorsement, POA3, to the Combined All Risks Policy ZCYP36 (“**Zurich 1**”);
  - (2) An ‘Action of Competent Authorities’ extension, to the Commercial Combined and Contractors Combined policies (“**Zurich 2**”).

21. Both of these wordings are “denial/prevention of access” wordings. Although the policy terms in which they appear also include Notifiable Diseases Extensions, it is common ground that such extensions do not respond to COVID-19. The Zurich Policies also contain Trends Clauses, as set out below.
22. Paragraphs 13 to 15 are noted.
23. As to paragraph 16:
  - (1) The first sentence is admitted: the Zurich’s Policies are subject to the law of England and Wales, Scotland, Northern Ireland, the Isle of Man or the Channel Islands, depending on the address of the policyholder as stated in their policy documentation. Alternatively, in the event of any dispute arising as to the choice of law applicable to any policy, the policy in question will be subject to English law;
  - (2) The second sentence is noted. No admissions are made as to the persuasive value of any decision of the Court to the interpretation of policies governed by the laws of other UK jurisdictions.

**D. COVID-19 AND THE RESPONSE TO IT**

24. The first and second sentences of paragraph 17 are admitted. As to the third sentence:
  - (1) It is admitted that (a) SARS-CoV-2 and COVID-19 have been present in England and Wales since early 2020 (the first reported case was in or around late January 2020), and (b) that the disease and the various measures which have been implemented by the UK Government in response to them have resulted in the interruption of, and interference with, the activities of certain businesses across the UK. In particular, businesses which have been forced to close under the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (the “**21 March Regulations**”) and the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the “**26 March Regulations**”) (together, the “**Regulations**”) have suffered interruption and/or interference;
  - (2) For the avoidance of doubt, it is denied that cover for such interruption and/or interference is available under the Zurich Policies, for the reasons set out further below;

- (3) Zurich pleads to the FCA's case as to the prevalence of COVID-19 at paragraphs 28 to 30 below.

25. As to paragraph 18:

- (1) Paragraphs 18.1 – 18.10 and paragraphs 18.14 – 18.26 are broadly admitted as an abridged chronological record of certain events between January and May 2020, save that:
  - (a) No admissions are made to paragraph 18.5. The first death to occur in the UK was not reported until 5 March 2020;
  - (b) As to paragraph 18.6, the guidance issued on 4 March 2020 anticipated social distancing may be necessary but did not confirm that it would be required or state when it might be implemented;
  - (c) In light of (amongst other things) footnote 2, paragraphs 18.11 to 18.13 are not relevant to the proper construction of Zurich 1 or Zurich 2;
  - (d) As to paragraph 18.17, it is admitted that in a speech on 22 March 2020, the Prime Minister announced the need for social distancing. He did not refer to there being a ban on gatherings of more than two people, or to the UK being in 'lockdown', during that speech. The Prime Minister did refer to gatherings of people being dispersed during his speech on 23 March 2020 but did not make reference to 'lockdown';
- (2) As alleged at paragraph 18.21, it is admitted and averred that the Regulations (specifically, Regulation 6 of the 26 March Regulations), imposed restrictions on the movement of individuals within England. Regulation 7 of the Regulations imposed restrictions on gatherings. Restrictions were also imposed on different categories of businesses pursuant to Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations, as to which Zurich pleads further below;
- (3) All the measures and statements or announcements referred to in paragraph 18 were taken or made by (a) the World Health Organisation; (b) the UK Government; (c) the UK Prime Minister; (d) Public Health England and (e) senior UK Government ministers including, but not limited to, the Chancellor of the

Exchequer and the Secretary of State for Health and Social Care. The FCA does not rely on any more specific or localised response by the police, a civil authority or local government organisation; and, at paragraph 18.25, acknowledges that the UK Government considered that there was benefit in “*the whole country moving together*”;

(4) Save as aforesaid, no admissions are made.

26. As to paragraph 19:

- (1) Zurich will refer to and rely upon the Regulations (and similar measures as applied in Wales, Scotland and Northern Ireland) for their full terms, meaning and effect;
- (2) It is admitted that the Regulations imposed restrictions on some of the categories of business identified by the FCA, but the FCA’s own pleading acknowledges that most businesses were permitted to remain open and/or carry on business (at least to some degree). In particular (but without limitation):
  - (a) Restaurant and other hospitality businesses within category 1 were permitted to operate a “take-away” service, and where they chose to do so, were not required to close, although they could not sell food or drink for consumption on the premises;
  - (b) Within category 2, the list of entertainment and/or leisure businesses within Part 2 of Schedule 2 to the 21 March Regulations, and the expanded list of such businesses within Part 2 of Schedule 2 to the 26 March Regulations, were required to close, save for very limited prescribed purposes;
  - (c) Food retailers and other essential services such as petrol stations, banks, medical and/or health services within category 3 were expressly permitted to remain open, and carry on business, and manufacturing and professional service businesses within category 5 were not precluded from remaining open to carry on business;



- (d) Other retail businesses within category 4 could continue to trade by virtual or distance means, and could remain open in order to service orders placed by those means;
- (e) Hotel/holiday accommodation providers within category 6, and educational and religious establishments within category 7 were permitted to remain open for certain specified purposes;
- (f) No admissions are made to the alleged employers' and occupiers' legal duties or their relevance, or whether they gave rise to interruption or interference, but any such duties would in any event arise on a nationwide basis;

(3) Save as aforesaid, no admissions are made.

**E. ZURICH'S RESPONSE TO CLAIMS**

27. As to paragraph 20:

- (1) Zurich has sought to respond to all of the claims it has received for business interruption losses attributed to COVID-19 on a case by case basis;
- (2) It is admitted that Zurich has declined claims for business interruption losses made by policyholders seeking to rely on Zurich 1 and/or Zurich 2 (including on grounds identified in paragraph 20). This is because neither of those Wordings provides cover in respect of such losses, for the reasons set out in this Defence;
- (3) Save as aforesaid, paragraph 20 is denied.

**F. ALLEGED PREVALENCE OF COVID-19 IN THE UK**

28. Paragraph 21 is noted. By his Order of 16 June 2020, Butcher J has directed that expert evidence going to the issue of actual prevalence of COVID-19 in the UK is not to be adduced or heard at the trial of these proceedings fixed to commence on 20 July 2020.

29. As to paragraph 22:

- (1) It is admitted and averred that the Zurich Wordings require (so far as relevant) the presence of a danger or disturbance "in the vicinity of" the insured premises, but it is denied that there was any such danger within the meaning or contemplation

of the AOCA Extension (even though the presence of COVID-19 is otherwise capable in principle of amounting to a “danger”);

(2) It is noted that the FCA does not allege that there was any disturbance within the meaning of the AOCA Extension;

(3) It is denied (insofar as the same is alleged) that the phrase “in the vicinity of” in the Zurich Wordings is to be interpreted by reference to a radius of a certain number of miles from the insured premises. The term “in the vicinity of” in the Zurich Wordings has its natural meaning, as pleaded further below;

(4) Save as aforesaid, paragraph 22 is not admitted.

30. As to paragraphs 23 to 30, Zurich adopts and relies upon the response of Royal & Sun Alliance Insurance Plc to section F of the Particulars of Claim.

#### **G. ASSUMED FACTS**

31. Paragraph 29.7 is admitted. In light of the FCA’s position in paragraph 30 that it does “not seek declarations by reference to assumed facts or sample scenarios”, it is unclear what the purpose of paragraph 29 is. Save as aforesaid, paragraphs 29 and 30 are noted.

#### **H. POLICY INTENTION**

32. Insurance for business interruption losses is typically purchased as part of a policy providing cover for both material damage and business interruption losses through a broker. All policyholders who have purchased the Zurich Policies were advised by and acted through authorised insurance intermediaries at the time of placement. The majority of the Zurich Policies were sold through online portals which could be accessed only by authorised insurance intermediaries. No Zurich Policies were purchased directly by policyholders.

33. Paragraph 31 is admitted. Any policyholders’ subjective intentions are likewise not relevant or admissible. All references below to the parties’ intentions are to such intentions as objectively ascertained.

34. As to paragraph 32:

- (1) Paragraph 32 above is repeated;
  - (2) It admitted that the Zurich Policies are in standard form and a large number of policyholders have such policies;
  - (3) As set out above, the Zurich Policies were sold through authorised intermediaries. It is admitted that the majority of the Zurich Policies were sold to small and medium enterprises operating through brokers via the online portals referred to in paragraph 32 above;
  - (4) Save as aforesaid, paragraph 32 is denied. The relevance of the matters pleaded in paragraph 32 to the construction of the Zurich Policies is denied.
35. As to paragraphs 33 and 34:
- (1) It does not follow from the fact that a policy does not exclude a particular peril that such peril is the subject of cover;
  - (2) If cover were (and were intended to be) provided in relation to COVID-19 under policies containing the Zurich 1 or 2 Wordings, it would be provided under the Notifiable Diseases Extensions;
  - (3) The Notifiable Diseases Extensions provide cover for losses resulting from interruption of, or interference with, the business carried on by the Insured at the Premises which is the consequence of the occurrence of a “Notifiable Disease... **at the premises** or attributable to food or drink supplied from **the premises...**” which causes “restrictions on the use of the Premises on the order or advice of the competent local authority...” [Emphasis added];
  - (4) Zurich 1 defines “notifiable diseases” by way of a closed list of specified diseases (which does not include COVID-19), and Zurich 2 contains an express exclusion in relation to of “any infectious diseases which have been declared as a **pandemic** by the World Health Organisation...” [Emphasis added];
  - (5) By reference to Zurich 2’s exclusion of pandemics from the cover which it provides in relation to notifiable diseases, the parties’ clear intention was that the policy did (and does) not provide cover in respect of pandemics (including

COVID-19), but, on the contrary, indemnity in respect of pandemics was (and was intended to be) expressly excluded;

- (6) 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 Extension which is (a) concerned with prevention of access rather than disease and (b) makes no reference to diseases or pandemics at all;
- (7) It would be equally surprising and uncommercial if, on its true construction, the AOCA Extension(s) in the Zurich Policies enabled policyholders to circumvent the restrictions on cover imposed by (a) the Zurich 1 notifiable diseases extension in relation to the closed list of notifiable diseases and, (b) both Zurich 1 and Zurich 2, as to the geographical location of the occurrence of the disease in respect of which cover is provided (i.e. at the premises);
- (8) It was not the parties' intention that policyholders should be able to obtain via the back door of the AOCA Extensions cover which it was expressly agreed was not available to them by the front door of the Notifiable Diseases Extensions;
- (9) Accordingly, these policies were not designed to, and it was not the intention of the parties that they should, and they do not, provide cover in relation to losses arising out of pandemics, including the COVID-19 pandemic;
- (10) Save as aforesaid, so far as they concern Zurich, paragraphs 33 and 34 are denied.

36. Paragraph 35 is denied. Insofar as it exists, the *contra proferentem* rule does not apply to the Zurich Policies.

## **I. ACTION OF COMPETENT AUTHORITIES EXTENSION**

### **Preliminary point**

37. The FCA has adopted an atomised approach to construction by considering individual words or phrases within the AOCA Extensions in question separately and without reference to (a) the other words which appear in such clauses or (b) the wider context of the policy as a whole. This is wrong. In line with clause 1.1 of the Framework Agreement, a unitary approach should be adopted by construing the meaning of the

words in the context of the clause, and in the wider setting of the policy, as a whole. The meaning of any individual word is necessarily informed by, and it takes its colour from, the other words around it in the clause, and the meaning of the word(s) and clause in question is informed by the context of the policy as whole.

#### **The proper construction of the AOCA Extension<sup>4</sup>**

38. The AOCA Extension in Zurich 1 provides cover for loss “**resulting from**” interruption of, or interference with, the business (as defined) carried on by the Insured at the premises (as defined) “**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 shall be **prevented** provided that there shall be no liability under this Section of this Extension for loss resulting from Interruption of the Business during the first [x] hours of the Indemnity Period...”

[Emphasis added]

39. On a true and proper construction, in order for cover to attach:

- (1) The loss which is the subject of the claim for indemnity must *result from* (i.e. be proximately caused by) interruption of or interference with the business;
- (2) Such interruption or interference must arise *in consequence of* (i.e. be proximately caused by) “Action by the Police or other competent Local, Civil or Military Authority...whereby access shall be prevented....”;
  - (a) “**Action** by the Police or other competent Local, Civil or Military Authority...” [Emphasis added] does not include advice or guidance, nor does it include action of the UK Government:
    - (i) Neither Zurich 1 nor Zurich 2 contains any reference to “advice” or “guidance”, and neither contains any reference to “government”;

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<sup>4</sup> There is no material difference between the wording of the Prevention of Access/AOCA clause in Zurich 1 and the corresponding clause in Zurich 2. None is identified by the FCA.

- (ii) If the parties had intended cover to attach to “advice” or “guidance”, or to actions of “government”, it would have been a straightforward matter for them to say so. But they did not say so, and there is no warrant for re-writing the AOCA Extension so as to include that which the parties did not;
  - (b) Accordingly, advice or guidance in relation to matters such as “social distancing” does not constitute “action” within the meaning of the AOCA Extension;
  - (c) The reference to “Civil Authority” is a reference to 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. The term “Civil Authority” does not encompass national government;
  - (d) The absence of reference to “government” in the AOCA Extension is consistent with, and supports, the requirement (set out below) that the “action” which is the subject of the AOCA Extension is an action at local level in response to a local “danger or disturbance” in the vicinity of the premises, not a nationwide response of the UK Government to a national and worldwide emergency;
  - (e) Such construction gains further support from the proviso, which, by excluding liability for the first hours of the danger or disturbance in question, contemplates a transient incident (such as a gas explosion or discovery of unexploded munitions) rather than an enduring state of affairs such as a pandemic;
- (3) The “action” in question must be an action “following” a “danger or disturbance in the vicinity of the Premises...”:
- (a) The causal connector “following” imports a requirement of proximate causation or alternatively a strong causal connection. The action in question must be *in response to* the danger or disturbance in the vicinity of the premises, not just later in time. Otherwise, the reference to “danger or disturbance” is both arbitrary and redundant. The action of

the UK Government in introducing measures which were applied across, and have affected, the entire country was not a response to a danger or disturbance in the vicinity of the premises within the meaning of the AOCA Extension, but, on the contrary, a response to a national (and international) pandemic;

- (b) The reference to “disturbance” (which is not mentioned by the FCA, and as to the meaning or significance of which it advances no case) provides an important indicator as to the meaning of “danger” because it reinforces the fact that the danger or disturbance contemplated by the AOCA Extension is a danger or disturbance which is *specific* to the *immediate locality* of the premises. The risk which a disturbance poses to business is a specific local risk – for example, a disturbance in Barnet is unlikely to require action preventing access to a business in Morden;
- (c) Moreover, it confirms that the authority whose response to it is required to constitute the action in consequence of which the business is interrupted or interfered with is a *local arm* of a civil authority (not central government);
- (d) Since, as pleaded at paragraph 35 above, it is the Notifiable Diseases Extension which provides cover for losses resulting from the incidence of (certain specified) diseases, it is denied that COVID-19 constitutes a “danger” *within the meaning and/or contemplation of the AOCA Extension*;
- (e) Further, and in any event, 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);
- (f) In support of the above construction, Zurich relies (amongst other things) on Extension “P0A4 – Prevention of Access”, which provides cover in the event of “loss or destruction of or damage to” property “in the vicinity of the premises” which prevents or hinders the use of, or access to, the premises. The property in question is property which is

within the immediate locality of the premises because it is only damage to such property which will, or is likely to, prevent or hinder access to the premises;

- (4) Further, the action in question must be action whereby access to the premises is prevented. "Prevention" 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. Measures such as those contained in the Regulations referred to below requiring cessation of a business activity do not amount to prevention of access to premises;
  - (5) If (which is denied) provisions of Regulations requiring cessation of business prevented access to premises, the Regulations had different effects on different businesses. On this alternative case, Zurich accepts that access to the premises of businesses within Category 2 was prevented by the Regulations;
  - (6) The business carried on by the Insured at the premises must be interrupted or interfered with *in consequence* of such prevention of access; and such interruption or interference must, in turn, *result* in loss. In each case, the causal requirement necessary to be satisfied by policyholders is that of proximate causation;
  - (7) Even if (which is denied) cover were available under Zurich 1 or Zurich 2, no policyholder would, or would be likely to, have suffered any recoverable loss. See Section N below.
40. The following paragraphs are pleaded in response to sections J to L of the Particulars of Claim and are without prejudice to, and should be read in the light of, paragraphs 32 to 39 above. To the extent that they are inconsistent with paragraphs 32 to 39 above, sections J to L of the Particulars of Claim are denied.

**J. PRESENCE OF THE DISEASE WITHIN A CERTAIN DISTANCE FROM THE PREMISES**

41. Zurich does not plead to paragraph 41 as it makes no reference to Zurich Wordings.
42. As to paragraph 42, it is admitted and averred that the advice and actions referred to at paragraph 18 were applied indifferently to all areas of England irrespective of the



incidence of COVID-19. They were not applied in response to a particular danger within a particular vicinity. Otherwise, no admissions are made as to the reasons why the advice and actions were applied nationally.

43. As to paragraph 43:

- (1) Save that no admissions are made as to the magnitude of the risk of fatality from contracting COVID-19, the first sentence of paragraph 43 is admitted;
- (2) It is denied that the existence of the pandemic of itself constituted a “danger” *within the meaning of the AOCA Extension*. As pleaded above, the danger referred to in the AOCA Extension is a specific danger within the “vicinity” of the premises which triggers a local response from the relevant civil authority;
- (3) It is denied that the undefined term “vicinity” in the Zurich Wordings has the same meaning as the defined term “Vicinity” in RSA4. In the Zurich Wordings, “vicinity” 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 (including any features peculiar to that area). Zurich repeats paragraphs 39(3) and 42 above;
- (4) Save as aforesaid, no admissions are made as to paragraph 43.

## **K. ADVICE AND REGULATIONS**

44. As to paragraph 44, it is admitted that some (but not all) of the facts and matters pleaded at paragraph 18 comprised advice, instructions and regulations, and that some (but not all) of them were given, issued or introduced by the UK Government. The facts and matters pleaded at paragraphs 18.1, 18.3, 18.5, 18.7, 18.11, 18.12, 18.13 and 18.25 did not comprise advice, instructions or regulations, and it is denied that they all constituted “action(s)” within the meaning of the AOCA Extension; and even if (which is denied) they did, none of them was the action of a “Civil Authority”, nor was any of them in response to a danger within a particular vicinity. Paragraph 39 above is repeated. As pleaded above, “advice” does not constitute “action”.

45. Insofar as it relates to the Zurich Wordings<sup>5</sup>, paragraph 45 is denied. None of the nationwide advice, instructions and regulations referred to at paragraph 18 were in response to a danger within a particular vicinity.

**L. INTERRUPTION OR INTERFERENCE**

46. Paragraph 46, paragraphs 46.1, 46.7 and 46.8 are denied:

- (1) Paragraphs 38, and 39 above are repeated;
- (2) The advice and/or instructions and/or announcements referred to in paragraph 46 did not amount to or cause *prevention* of access to the premises within the AOCA Extension;
- (3) Pursuant to the AOCA Extension, the “interruption of” or “interference with” the business must arise in consequence of prevention of access. If the advice and/or instructions and/or announcements referred to in paragraph 46 did not amount to or cause *prevention* of access to the premises within the AOCA Extension clause, the AOCA Extension is not triggered;
- (4) It is not otherwise relevant whether the advice and/or instructions and/or announcements referred to in paragraph 46 generally interrupted or interfered with the business;
- (5) Moreover, and in any event, even if the advice and/or instructions and/or announcements referred to in paragraph 46 amounted to or caused prevention of access, they do not give rise to indemnity under the AOCA Extension because they were taken on a nationwide basis in response to the COVID-19 pandemic, as opposed to a response to a danger in the vicinity of the premises in question. Paragraph 39(5) above is repeated.

47. As to paragraph 47, paragraphs 47.1 and 47.7 and 47.8:

- (1) It is denied that the effect of any of the Regulations was to prevent access to the premises of any insured business within the meaning of the AOCA Extension. Paragraph 39(4) above is repeated;

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<sup>5</sup> The FCA’s case is unclear. Paragraph 45 concerns the definition of Vicinity in RS4, but paragraph 43 suggests that the FCA is alleging that this definition should be adopted in respect of “vicinity” in Zurich 1 and 2.

(2) Alternatively, if (which is denied) provisions of Regulations requiring cessation of businesses prevented access to businesses within the meaning of the AOCA Extension:

(a) In respect of businesses in Category 2, it is admitted that when they were ordered to close on the relevant date in March 2020, this amounted to access to them being “prevented” within the AOCA Extension;

(b) In respect of businesses in Categories 1, 4, 6 and 7, it is denied that access was “prevented” within the AOCA Extension. As set out at paragraph 19 (which is pleaded to at paragraph 26 above), access was expressly permitted in certain circumstances;

(3) Zurich repeats (*mutatis mutandis*) paragraphs 46(3) to (5) above.

#### **M. EXCLUSIONS**

48. Paragraph 50 is noted. Zurich does not plead to paragraphs 51 and 52 which do not relate to the Zurich Policies.

#### **N. CAUSATION**

49. At least two separate causation questions arise on the Zurich Policies. First, whether the action by a Civil Authority preventing access to the premises was “following” (i.e. in response to) a danger in the vicinity of the premises. If the answer is no, there is no cover because there is no “action” within the meaning of the AOCA Extension. Second, if the answer is yes, what would have happened but for such action. If the policyholder would have suffered the same loss in that counterfactual, there is no recoverable loss.

50. The first question arises on the construction of the Zurich Wordings, and is addressed at paragraph 39 and sections K and L above, and further below. The second question arises both from application of the Zurich Wordings (in particular, the Trends Clauses) and from general causation principles, see further paragraphs 59 to 69 below.

51. These two separate issues have been elided by the FCA at Section N. Further, the response to many of the points pleaded by the FCA in Section N concerns the application of the AOCA Extension on its true construction which has already been set

out at sections H to L above (to which cross-reference is made when responding to Section N below).

52. Paragraph 53 is denied. Without prejudice to the generality of the foregoing denial:

- (1) The issue of what, if any, business interruption loss was factually and proximately caused by an insured peril can only be determined on the facts of each individual case, having regard to all the facts considered in the context of, and with reference to, the relevant policy wording;
- (2) There may be different factual and/or proximate causes of different losses, depending upon the time at which the loss in question is said to have been incurred;
- (3) Without prejudice to the burden of proof (which rests on the individual policyholder to prove that its loss was factually and proximately caused by the peril insured against), Zurich contends that:
  - (a) The factual causes of the losses claimed by policyholders are or include, or are likely to be or include:
    - (i) The COVID-19 pandemic, nationally and/or internationally, resulting in individuals contracting COVID-19 and/or self-isolating and/or shielding; and/or
    - (ii) The response of individuals and the public at large to COVID-19, including general public fear, and the adverse impact of such response on economic activity and public confidence arising out of knowledge and experience of COVID-19 generally, irrespective of any governmental advice or action (including, for the avoidance of doubt, deterrence of people who would have otherwise visited the UK from overseas); and/or
    - (iii) The advice and/or guidance issued by the UK Government and/or the devolved legislatures, applying to England and/or the whole of the UK, responding to the pandemic; and/or

- (iv) The Regulations introduced by the UK Government, and/or the similar measures introduced by the devolved legislatures, applying to England and/or to the whole of the UK, responding to the pandemic;
  - (b) None of the above causes falls within the cover provided by the AOCA Extension. As a result, no cover is available under any of the Zurich Wordings because such matters are not insured perils (on the true construction of the AOCA Extensions). Without limitation:
    - (i) The existence of the pandemic is not an “action” at all;
    - (ii) None of the above matters comprised action taken by a “Civil Authority”;
    - (iii) None of them followed a danger in the vicinity of the premises (in that none of them was a specific or local response to any such danger);
    - (iv) None of them prevented access to the premises;
    - (v) Alternatively, none of them prevented access to the premises other than Regulations requiring businesses to close fully (that is, Category 2 businesses).
- (4) It follows that, if, as pleaded at paragraph 53.1, the sole proximate cause of all losses was the nationwide presence of COVID-19 and the restrictions imposed by the UK Government, the AOCA Extension does not respond because (on the FCA’s own case) the interruption or interference said to give rise to the loss in question was not the consequence of the action of a civil authority in response to a danger or disturbance in the vicinity of the premises, but rather the existence of a (national and international) pandemic and the response of the UK Government to it (on a nationwide basis), irrespective of the position in any particular vicinity;
- (5) Further and alternatively, if one or more of the causes identified above fall within the scope of the cover provided by the AOCA Extension, then the other causes were independent concurrent causes of any losses suffered by policyholders, and

accordingly policyholders would have suffered or would be likely to have suffered the same or substantially the same loss in any event.

- (6) As to paragraphs 53.2(a) to (d), the language of the AOCA Extension itself makes such distinctions, or requires them to be made. Zurich repeats paragraphs 32 to 39 above;
  - (7) As to the relevance of the matters pleaded by the FCA to the “but for” test and the appropriate counterfactual, see paragraphs 59 to 69 below.
53. Paragraph 54 refers to Wordings requiring a disease, emergency or public (as opposed to civil) authority intervention to be within a particular locality. The Zurich Wordings do not contain such requirements. Without prejudice to this:
- (1) Paragraph 54.1 is denied. The AOCA Extension is concerned with losses which result from interruption or interference which is the consequence of action by the relevant civil authority in response to a specific danger within the vicinity, not the action of the UK Government which is in response to a nationwide pandemic;
  - (2) Paragraph 54.2 is denied. The AOCA Extension is clear; and its true construction is as set out at paragraphs 32 to 39 above. In relation to paragraph 33, Zurich repeats paragraph 35 above;
  - (3) As to paragraph 54.3:
    - (a) It is admitted that some Insurers’ Wordings make express reference to governmental action. Zurich 1 and Zurich 2 do not refer to, and do not provide (or contemplate) cover in the case of, a national pandemic such as would attract intervention from the national government. They respond to the action of the relevant Civil Authority, not the UK (or devolved national) Government;
    - (b) Save as aforesaid, no admissions are made.
54. Paragraph 55 is denied. It is denied that the Zurich Policies are premised on the existence of disease or an emergency of sufficient seriousness so as to give rise to government or public authority action. Neither the Government, nor a public authority, is mentioned in the AOCA Extension. Zurich repeats paragraph 39(2) above.

55. As to paragraph 56:

- (1) It is admitted that the package of measures imposed was imposed at national level by the UK (or devolved national) Government, and, it is averred, irrespective of the incidence of COVID-19, and/or the presence of a danger, in any particular vicinity. Accordingly, for the reasons set out above, losses which are attributable to prevention of access as a result of such measures are not covered by the Zurich Policies;
- (2) As to paragraphs 56.1 to 56.7, Zurich repeats paragraph 25 above;
- (3) As to paragraph 56.8, the AOCA Extension itself requires a distinction to be made between a danger or disturbance in the vicinity and a broader national response to a pandemic: any action must be in response to a danger in the vicinity. As to the relevance of the matters pleaded by the FCA to the “but for” test and the appropriate counterfactual, see paragraphs 59 to 69 below;
- (4) The AOCA Extension itself also requires a distinction to be made between advice and action which prevents access to the premises. Section L above is repeated;
- (5) Save as aforesaid, paragraph 56 is denied.

56. Paragraph 57 is denied. The FCA does not identify what it contends the concurrent causes are, and accordingly it is not understood on what basis it alleges that they are “interdependent” or “independent”. The causes set out at paragraph 52(3) above were independent causes.

57. As to paragraph 58:

- (1) If one or more of the causes identified at paragraph 52(3) above fall within the scope of the cover provided by the AOCA Extension, then the other causes were independent concurrent causes of any losses suffered by policyholders, and accordingly policyholders would have suffered or would be likely to have suffered the same or substantially the same loss in any event;
- (2) Further and alternatively, as pleaded at 35 above, so far as the Notifiable Diseases Extension is concerned, cover in relation to pandemics is excluded by Zurich 2,

and Zurich 1 contains a closed list of notifiable diseases in respect of which cover is provided;

(3) Save as aforesaid, paragraph 58 is denied.

58. Paragraphs 59, 60, 62, 64 and 71 are denied. In respect of the causation test required by words of the AOCA Extension (in particular the use of the word “following”), Zurich repeats paragraph 39 and sections K and L above. In respect of the “but for” test and the appropriate counterfactual, see paragraphs 59 to 69 below.

### **The “but for” test and the Trends Clauses**

59. Further or alternatively, if (which is denied) the Zurich Policies respond to business interruption claims arising out of COVID-19, Zurich relies on the Trends clauses (the “**Trends Clauses**”) contained in the Zurich Policies which are set out in Schedule 8 to the Particulars of Claim. These clauses provide expressly for that which is inherent in the indemnity nature of the policy, namely that the policyholder is to be indemnified in respect of loss caused by the insured peril, not more and not less.

60. Zurich 1 (when written on a Loss of Gross Profit or Loss of Revenue basis)<sup>6</sup> and Zurich 2 contain Trends Clauses which are applicable to non-damage cover. To this extent, paragraph 75.5 (insofar as it concerns the Zurich Policies) is admitted and averred. As regards Zurich 1 when written on an Increased Cost of Working basis, paragraph 75.2 is admitted.

61. The Trends Clauses contained in the Zurich Policies provide (so far as material) that the amount of indemnity payable under the policy is to be calculated by making such 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 Incident or which would have affected the business **had the Incident not occurred**, so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which **but for the Incident** would have been obtained during the relative period after the Incident.” [Emphasis added].

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<sup>6</sup> As to footnote 12 to the Particulars of Claim, an example of a Loss of Revenue schedule which includes a Trends Clause has been supplied to the FCA under cover of the third letter from Clyde & Co LLP to Herbert Smith Freehills LLP dated 9 June 2020.



62. On their true and proper construction, the Trends Clauses thus require the calculation of any indemnity under the Zurich Policies:
- (1) To take account of “variations in or other circumstances” affecting the insured business which would have affected the business had the “Incident” (or “incident”) not occurred;
  - (2) So that the amount of indemnity represents as nearly as is reasonably practicable the results which “but for” the “Incident” (or “incident”) would have been obtained by the business after the “Incident” (or “incident”).
63. The Zurich Policies define what is deemed to be an “Incident” or “incident” as follows:
- (1) Zurich 1:  
“Any loss ... resulting from interruption of or interruption of or interference with the Business in consequence of accidental loss destruction or damage at the under-noted situations ... shall be deemed to be an Incident ...”
  - (2) Zurich 2:  
“Any loss as insured under this section resulting from interruption of or interference with the **business** in consequence of: ..  
  
b) any of the under-noted contingencies  
  
will be deemed to be an **incident**.”
64. Accordingly:
- (1) On the true and proper construction of the Trends Clauses, an assessment is required of what would have happened “**but for**” the “Incident” (or “incident”);
  - (2) That in turn requires assessment of what would have happened but for the action of the competent local or civil authority following a danger in the vicinity of the premises whereby access thereto was prevented.
65. In the counterfactual required by the Trends Clauses and/or generally applicable causation principles, it should be assumed that the “action” which prevented access had

not occurred, but everything else which actually happened should be assumed to have happened.

66. For this purpose, the meaning of “action” is the action (if any) which the Court finds could trigger the AOCA Extension. Paragraph 39 above is repeated. If (which is denied) the Regulations or other measures introduced by the UK Government constituted an action or actions preventing access within the AOCA Extension, the same action or actions preventing access should be assumed to have not occurred.
67. Accordingly, in the present case, the following relevant factual circumstances are to be assumed to have existed or occurred (without limitation):
  - (1) The COVID-19 pandemic, nationally and internationally, resulting in individuals contracting COVID-19 and/or self-isolating and/or shielding; and/or
  - (2) The response of individuals and the public at large to COVID-19 including general public fear, and the adverse impact of such response on economic activity and public confidence arising out of knowledge and experience of COVID-19 generally, irrespective of any governmental advice or action (including, for the avoidance of doubt, deterrence of people who would have visited the UK from overseas); and/or
  - (3) The advice and/or guidance issued by the UK Government and/or the devolved legislatures, applying to England and/or the whole of the UK, responding to the pandemic; and/or
  - (4) The Regulations introduced by the UK Government, and/or the devolved legislatures, applying to England and/or to the whole of the UK responding to the pandemic (or, on Zurich’s alternative case, the Regulations introduced by the UK, Government except those which prevented access).
68. In the premises, paragraphs 74, 76, 77 and 78 are denied:
  - (1) The “but for” test cannot (and should not) be disapplied in this context. It has been agreed pursuant to the Zurich Policies that a “but for” approach to causation should be adopted, and the assumption required to be made in applying that approach has also been agreed. Further, to the extent alleged by the FCA, fairness and reasonableness do not require the but for test to be disapplied;

- (2) The Trends Clauses do not require the “elimination of all interdependent and interlinked matters”, as alleged in paragraph 74. Nor do they permit circumstances that would have affected the business had the “Incident” (or “incident”) not occurred to be excluded when calculating the indemnity under a policy by reason of the alleged unrealism of the resulting counterfactual;
- (3) The relevance of the FCA’s reference to the “peril” and/or “insured perils” in paragraphs 76 and 77 is not understood. The relevant peril in the Zurich Wordings is the occurrence of “action by the Police or other competent Local, Civil or Military Authority following a danger or disturbance in the vicinity of the Premises”. Paragraphs 65 to 67 above are repeated;
- (4) The Trends Clauses expressly require account to be taken of any and all “variations” and “circumstances” which would have affected the insured business had the (for these purposes, assumed) “action” preventing access not occurred. There is no basis for limiting the “variations” and “circumstances” that fall to be taken into account to extraneous matters that can “be described as an ordinary vicissitude of commercial life, such as economic trends or regulatory actions independent of the COVID-19 outbreak”, as alleged in paragraph 76. No restriction is imposed by the Trends Clauses on the type or nature of the “variations” and “circumstances” to be taken into account. Accordingly, such circumstances include the facts and matters set out at paragraphs 65 to 67 above.

69. As to paragraph 79:

- (1) The correct counterfactual is as set out at paragraphs 65 to 67 above;
- (2) It is likely that policyholders would have suffered the same loss in the correct counterfactual, and accordingly unlikely that there will be any recoverable loss;
- (3) It is denied that, in the circumstances of the counterfactual identified at paragraph 79, the indemnifiable amount may increase. In that counterfactual scenario, the general population would not have visited the business for reasons which include COVID-19 pandemic, the fear of COVID-19 generally elsewhere in the UK, and Government measures other than the action within the Relevant Policy Area (i.e. the vicinity of the premises), such as advice on social distancing or to “stay at home” and/or to avoid all non-essential travel;

(4) Save as aforesaid, paragraph 79 is denied.

**O. COVER**

70. Paragraphs 80.1, 80.2 and 80.4 are denied for the reasons set out above.

71. Paragraph 80.3 is denied. The reasons given for denial by Zurich are correct in law.

72. Paragraph 80.5 is noted.

**P. DECLARATIONS**

73. Declarations 1, 2, 3, 4, 5, 6, 10, 13, 14 and 17 do not relate to Zurich and Zurich does not plead thereto.

74. Insofar as they relate to Zurich, for the reasons set out above it is denied that the FCA is entitled to any of Declarations 7, 8, 9, 11, 12, 15, 16, 18 and 19, or the six declarations set out at Schedule 8.

**ANDREW RIGNEY QC**

**CRAIG ORR QC**

**CAROLINE McCOLGAN**

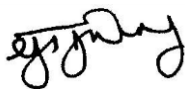
**MICHELLE MENASHY**

Dated this 23<sup>rd</sup> day of June 2020

**STATEMENT OF TRUTH**

The Eighth Defendant believes that the facts stated in this Defence 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.

Signed:



Name: Mark Wing

Position: Partner

Date: 23 June 2020