

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

BETWEEN

THE FINANCIAL CONDUCT AUTHORITY

Claimant

-and-

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

Defendants

AGREED LIST OF ISSUES AND COMMON GROUND¹

17 July 2020

Disease

Common ground

1. COVID-19 was from 5 March 2020 in England and from 6 March 2020 in Wales:²
 - 1.1. A notifiable disease as defined in MS Amlin 1-2, QBE 3 and RSA 3.³

¹ To the extent they cover issues, reference should also be made to the Agreed Facts documents which set out common ground between the parties. Where a matter identified as common ground relates to a specific Defendant or Defendants and/or its/their wordings, that matter is common ground between the FCA and the specific Defendant(s) only.

² PoC 36-37; Reply 10. References below to 5/6 March are to 5 March in England and 6 March in Wales.

³ MS Amlin 67, 82; QBE 45-46; RSA 36-37.

- 1.2. A notifiable human disease as defined in Argenta1, Hiscox2 and Hiscox4 (public authority clause) and RSA1.⁴
- 1.3. A human infectious or human contagious disease, an outbreak of which must be notified to the local authority in Hiscox1 and Hiscox3-4 (public authority clauses).
- 1.4. A human infectious or human contagious disease an outbreak of which the local authority⁵ has stipulated shall be notified to them in QBE1-2 and RSA3.⁶
2. COVID-19 was deemed to be a notifiable disease in RSA4 from at least 31 January 2020 (the date of its initial outbreak in England).⁷

Issues

3. In RSA4, was COVID-19 deemed to be a notifiable disease from 31 December 2019 (when the first cases in Wuhan were confirmed)? (the FCA's case)⁸ or only from 31 January 2020? (RSA's case)⁹

Disease occurrence and vicinity

Common ground

4. Whenever a person or persons had contracted COVID-19 such that it was diagnosable within 25 miles of the premises, there was:¹⁰
 - 4.1. An occurrence of a notifiable human disease (as defined) within a radius of 25 miles of the premises in Argenta1;¹¹

whether or not it was in fact verified by medical testing or a medical professional, and whether or not it was formally confirmed or reported to the UK Department of Health and Social Care and Public Health England, and whether or not it was symptomatic.

Issues

5. In Hiscox1-3 (public authority clause) was there an 'occurrence' of COVID-19 on 5/6 March (when COVID-19 was made a notifiable disease)? (the FCA's case)¹² or not (Hiscox's case)¹³? Does the word 'occurrence' in the public authority clause require a small-scale event which must be local and/or specific to the insured, its business, activities or premises? (Hiscox's case)¹⁴

⁴ Argenta 14, 54; Hiscox 73-74.

⁵ "Competent local authority" in QBE2.

⁶ QBE 45-46, RSA 36-38.

⁷ PoC 39-40, RSA 38-9.

⁸ PoC 39-40.

⁹ RSA 39.

¹⁰ PoC 36-41.

¹¹ Argenta 54-55.

¹² PoC 38, Reply 46.

¹³ Hiscox 75.

¹⁴ Hiscox 14.3, 75.5.

6. In Hiscox4 (public authority clause), MSAmclin1-2¹⁵, and QBE2-3, was there (an occurrence of)/(illness sustained by any person resulting from) COVID-19 within a 25-mile (MSAmclin1-2, QBE2) or 1-mile (Hiscox4, QBE3) radius of the premises, whenever after 5/6 March 2020 and wherever a person or persons had contracted COVID-19 such that it was diagnosable and was/were within 25 miles/1 mile of the premises? (the FCA’s case)¹⁶ Or is that a question of fact in each particular case? (QBE’s case)¹⁷ Is it a question of fact, but one that requires, at the least, medical verification of COVID-19? (Hiscox’s case, adopted by MS Amclin)¹⁸
7. In QBE1, RSA1 and RSA3, was COVID-19 manifested by any person within a 25-mile radius of the premises whenever after 5/6 March 2020 and wherever a person or persons had contracted COVID-19 such that it was diagnosable and was/were within 25 miles of the premises? (the FCA’s case)¹⁹ Or is that a question of fact in each particular case? (QBE’s case)²⁰ Or does that clause require an actual diagnosis? (RSA’s case)²¹
8. In RSA4, did COVID-19 occur within the Vicinity (as defined) of the premises:
 - 8.1. On 31 January 2020 (when COVID-19 was first diagnosed in England)?²² (the FCA’s case)
 - 8.2. On the date when COVID-19 occurred within a more localised area surrounding the premises (such as within a 1-mile or 25-mile radius), that being a question of fact in each case?²³ (the FCA’s alternative case)
 - 8.3. On the date when COVID-19 occurred within ‘a close spatial proximity having regard to the nature of the insured’s business and the geographical area in which it is located’ but not the whole of the UK or always the same city, town or village? (RSA’s case)²⁴

Prevalence of COVID-19

Common ground

9. In Agreed Facts 3,²⁵ it is common ground that: some policies require a policyholder to prove a case of COVID-19 within the Relevant Policy Area (as defined in Agreed Facts 3); policyholders may be able to prove a case of COVID-19 at a particular location by specific evidence in a particular case; policyholders can rely on Reported Cases and ONS death statistics in particular circumstances (as set out in Agreed Facts 3); by 26 March 2020 there were Reported Cases in all but one of the LTLAs within England; the true number of people infected in the UK during March 2020 was “*much higher*” than those who tested positive for

¹⁵ MSAmclin confirmed by letter from DAC Beachcroft dated 8 July 2020 that it would adopt Hiscox’s Defence to this allegation.

¹⁶ PoC 41, Reply 47.2-47.5.

¹⁷ QBE 47.

¹⁸ Hiscox 77.

¹⁹ PoC 41, Reply 47.2, 47.5.

²⁰ QBE 47.

²¹ RSA 40-43.

²² PoC 41.5, RSA 43.

²³ PoC 41.5, RSA 43.

²⁴ RSA 43.

²⁵ As identified in footnote 1, to the extent they cover issues, reference should also be made to the Agreed Facts documents which set out common ground between the parties. In relation to prevalence, Agreed Facts 3 reflects common ground between the parties, and key aspects of that document are summarised in this paragraph.

COVID-19 during March 2020; policyholders may rely on certain data as to area size, population size and population density (as set out in Agreed Facts 3). (While agreeing on those points, the parties disagree as to policyholders' entitlement to rely on, and/or extrapolate from, certain data and information.)

Issues

10. As per the ruling at the Second CMC, save where now agreed between the parties:
 - 10.1. The type(s) of proof which could be sufficient to discharge the burden of proof upon insureds; and
 - 10.2. On the assumption that the matters pleaded by the FCA represent the best evidence available, whether it is sufficient as a matter of principle to discharge the burden of proof.

Public authority action

Common ground

11. From 3 March 2020 there was an emergency likely to endanger life in Arch1.²⁶
12. From at least 12 March 2020 there was an emergency which could endanger human life in Ecclesiastical1.1-1.2 (the dispute on this point being limited to whether an earlier date applies).²⁷
13. COVID-19 falls within the defined term 'injury' in MSAm1in3.²⁸
14. The following Government action pleaded in the sub-paragraphs of PoC 18 was:²⁹
 - 14.1. Actions or advice of the government within Arch1: 18.4, 18.6-18.7 (second and third sentences), 18.9-18.10, 18.14-18.24, 18.26;³⁰
 - 14.2. Capable of being restrictions imposed by a public authority within Hiscox1-4: Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations;³¹
 - 14.3. Actions or advice of a competent Public Authority within RSA2.1-2.2 and of a governmental authority or agency within RSA4 (prevention of access clause): 18.8-18.9, 18.14, 18.15(b), 18.16 (the 21 March Regulations), 18.17-18.19, 18.21 (the 26 March Regulations), 18.22, 18.26.³²

²⁶ PoC 43.1, Arch 36, 63.

²⁷ PoC 43.2, Ecclesiastical 35.

²⁸ MSAm1in 87.

²⁹ PoC 44.

³⁰ Arch 37-38.

³¹ Hiscox 14.2, 83.4.

³² RSA 46-47.

15. There was prevention of access to the premises in Arch1:³³
 - 15.1. For those policyholders which were required to close the premises by the 21 March Regulations or the 26 March Regulations; and
 - 15.2. To the extent any further action or advice from government or local authority (e.g. the Government's advice on 20 March and 23 March to the effect that certain premises should be closed) prevented access to the premises for the purposes of carrying on the Business.
16. In Argenta1:³⁴
 - 16.1. The advice, instructions and/or announcements in PoC 46 and 49 were capable of causing an 'interruption' to the business of policyholders;
 - 16.2. 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;
 - 16.3. The 26 March Regulations and equivalent Regulations in Wales caused an 'interruption' to the business of policyholders located in England and Wales insofar as such business was otherwise continuing.³⁵
 - 16.4. An 'interruption' to the business of policyholders gives rise to a claim under Argenta1 if, and insofar as, it is as a result of (i.e. proximately caused by) any occurrence of COVID-19 within a radius of 25 miles of the premises.
17. In Ecclesiastical1.1-1.2, use of churches was hindered from 23 March 2020.³⁶
18. In Hiscox1-4, Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations could cause an 'inability to use' within Hiscox1-4.³⁷
19. In QBE1-3, human action and/or intervention including the social distancing measures listed in PoC 46 and closure measures listed in PoC 47 could in principle cause interference with the insured business.³⁸
20. In RSA1, 2.1-2.2 and 4, the 20, 21, 23, 24 and/or 26 March closure measures in PoC 47 amounted:³⁹
 - 20.1. In principle to a closure placed on the premises and/or restrictions placed on the premises for any business in Category 6 from its effective date (in RSA1)⁴⁰;

³³ Arch 7.8-7.9, 43.

³⁴ Argenta 58-59.

³⁵ Subject to Regulation 5(4) of the 26 March Regulations, as to which is not common ground.

³⁶ Ecclesiastical 37, 44.

³⁷ Hiscox 86.4.

³⁸ QBE 51.1.

³⁹ RSA 50, 52.

⁴⁰ RSA, 50(b) and 52(a). The reference to Category 1 in RSA 50(b) is an error and should be read as a reference to a Category 6 business: see RSA skeleton Appendix 1 page 5 footnote 5.

- 20.2. In principle to a *pro tanto* prevention of or hindrance to the use of the premises with respect to any business ordered to close the premises in full or in part (in RSA2.1-2.2), and
- 20.3. In principle to a *pro tanto* hindrance to the use of the premises and/or the enforced closure of the premises with respect to any business ordered to close the premises in full or in part (in RSA4).
21. In Zurich1-2, businesses required to close by the 21 March and 26 March Regulations have suffered interruption and interference.⁴¹

Issues

22. Was there, by reason of the matters pleaded in PoC 43, irrespective of the location of the insured premises in England and Wales:⁴²
- 22.1. From 3 March, an emergency which could endanger human life in Ecclesiastical1.1-1.2 (the only issue on this point being the date, it being common ground that there was such an emergency from 12 March 2020)?⁴³
- 22.2. From 3 March, 12 March or such other date as the Court shall determine (all of these: the FCA's cases⁴⁴):
- a. An incident within a 1-mile radius of the premises in Hiscox1-2 and Hiscox4 / within the vicinity of the premises in Hiscox2? Does the non-damage denial of access (NDDA) clause require a specific, small-scale, identifiable physical event of short temporal duration and limited geographical extent which is only within (and not both within and without) the 1-mile radius or the vicinity?⁴⁵ (Hiscox's case)
 - b. A danger in the vicinity of the premises in MSAmclin1 and Zurich1-2? Or does that require an acute risk of harm from something specific happening in the immediate locality of the premises?⁴⁶ (MSAmclin's case) Or is the COVID-19 pandemic not capable of being a "danger...in the vicinity of the premises" because:
 - (1) the danger referred to in the Wording is a specific local danger, in the immediate locality/within close spatial proximity which triggers a local response from the relevant civil authority; and/or
 - (2) "danger" does not refer to disease at all (Zurich's case)⁴⁷

⁴¹ Zurich 24(1).

⁴² PoC 43 in each case.

⁴³ PoC 43.2, Ecclesiastical 35.

⁴⁴ PoC 43, Reply 48.

⁴⁵ Hiscox 13.1, 13.2, 80.

⁴⁶ MSAmclin 51.

⁴⁷ Zurich 6, 29(1), 29(3), 35(6), 39(3)(b), 43(3), 44-45.

- c. An incident within a 1-mile radius of the premises in MS Amlin 2? Or does that term require a distinct and specific happening (within the relevant area)?⁴⁸ (MS Amlin’s case)
 - d. A threat or risk of damage or injury in the vicinity of the premises in MS Amlin 3? Or does that require a specific threat or risk of injury referable specifically to the vicinity of the premises?⁴⁹ (MS Amlin’s case)
 - e. An emergency likely to endanger life or property in the vicinity of the premises in RSA 2.1-2.2? Does the policy require an emergency within the vicinity of the premises which is likely to endanger life (as RSA contends⁵⁰) or an emergency which is likely to endanger life within the vicinity of the premises (the FCA’s case)?
 - f. Health reasons or concerns in RSA 4 (enforced closure clause)? Or, if required by RSA 4 (contrary to the FCA’s case but as RSA contends), health reasons or concerns at or within the ‘Vicinity’ of the insured location?⁵¹
23. If not, was the requirement for such an incident, emergency, danger or threat or risk of injury or health reasons or concerns satisfied whenever it is proven that a person with COVID-19 had been present within (the FCA’s alternative cases):⁵²
- 23.1. 1-mile of the premises in Hiscox 1-2, Hiscox 4 and MS Amlin 2?⁵³
 - 23.2. An area surrounding or adjacent to the premises in which events that occur within such area would be reasonably expected to have an impact on an insured or an insured premises in Hiscox 2,⁵⁴ MS Amlin 1, MS Amlin 3,⁵⁵ RSA 2.1-2.2, RSA 4⁵⁶ and Zurich 1-2?⁵⁷
24. Which if any of the events listed in PoC 18.9, 18.14, 18.15(b), 18.16-24, and 18.26 were⁵⁸ (the FCA’s case is that they were, the Defendants that they were not):
- 24.1. Action of the government in Ecclesiastical 1.1-1.2?⁵⁹
 - 24.2. Action by the competent civil authority in MS Amlin 1?⁶⁰

⁴⁸ MS Amlin 75.4.

⁴⁹ MS Amlin 88-89.

⁵⁰ RSA 45(b).

⁵¹ RSA 45(c), 46(a), Reply 51.

⁵² PoC 43.

⁵³ Hiscox 81, MS Amlin 78.

⁵⁴ Hiscox 81-82.

⁵⁵ MS Amlin contends that 28, 71, 95 of its Defence amounts to a denial of the FCA’s case on this issue.

⁵⁶ RSA 45 makes no admissions to this alternative case in PoC 43.

⁵⁷ Zurich 43 denies that the existence of the pandemic of itself constituted a “danger” within the meaning of the clause (as set out at issue 21(2)(b) above) and denies the FCA’s case as to ‘vicinity’. Accordingly, Zurich denies the FCA’s alternative case in PoC 43.

⁵⁸ PoC 18, 44-45. Note that Arch is deliberately omitted from this paragraph, it being common ground that the following matters were actions or advice of the government within Arch 1: 18.4, 18.6-18.7 (second and third sentences), 18.9-18.10, 18.14-18.24, 18.26 (as to which see common ground above).

⁵⁹ Ecclesiastical 15, 34-39, 44.

⁶⁰ MS Amlin 15, 50-60.

- 24.3. Action by a competent public authority in MSAm1in3?⁶¹
- 24.4. Enforced closure by any governmental authority or agency within RSA4 (enforced closure clause)?⁶² Does that clause have a Vicinity requirement and if so to what does it apply?⁶³
- 24.5. “Action” and, if so, action of a competent civil authority in Zurich 1-2?⁶⁴
25. Were either of the events listed in PoC 18.20 and 18.23⁶⁵ (the FCA’s case is that they were, the Defendants that they were not) actions or advice of a competent Public Authority within RSA2.1-2.2 and actions or advice of a governmental authority or agency in the vicinity of the premises within RSA4 (prevention of access clause): (it being common ground that certain events were: see paragraph 14.3 above)?⁶⁶
26. As regards Arch1:
- 26.1. Is prevention of access by closure limited to situations where a business is ordered or advised to close the entire premises (as contended by Arch) or does it also arise where the government action closes part of the premises or requires the policyholder not to carry on certain business activities (as contended by the FCA)?⁶⁷ Did all policyholders experience a prevention of access to their premises due to the actions or advice of a government from 16 March 2020 or such subsequent date as determined by the Court, by reason of the Government advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18?⁶⁸
- 26.2. Did all policyholders in Categories 1, 4, 6 and 7 (and not only those which were ordered to close completely, as contended by Arch) experience a prevention of access to the premises due to the actions or advice of a government:
- a. from 21 March 2020, by reason of the 21 March Regulations; and/or
 - b. from 26 March 2020, by reason of the 26 March Regulations?
 - c. on such other date as alleged by the FCA in paragraph 47 of the PoC?⁶⁹
27. Subject to the common ground set out in paragraph 15 above, as regards Argenta1 and the Category 6 businesses it insured, to the extent that this is not a question of fact that cannot be determined by reference to assumed facts:⁷⁰

⁶¹ MSAm1in 15, 89-93.

⁶² RSA 46-48.

⁶³ RSA 45(c), Reply 51.

⁶⁴ Zurich 8, 39(2), 44.

⁶⁵ PoC 18, 44-45. Note that Arch is deliberately omitted from this paragraph, it being common ground that the following matters were actions or advice of the government within Arch1: 18.4, 18.6-18.7 (second and third sentences), 18.9-18.10, 18.14-18.24, 18.26 (as to which see common ground above).

⁶⁶ RSA 46-48.

⁶⁷ Arch 7.7, 22.

⁶⁸ PoC 46, Arch 41-42.

⁶⁹ PoC 47, Arch 43.

⁷⁰ Argenta 58.

- 27.1. Was there interruption from 16 March 2020 or such subsequent date as determined by the Court, by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18?⁷¹
- 27.2. Was there interruption from 16 March, by reason of the Government statements including to cease travel and self-isolate, or 24 March 2020 given the Government advice to close for commercial use as quickly as was safely possible (it being common ground that, in the case of policyholders whose business was otherwise continuing, the 21 March Regulations were (i) capable of causing, and likely to have caused, an interruption for those insureds operating a bar or restaurant in their accommodation, and (ii) the 26 March Regulations did cause interruption)?⁷²
28. As regards Ecclesiastical 1.1-1.2:
- 28.1. Does prevention of access only arise where access is rendered physically impossible?
- 28.2. Does prevention of use only arise where use is rendered physically or legally impossible?⁷³
- 28.3. Does hindrance of access/use only arise where it is made more difficult or inhibited (it being common ground that it is irrelevant whether the hindrance is that of the Insured, its employees, its customers/clients/consumers, or its parishioners / congregants / members)?⁷⁴
- 28.4. As regards businesses, including businesses in Categories 1, 2, 4, 5, 6 and 7 (and including churches, nurseries, schools and colleges):
- a. was there any prevention or hindrance of access or use as pleaded in PoC 46-47?
 - b. Specifically in relation to churches, was there hindrance of use of churches before 23 March 2020 as pleaded in PoC 46-47 (it being common ground that there was hindrance of use for churches after that date)?⁷⁵
 - c. Specifically in relation to residential care homes or day care facilities or similar, was access to or use of such premises ever prevented or hindered (it being Ecclesiastical's case that it was not)?⁷⁶
- 28.5. Was there interruption of or interference with the insured business as a result of access to or use of the premises being prevented or hindered from 16 March 2020, or such subsequent date as determined by the Court, by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18?⁷⁷ Or

⁷¹ PoC 46, Argenta 58-59.

⁷² PoC 46, Argenta 59, Argenta skeleton 48(2).

⁷³ Ecclesiastical 33.2.

⁷⁴ Ecclesiastical 33.3.

⁷⁵ Ecclesiastical 16.3, 36-37, 40, 44.

⁷⁶ Ecclesiastical 38.2.

⁷⁷ PoC 46.

are these factual issues which are outside the scope of the test case and cannot be resolved by reference to assumed facts?⁷⁸

28.6. Was there interruption of or interference with the business as a result of access to or use of the premises being prevented or hindered for businesses in Categories 1, 2, 4, 6 and 7, from 20, 21, 23, 24 and/or 26 March 2020, as pleaded in PoC 47?⁷⁹ Or are these factual issues which are outside the scope of the test case and cannot be resolved by reference to assumed facts?⁸⁰

29. As regards Hiscox:

29.1. Does the requirement (in the NDDA clause) that the denial of or hindrance in access be ‘imposed’ require something which has the force of law, compliance with which is compulsory, or which is mandatory?⁸¹

29.2. Is the question whether or not as regards any particular insured there has been a denial of or hindrance in access one of fact which cannot be determined by reference to assumed facts?⁸²

29.3. Under the NDDA clause, if there was an ‘incident’ within a one mile radius/the vicinity of the premises, did that ‘incident’ result in the denial of or hindrance in access (if any) being imposed?⁸³

29.4. Does ‘interruption’ require a cessation or stop, meaning a business that continues in part is (in principle) not interrupted?⁸⁴

29.5. Is the question whether or not as regards any particular business there has been an ‘interruption’ one of fact which cannot be determined by reference to assumed facts?⁸⁵

29.6. As regards Hiscox1-4 (public authority clause):

- a. Must the inability to use the insured premises be that of the insured itself (and no one else – e.g. the insured’s customers)?⁸⁶
- b. Does the public authority clause require physical and/or legal inability to use the insured premises?⁸⁷
- c. Does the public authority clause, specifically the words ‘restrictions imposed’, require something which has the force of law, compliance with which is compulsory, or which is mandatory?⁸⁸

⁷⁸ Paragraph 3 of DACB letter dated 8 July 2020.

⁷⁹ PoC 47.

⁸⁰ Paragraph 3 of DACB letter dated 8 July 2020.

⁸¹ Hiscox 13.3, 83.2.

⁸² Hiscox 85.8.

⁸³ Hiscox 13.5, 102.5.

⁸⁴ Hiscox 15, 85.6

⁸⁵ Hiscox 85.8.

⁸⁶ Hiscox 14.1, 85.4.

⁸⁷ Hiscox 14.1, 85.4.

⁸⁸ Hiscox 13.3, 14.2, 83.2.

- d. Did the advice and guidance of the Government from 16 March amount to ‘restrictions imposed’?⁸⁹
- e. Save for Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations (which it is common ground have this effect),⁹⁰ could any of the other events relied on in PoC 46-47 amount to an inability to use the premises due to restrictions imposed by a public authority?⁹¹
- f. Was there interruption to the insured’s activities caused by an inability to use the premises due to restrictions imposed by a public authority from 16 March 2020, or such subsequent date as determined by the Court, by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18?⁹²
- g. Was there interruption to the insured’s activities caused by an inability to use the premises due to restrictions imposed by a public authority for businesses in Categories 1, 2, 4, 6 and 7, from 20, 21, 23, 24 and/or 26 March 2020, as pleaded in PoC 47?⁹³

29.7. As regards Hiscox1, 2 and 4 (non-damage denial of access):

- a. Does the closure of premises or cessation of business amount to a denial of or hindrance in access? If so, was the denial of or hindrance in access limited to those businesses forced to close their premises or cease business?⁹⁴
- b. Was there interruption to the insured’s activities caused by an incident within the vicinity / a 1-mile radius of the premises which resulted in a denial of or hindrance in access to the premises imposed by the relevant authority from 16 March 2020, or such subsequent date as determined by the Court, by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18?⁹⁵
- c. Was there interruption to the insured’s activities caused by an incident within the vicinity / a 1-mile radius of the premises which resulted in a denial of or hindrance in access to the premises imposed by the relevant authority for businesses in Categories 1, 2, 4, 6 and 7, from 20, 21, 23, 24 and/or 26 March 2020, as pleaded in PoC 47?⁹⁶

30. As regards MSAmclin:

⁸⁹ Hiscox 14.1, 85.4.

⁹⁰ Hiscox 86.4.

⁹¹ Hiscox 14.2, 85.4.

⁹² PoC 46, Hiscox 85.

⁹³ PoC 47, Hiscox 86.

⁹⁴ Hiscox 13.4, 85.3.

⁹⁵ PoC 46, Hiscox 85.

⁹⁶ PoC 47, Hiscox 86.

- 30.1. Is access to the premises only prevented where access is physically impossible, and not where it is only partially prevented or where its use is restricted or not legal?⁹⁷
- 30.2. Did anything done by any competent authority prevent physical access to the premises at all?⁹⁸
- 30.3. Does denial of or hindrance in access to the premises only occur where physical access is impossible or inhibited, but not where the use of the premises is legally restricted or proscribed?⁹⁹
- 30.4. Does prevention of use only arise where use is rendered physically or legally impossible?¹⁰⁰
- 30.5. Does hindrance of access/use only arise where it is made more difficult or inhibited (it being common ground that it is irrelevant whether the hindrance is that of the Insured, its employees, or its customers)?¹⁰¹
- 30.6. As regards MS Amlin 1, if a legal impediment to the use of the business is a prevention of access:
- a. Did anything done by any competent authority by way of advice, instructions or announcements (whether before or after the 21 March and 26 March Regulations) amount to a prevention of access?¹⁰²
 - b. Did all insureds (and not only those which were ordered to close completely) experience prevention of access to the premises due to the actions of government:
 - (1) on any particular date asserted by the FCA; and/or
 - (2) from 21 March 2020, by reason of the 21 March Regulations (it being common ground that, on MS Amlin's alternative case, they did prevent access to insured businesses within Part 2 of the Schedule)?¹⁰³; and/or
 - (3) from 26 March 2020, by reason of the 26 March Regulations (it being common ground that, on MS Amlin's alternative case, they did prevent access to insured businesses newly falling within Part 2 of Schedule 2)?¹⁰⁴
 - c. Did the restrictions on movement in paragraph 6 of the 26 March Regulations prevent access to any businesses not listed in Part 2 of Schedule 2?¹⁰⁵
- 30.7. As regards MS Amlin 1:

⁹⁷ MS Amlin 49.4-49.5.

⁹⁸ MS Amlin 54, 76.

⁹⁹ MS Amlin 75.6.

¹⁰⁰ MS Amlin 88.4.

¹⁰¹ MS Amlin 88.5.

¹⁰² MS Amlin 56, 57.1, 58.1.

¹⁰³ MS Amlin 57.2, 59.

¹⁰⁴ MS Amlin 58.2, 59.

¹⁰⁵ MS Amlin 60.

- a. Was there interruption of or interference with the business (which, in the case of the denial of access clauses, was following action which prevented access to the premises) from 16 March 2020, or such subsequent date as determined by the Court, by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18 and 46?¹⁰⁶
- b. Was there interruption of or interference with the business (which, in the case of the denial of access clauses, was following action which prevented access to the premises) for businesses in Categories 1, 2, 4, 6 and 7, from 20, 21, 23, 24 and/or 26 March 2020, as pleaded in PoC 47?¹⁰⁷

Or are these factual issues which are outside the scope of the test case and cannot be resolved by reference to assumed facts?¹⁰⁸

30.8. As regards MSAmIn2:

- a. Does interruption to the business require a complete cessation of the business (as distinct from interference, which does not require such a cessation)?¹⁰⁹
- b. Does the requirement that the denial of or hindrance in access be ‘imposed’ or ‘by order of’ mean that only legislation or legally enforceable requirements suffice to establish any relevant denial of or hindrance in access?¹¹⁰
- c. Was there interruption of or interference with the business (and, in the case of the denial of access clauses, a denial of or hindrance in access to the premises from 16 March 2020, or such subsequent date as determined by the Court, by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18)?¹¹¹
- d. Was there interruption of or interference with the business (and, in the case of the denial of access clauses, a denial of or hindrance in access to the premises for businesses in Categories 1, 2, 4, 6 and 7, from 20, 21, 23, 24 and/or 26 March 2020, as pleaded in PoC 47)?¹¹²
- e. Or, as regards (c) and (d), does the question of whether there was interruption or interference involve factual issues which are outside the scope of the test case and cannot be resolved by reference to assumed facts?¹¹³

30.9. As regards MSAmIn3 (which applies to category 5 businesses only),¹¹⁴ was there action which prevented or hindered access or use of the premises from 16 March 2020, or such subsequent date as determined by the Court, by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown

¹⁰⁶ PoC 18, 46.

¹⁰⁷ PoC 47.

¹⁰⁸ Paragraph 3 of DACB letter dated 8 July 2020.

¹⁰⁹ MSAmIn 75.3.

¹¹⁰ MSAmIn 75.7.

¹¹¹ PoC 18, 46.

¹¹² PoC 47.

¹¹³ Paragraph 3 of DACB letter dated 8 July 2020.

¹¹⁴ MSAmIn 85.

and restricted travel and activities, staying at home and home-working as pleaded in PoC 18 and 46?¹¹⁵

31. As regards QBE:

31.1. Is the question of whether there was an interruption of or interference with the business a matter of fact for each individual insured to prove, even in circumstances where QBE admits that certain of the human actions and/or interventions and closure measures which it is common ground took place could, in principle, cause interference with the insured business?¹¹⁶

31.2. Was there interruption of or interference with the business from 16 March 2020, or such subsequent date as determined by the Court, by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18?¹¹⁷

31.3. Was there interruption of or interference with the business for businesses in Categories 1, 2, 4, 6 and 7, from 20, 21, 23, 24 and/or 26 March 2020, as pleaded in PoC 47?¹¹⁸

32. As regards RSA:

32.1. As regards RSA1:

a. Was there closure of the premises or were there restrictions placed on the premises from 16 March 2020, or such subsequent date as determined by the Court, by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18?¹¹⁹

b. Was there closure of the premises or were there restrictions placed on the premises from 16 March, by reason of the Government advice including to cease travel and self-isolate, or 24 March 2020 given the Government advice to close for commercial use as quickly as was safely possible, and/or for businesses in Category 6 (the only category relevant to RSA1)¹²⁰, from 20, 21, 23, 24 and/or 26 March 2020, as pleaded in PoC 47 (it being common ground that there was closure / were restrictions as regards “Closure Measures” for all Category 6 businesses);¹²¹

c. If the answer to 31.1(a) and/or (b) is ‘yes’, was such closure of the premises or were such restrictions placed on the premises as a result of a notifiable human disease manifesting itself within a radius of 25 miles of the premises?

32.2. As regards RSA2.1-2.2:

¹¹⁵ PoC 18, 46, MSAmlin 92.

¹¹⁶ QBE 51.1-51.2.

¹¹⁷ PoC 46, QBE 51.

¹¹⁸ PoC 47, QBE 51.

¹¹⁹ PoC 46, RSA 49(c)(i).

¹²⁰ RSA 50(b). The reference to Category 1 in RSA 50(b) is an error and should be read as a reference to a Category 6 business: see RSA skeleton Appendix 1 page 5 footnote 5.

¹²¹ PoC 47, 49, RSA 50(b), 51, 52(a).

- a. Was there prevention or hindrance of the use of or access to the premises from 16 March 2020, or such subsequent date as determined by the Court, by reason the advice, instructions and/or announcements as to social distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18?¹²²
- b. If so, were such actions taken or advice given due to an emergency likely to endanger life or property in the vicinity of the Premises?

32.3. As regards RSA3:

- a. Was there interruption of or interference with the business from 16 March 2020, or such subsequent date as determined by the Court?
- b. If so, did such interruption of or interference with the business “follow” any occurrence of a notifiable disease within a radius of 25 miles of the premises? Does “follow” refer to a proximate and/or ‘but for’ cause (as RSA contends) or have a “*looser causal connection*”¹²³ (the FCA’s case).

32.4. As regards RSA4 (disease clause):

- a. Was there interruption or interference to the business from 16 March 2020, or such subsequent date as determined by the Court?
- b. If so, was such interruption or interference to the business as a result of notifiable disease occurring within the Vicinity of the insured location?

32.5. As regards RSA4 (enforced closure clause):

- a. Is government advice sufficient to amount to ‘enforced closure’?¹²⁴
- b. Was there interruption or interference to the business as a result of enforced closure of the insured location from 16 March 2020, or such subsequent date as determined by the Court, by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18?¹²⁵
- c. Was there interruption or interference to the business as a result of enforced closure of the insured location for businesses in Categories 1, 2, 4, 6 and 7, from 20, 21, 23, 24 and/or 26 March 2020, as pleaded in PoC 47 (it being common ground that there was an enforced closure with respect to any business ordered to close the insured location in full or in part from 20 March 2020)?¹²⁶
- d. If the answer to 31.5(a) and (b), and/or 31.5(a) and (c) is ‘yes’, was such interruption or interference to the business as a result of the enforced closure?

32.6. As regards RSA4 (prevention of access clause):

¹²² PoC 46, RSA 49(c)(ii).

¹²³ PoC 60.

¹²⁴ RSA 46(c).

¹²⁵ PoC 46, RSA 49(c)(iii)(1).

¹²⁶ PoC 47, RSA 50(d)-50(f), 51.

- a. Was there action or advice of a government authority or agency from 16 March 2020, or such subsequent date as determined by the Court, by reason the advice, instructions and/or announcements as to social distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18?¹²⁷
 - b. If so, was that action or advice in the vicinity of the premises?
 - c. If so, did such action or advice prevent or hinder the use of or access to the premises?¹²⁸
33. As regards Zurich:
- 33.1. Does prevention of access require entry to the premises to be physically obstructed, prevented altogether, or otherwise rendered impossible?¹²⁹ Would it not be enough for access to be partially prevented or where use of the property is restricted?
 - 33.2. Was there prevention of access to the premises from 16 March 2020, or such subsequent date as determined by the Court, by reason of the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working as pleaded in PoC 18?¹³⁰ If so, was there interruption of or interference with the business in consequence of such prevention of access?¹³¹
 - 33.3. Was there prevention of access to the premises of businesses in Categories 1, 2, 4, 6 and 7, from 20, 21, 23, 24 and/or 26 March 2020, as pleaded in PoC 47?¹³² If so, was there interruption of or interference with the business in consequence of the prevention of access?¹³³
 - 33.4. Insofar as the Regulations required cessation of particular business activities, do such Regulations prevent access to premises?¹³⁴ On Zurich's alternative case, if (which Zurich denies) the Regulations requiring cessation of particular business activities did prevent access to the premises where those activities were carried on, was there a prevention of access to the premises of businesses in Categories 1, 4, 6 and 7 (it being common ground, on Zurich's alternative case, that there was such prevention in respect of Category 2 businesses when they were ordered to close)?¹³⁵
34. If the answer to any of the questions at paragraphs 26-33 above is that it is a question of fact, what guidance (if any) can or should the Court give as to resolving that question on particular facts, by reference to assumed facts?

¹²⁷ PoC 46, RSA 49(c)(ii).

¹²⁸ PoC 46, RSA 49(c)(iii)(2).

¹²⁹ Zurich 9, 39(4), 46, 47.

¹³⁰ PoC 46, Zurich 46.

¹³¹ PoC 46, Zurich 46.

¹³² PoC 47, Zurich 47.

¹³³ PoC 47, Zurich 47.

¹³⁴ Zurich 39(4), 47(1).

¹³⁵ Zurich 39(5), 47(2).

Exclusions

Common ground

35. The following exclusions do not apply in the following circumstances:
- 35.1. The microorganism exclusions in Argenta1 and QBE3 do not apply to the disease clauses;¹³⁶
- 35.2. The pollution and contamination exclusions in the following do not apply to:
- a. The disease clauses in QBE1-3, RSA1 and RSA2.2;¹³⁷
 - b. The prevention of access clauses in Zurich1-2;¹³⁸
 - c. The disease or prevention of access clauses in MSAmclin1-2.¹³⁹

Issues

36. Do any of the following exclusions apply (as the Defendants contend, and the FCA disputes) (and if so, in what circumstances):
- 36.1. Loss arising from those premises that are not directly affected by the occurrence in Argenta1 (it being common ground that this exclusion does apply, but there is a dispute as to its effect)?¹⁴⁰
- 36.2. Closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease) in Ecclesiastical1.1-1.2?¹⁴¹
- 36.3. (i) Exclusion e) in RSA2.2¹⁴² and (ii) General Exclusion L in RSA3?¹⁴³

Other matters of construction

37. How (if at all) does the *contra proferentem* principle affect the approach to construction of the policies for the purposes of determining any of the issues above?¹⁴⁴
38. What (if any) relevance does the absence of an exclusion for pandemics carry?¹⁴⁵

¹³⁶ Argenta 52, QBE 53.

¹³⁷ QBE 53, and PoC 50 to which RSA does not rely on these exclusions in response (and does rely on other exclusions).

¹³⁸ Zurich 48.

¹³⁹ PoC 50. MSAmclin does not invoke this exclusion.

¹⁴⁰ Argenta 24, 62; Reply 54.

¹⁴¹ PoC 18, 44.5, 50-51; Ecclesiastical 34, 44; Reply 55. However, Ecclesiastical does not agree with the FCA's characterisation of the Infectious Disease Carve-Out (see Ecclesiastical 32) as an exclusion.

¹⁴² RSA 32(b), 33(d), 54, 72, 79; Reply 56.

¹⁴³ PoC 52; RSA 32(a), 33(d), 55, 84; Reply 57.

¹⁴⁴ PoC 35, Arch 31, Argenta 53, Ecclesiastical 27, Hiscox 72, MSAmclin 27, QBE 44, RSA 34, Zurich 36, Reply 38-39.

¹⁴⁵ POC 4.2, 33, Hiscox 10.

Causation¹⁴⁶

Common ground

39. The policyholder must establish that its losses are proximately caused by an insured peril.

Issues

40. Is the insurer entitled to deny cover by reason of the loss (or any part of the loss) not being caused by the insured peril?¹⁴⁷
41. What is the applicable test for causation in each of the Wordings and was it satisfied? In particular, what is the necessary causal link between:
- 41.1. The loss and the interruption to / interference with the business?
 - 41.2. The interruption / interference and the closure / restriction / prevention of access to / inability to use / hindrance of access / use / advice / action and the occurrence / manifestation of COVID-19?
 - 41.3. The inability to use/ closure / restriction (*etc*) and the action / advice /restrictions of the relevant authority?
 - 41.4. The action / advice of / restrictions imposed by the relevant authority and the underlying event (*e.g.* occurrence of disease, emergency, danger, in the vicinity etc)?
42. Was there one cause of the assumed losses (namely the COVID-19 disease and all actions resulting from it), or were there concurrent causes including, among other matters:
- 42.1. the public information and advice relating to COVID-19;
 - 42.2. the public response to COVID-19;
 - 42.3. any of the specific actions and advice and legislation of the UK Government, whether individually or taken together; and/or
 - 42.4. the economic loss of confidence in the UK and around the world?
43. Were any concurrent causes of the loss, or any part of the loss, independent or interdependent, and is this relevant?
44. If there was more than one cause of the loss or any part of the loss, what is the consequence under each of the Wordings?

¹⁴⁶ The causation issues included in this document are deliberately concise and broad. They do not reflect, and are not intended to reflect, the number or complexity of the issues between the parties, which will be a matter for submissions, but it would not be valuable or proportionate for this document to recite each party's case on each causal link in each wording, nor to identify each paragraph of each party's pleading which addresses each individual issue. The primary paragraphs of the pleadings which address causation are the following (this is not a comprehensive list and the parties' cases on causation are set out pervasively throughout their pleadings, including as to trends clauses addressed separately below for convenience): PoC 53-73, 77-79; Arch 46-56, 60-61; Argenta 63-65, 67; Ecclesiastical 97-112, 131-135; Hiscox 91-112, 116-123; MSAmlyn 97-130; QBE 54-69, 73-75; RSA 56-104; Zurich 59-69; Reply 58-61.

¹⁴⁷ PoC 4.3.

45. On which party does the burden of proving the existence or absence of causation by more than one cause lie?¹⁴⁸
46. What is the correct counterfactual for applying the ‘but for’ test under each of the Wordings?
- 46.1. What effect do the following have on the correct counterfactual:
- a. The nature of the insured peril (Disease, Prevention of Access, etc.?)
 - b. The ambit of the insured peril?
 - c. The presence or absence of a vicinity requirement?
- 46.2. If, by reason of a vicinity requirement, the correct counterfactual is to assume that there is no disease or action within an area but only outside it, does this lead to an indemnity for policyholders on the basis that its premises are in a disease/action-free island surrounded by a sea of disease/action, i.e. to include any decrease or uplift to reflect this?
47. Is the correct counterfactual under each of the Wordings a world in which there was no COVID-19 and no Government intervention related to COVID-19?¹⁴⁹

Quantification and trends clauses

Common ground

48. Zurich1 if written on an Increased Cost of Working basis does not contain a trends clause.¹⁵⁰
49. The following Policies contain trends or similar clauses that are potentially applicable to non-damage cover:¹⁵¹ Arch1, Argenta1, Ecclesiastical1.2, Hiscox1 – 8671 Recruitment BI and 8617 BI – OM (Jelf), Hiscox2 – all except 15779, 9102, 7103 WD-CCP-UK-PVB(2), Hiscox3 – 8358, 14174 and 9519, Hiscox4 (all except 20155), RSA4, Zurich1 (if written on a Loss of Gross Profit or Loss of Gross Revenue basis), Zurich2.

Issues

50. Does QBE1 (POFP040120 only) contain a trends clause at all?¹⁵²
51. How should any trends clauses found to be applicable to the clauses in issue be operated and what effect(s) would they have on the quantification of any indemnity which might be due to the policyholder in question as a result?¹⁵³
52. As for the express contractual quantification machinery (and any trends language) in the listed policies:

¹⁴⁸ Reply 61.

¹⁴⁹ PoC 4.3.

¹⁵⁰ PoC 75.2, Zurich 60.

¹⁵¹ PoC 75.5, Reply 62-63.

¹⁵² PoC 75.2, QBE 70-71.

¹⁵³ QBE 12.3, 70-72.

- 52.1. Is it limited to claims under the primary cover clause and/or to physical/property damage only, and accordingly inapplicable to the non-damage clauses in issue in these proceedings:¹⁵⁴ Ecclesiastical1.1, MSAmclin1-3, QBE1-3, RSA1, RSA2.1-2 and RSA3;
- 52.2. As regards Hiscox:
- a. Is it limited to physical/property damage and inapplicable to the non-damage clauses challenged in these proceedings: Hiscox1 all except 8671 (Recruitment BI and BI – OM (Jelf)) but only when the trends clause has been opted for by inclusion in the policyholder’s Schedule); Hiscox2 – 15779, 9102, 7103 WD-CCP-UK-PVB(2); Hiscox3 - 8006 and 10272, and Hiscox4 (20155);¹⁵⁵
 - b. Does it only provide upwards adjustment of the loss to allow for trends, and so for that additional reason cannot support any case that any suffered losses are irrecoverable on causation or related grounds: Hiscox1 and Hiscox4 (20155).¹⁵⁶
53. What effect (if any) do any trends clauses found to be applicable to the clauses in issue have on the causal test to be applied when determining whether there is a right to an indemnity under the relevant policy wordings?¹⁵⁷
54. Would the application of general common law / insurance law principles produce a similar result as would the operation of a trends clause in any event, i.e. by quantifying the amount of any indemnity which might be due to the policyholder by reference to their actual loss, taking into account loss which they would have suffered in any event?¹⁵⁸

Declarations

Common ground

55. The following General and Specific declarations sought by the FCA should be granted:¹⁵⁹
- 55.1. Arch: General declaration 8: there was an emergency likely to endanger life for the purposes of Arch1 as from 3 March 2020.¹⁶⁰
 - 55.2. Argenta:¹⁶¹
 - a. General declarations 1, 5, 6, 7(a) and Specific declaration 1 in Schedule 2 in their entirety and insofar as they relate to Argenta (save that Covid-19 became a Notifiable Human Disease in Wales on 6 March 2020).
 - b. General declaration 12 to the extent 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.

¹⁵⁴ PoC 75.1; Ecclesiastical 135; MSAmclin 116, 120, 122, 126, 130; QBE 70; RSA 63, 71(b), 77, 85, 104; Reply 63-65.

¹⁵⁵ PoC 75.3, Hiscox 114.2.

¹⁵⁶ PoC 75.4, Hiscox 114.3.

¹⁵⁷ PoC 75-77; Arch 57-60; Argenta 67; Ecclesiastical 135; Hiscox 114-120; MSAmclin 116, 120, 122, 126, 130; QBE 70-73; RSA 63, 71(b), 77, 85, 104; Zurich 59-68, Reply 62-65.

¹⁵⁸ QBE 12.3, 70.8, 71.5, 72

¹⁵⁹ PoC Section P and Schedules 1-8.

¹⁶⁰ Arch 63.

¹⁶¹ Argenta 68.

- 55.3. Ecclesiastical and MSAmelin: General declaration 1 (save that COVID-19 became notifiable on 6 March 2020 in Wales).¹⁶²
- 55.4. Hiscox: General declaration 1.¹⁶³
- 55.5. QBE: General declaration 1.¹⁶⁴
56. The following declarations sought by the Defendants should be granted:
- 56.1. Arch: the first sentence of declaration 1.¹⁶⁵

Issues

57. Save as is common ground at paragraph 55 above, should the General declarations 1-19 and the Specific declarations sought by the FCA in PoC Section P and Schedules 1-8 be granted?¹⁶⁶
58. Save as is common ground at paragraph 56 above, should the following declarations sought by the Defendants be granted:
- 58.1. Arch declarations 1-3.¹⁶⁷
- 58.2. Argenta declarations 1-5.¹⁶⁸
- 58.3. QBE declarations 1-8.¹⁶⁹

¹⁶² Ecclesiastical/MSAmelin 137.

¹⁶³ Hiscox 125.

¹⁶⁴ QBE 78.

¹⁶⁵ Arch 68, Reply 68.

¹⁶⁶ PoC Section P, Arch 63-65, Argenta 68, Ecclesiastical/MSAmelin 137-138, Hiscox 123 and Annex 1, QBE 78, RSA 109, Zurich 73-74.

¹⁶⁷ Arch 68.

¹⁶⁸ Argenta 70.

¹⁶⁹ QBE 80.