Appeal No. 2020/0179-0184

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM
THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS, COMMERCIAL COURT (QBD)
FINANCIAL LIST
Neutral Citation: [2020] EWHC 2448 (Comm)

BETWEEN:

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

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

-and-

HISCOX ACTION GROUP

Intervener

Appeal No. 2020/0177-0178

AND BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Appellant

-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

Respondents

-and-

HISCOX ACTION GROUP

Intervener

WRITTEN CASE OF THE FIRST APPELLANT (ARCH)

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*References to the hearing bundle are in the form **[Bundle/Tab/Page]***

INTRODUCTION

1. This appeal raises important questions as to the applicable rules of causation which apply, generally and by reason of a "trends" clause, to non-damage extensions to insurance policies which principally provide cover for damage to insured property and for business interruption losses consequent on such damage.

2. The case was heard in the Financial List of the Commercial Court ("**the Court**") under the Financial Markets Test Case Scheme to determine whether and how certain non-damage extensions respond to claims by policyholders resulting from the Covid-19 pandemic. The case was tried, by reference to a sample of policy wordings, on an expedited basis to seek to bring certainty and clarity in the light of the huge impact of the pandemic on commercial life in the United Kingdom and the number of possible claims and disputes.

3. In the case of the First Appellant ("**Arch**"), three sample policy wordings were put before the Court. They each included a materially identical Government and Local Authority Action clause ("**the GLAA Extension**") which is set out below (and at §324 of the Judgment **[C/3/125]**).

4. Arch accepted from the outset that the GLAA Extension covers the loss of gross profit sustained by insured businesses whose premises were completely closed as a result of the government advice of 20 and 23 March and/or the 21 and 26 March Regulations. Arch maintained, however, that no other measures taken in response to the pandemic were capable of triggering the GLAA Extension as those measures did not require the closure of insured business premises. Arch's position was upheld by the Court (and is the subject of the FCA's appeal, to be addressed separately in Arch's Respondent's Case).

5. The central issue on Arch's appeal is whether, in calculating the losses to which the policy responds, Arch is entitled to apply an adjustment for the reduction in turnover which the policyholder would have suffered in any event, even if the insured premises had not been closed. Arch's position is that the GLAA Extension insures only the loss of gross profit arising from the closure of the business premises. A policyholder

is not entitled to claim from Arch any loss of gross profit which would have arisen from other aspects of the Covid-19 pandemic, such as the national lockdown or the effects of social distancing advice, even if the premises had remained open. This is entirely consistent with orthodox principles of "but for" causation in contract law damages and with the express requirements of the "trends" clause in the Arch policy.

6. The Court disagreed: see Judgment §347 **[C/3/132]**.

7. Arch submits that the Court's conclusion on this point was erroneous. By requiring Arch to indemnify for all consequences of the pandemic which occurred during the indemnity period, the Court effectively extended the scope of coverage under the GLAA Extension from a narrow prevention of access clause to broad-based pandemic insurance. The Court arrived at a conclusion which treats the financial effects of the pandemic, and of all government action or advice taken in response to the pandemic, as having been insured by Arch, even though they are clearly not insured perils.

8. In reaching its conclusion the Court distinguished the decisions of the arbitration tribunal and the Commercial Court in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA [2010] EWHC 1186 (Comm)* [2010] Lloyd's Rep IR 531 **[E/31/921]**, the reasoning in which was correct and supportive of Arch's case on "but for" causation and on the trends clause. The Court also expressed its view the case was wrongly decided in any event and doubted its reasoning in a number of respects: Judgment §523, §529 **[C/3/176] [C/3/178]**.

9. In summary, Arch submits that the Court fell into error. Having accurately characterised the limited scope of the insured peril under the GLAA Extension, the Court misapplied the principles of "but for" causation and the trends language in the Arch policy, such that the scope of coverage under the policy was mistakenly extended from the loss of gross profit resulting from prevention of access to the loss of gross profit arising in connection with the pandemic.

THE RELEVANT PROVISIONS OF THE ARCH POLICIES

10. There were 3 relevant policy wordings written by Arch which were the subject of the test case but the key provisions of the Arch Policies are materially the same and are referred to in the Judgment as the "Arch wording". See Judgment §307 **[C/3/121]**.

On this appeal, it is necessary to consider only the Arch Commercial Combined ("**Arch1**") wording which was the lead Arch wording at trial and which is representative of the position.

11. The GLAA Extension provides:

> *"We will also indemnify You in respect of reduction in Turnover and increase in cost of working as insured under this Section resulting from…*
>
> ***Government or Local Authority Action***
>
> *Prevention of access to The Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property.*
>
> *We will not indemnify You in respect of*
>
> *(1) any incident lasting less than 12 hours*
>
> *(2) any period other than the actual period when the access to The Premises was prevented*
>
> *(3) a Notifiable Human Infectious or Contagious Disease as defined in the current relevant legislation occurring at The Premises*
>
> *The maximum We will pay under this Clause is £25,000, or the Business Interruption Sum Insured or limit shown in the Schedule, whichever is the lower, in respect of the total of all losses occurring during the Period of Insurance."* **[C/3/121]**

12. This GLAA Extension is an example of what the Court referred to in its Judgment as a 'Prevention of Access' clause (as distinct from the other two broad categories of clauses considered, namely 'disease clauses' or 'hybrid clauses'): Judgment §308 **[C/3/121]**.

13. The Gross Profit cover states "We will indemnify You in respect of any interruption or interference with The Business *as a result of* Damage occurring during the Period of Insurance" (emphasis added) **[C/3/130]**.

14. The amount payable is stated to be "in respect of reduction in Turnover, the sum produced by applying the Rate of Gross Profit to the amount by which, *due to the Damage*, the Standard Turnover exceeds the Turnover during the Indemnity Period [a defined term: see p 32 of Arch1 **[C/4/224]**" (emphasis added) and "in respect of increase in cost of working, any additional expense You necessarily and reasonably incur solely to prevent or limit a reduction in Turnover during the Indemnity Period which but for such additional expenses would have taken place *due to the Damage*" (emphasis added) **[C/4/225]**.

15. "Turnover" is defined (p 33 of Arch1 **[C/4/225]**) as the money paid or payable to the Policyholder for goods or services in the course of the Business at the Premises.

16. Rate of Gross Profit is defined (p 32 of Arch1 **[C/4/224]**) as "Gross Profit earned on the Turnover and expressed as a percentage of Turnover, during the financial year before the date of the Damage". Standard Turnover is defined (pp 32-33 **[C/4/224]-[C/4/225]**) as "the Turnover during that period in the 12 months immediately before the date of the Damage which corresponds with the Indemnity Period".

17. "Gross Profit" is defined (p 32 of Arch1 **[C/4/224]**) as the combined value of the Turnover, closing stock and work in progress, less the combined value of opening stock and work in progress and Uninsured Working Expenses.

18. Accordingly, the calculation of the indemnity payable under the Gross Profit cover starts with a comparison between the turnover achieved by the insured business during the indemnity period and the turnover during the equivalent period in the preceding year.

19. However, the policy is not a financial guarantee of the financial results of the previous 12 months: it is a policy of indemnity.

20. In a case where (as here) an insurer has agreed to indemnify the insured against loss or damage caused by an insured peril, the nature of the insurer's promise is that the insured will not suffer the specified loss or damage. The occurrence of such loss or damage is therefore a breach of contract which gives rise to a claim for damages. The general object of an award of damages for breach of contract is to put the claimant in the same position so far as money can do it as if the breach had not occurred. See

Endurance Corporate Capital v Sartex Quilts [2020] EWCA Civ 308 at [35] and [36] **[E/37/1053]**. It follows that on orthodox principles (and irrespective of whether there is a "trends" clause), an insurer is not obliged to hold the insured harmless against losses which the insured would have suffered in any event if the insured peril had not occurred.

21. Turnover in the preceding year would be a sufficient means of calculating the indemnity only if the trading environment and financial performance of the business had remained static over time, which would be unusual. The gross profit calculation formula requires adjustments to accommodate matters which would have affected the financial performance of the business even if the insured peril had not materialised. The adjustment is inherent in the concept of indemnity and it is often reinforced (as in the case of the Arch wording) by the inclusion of a "trends clause" in the adjustment formula.

22. There is no single definition of a trend or circumstance. Consistent with the guiding principle of indemnity, a trend or circumstance may include any event or state of affairs, other than the peril insured, which has a measurable effect on the financial performance of the insured business. Trends and circumstances may be of a temporary or a permanent nature. They may be intrinsic or external to the business. They may have a positive or negative effect on financial performance.

23. Unless an adjustment for trends and circumstances is made, the policyholder may well receive an amount which is greater or less than the true measure of the insured loss.

24. The wording of the Arch1 requires an adjustment for trends and circumstances to be made. It is to be found under the definition of Standard Turnover, as follows ("the Arch trends clause"):

> *"Rate of Gross Profit and Standard Turnover may be adjusted to reflect any trends or circumstances which (i) affect The Business before or after the Damage (ii) would have affected The Business had the Damage not occurred.*
>
> *The adjusted figures will represent, as near as possible, the results which would have been achieved during the same period had the Damage not occurred."* **[C/4/224]**

25. It will be noted that the Gross Profit cover refers to Damage, which is a defined term meaning "accidental loss or destruction of or damage to property used by You at the Premises for the purpose of The Business" **[C/4/224]**. It was common ground between the FCA and Arch at the trial that, for the non-damage business interruption extensions, Damage has to be read as referring to the insured peril under the relevant extension: see Judgment §341 **[C/3/130]**.

ARCH'S APPEAL

(1) THE INSURED PERIL

26. The Court held (Judgment §309 **[C/3/122]**) that "it is important to identify at the outset what is the insured peril or risk and the extent to which it is common ground that the insured peril is triggered."

27. In the case of the GLAA Extension, the insured peril comprises a particular sequence of causally related events. It requires a prevention of access to the premises "due to" the actions or advice of government or local authority "due to" an emergency which is likely to endanger life or property.

28. The policyholder is only entitled to recover those business interruption losses which are the product of the causal sequence. Losses arising from an event which bears no relationship to the specified causal sequence are not covered. Nor is there coverage for a loss which arises from only one component of the causal sequence. For example, if an insured business suffered a decline in turnover as the result of the emergency (e.g. a decline in footfall brought about by public concern about the pandemic), its losses would not be covered. In order to qualify for indemnity, an emergency must lead to government action or advice which must lead to the closure of the insured premises, which must lead to the policyholder's loss.

29. It follows that, when considering a claim under the GLAA Extension, Arch is entitled to apply an adjustment which excludes the financial consequences of any cause which is not the product of the specified causal sequence.

30. The Court correctly identified these aspects of the insured peril. It held (at §309 **[C/3/122]**) that the pandemic (the "emergency" for the purposes of the GLAA Extension) was not the insured peril. At §§328 and 329 of the Judgment **[C/3/127]**,

the Court also held (again, correctly) that social distancing advice and Regulation 6 of the 26 March 2020 Regulations did not prevent access to insured premises (and so cannot have been part of the insured peril).

31. However, the Court erroneously undermined those conclusions by holding at §347 **[C/3/132]** that, where premises have closed as a result of government action or advice taken in response to the pandemic, the loss should be adjusted on the assumption that there was no pandemic, and no government action or advice.

32. Having held that the emergency was not the insured peril under the GLAA Extension and that social distancing advice and Regulation 6 did not prevent access to the insured premises, the Court erred in principle, and failed to give effect to orthodox principles of indemnity, in holding that where insured premises were required to be closed, the losses which could be recovered included losses which the policyholder would have suffered even in the absence of the specified causal sequence (i.e. the premises had not been required or advised to close), by reason of the emergency and by the social distancing advice and Regulation 6, none of which were insured perils.

33. Looking only at §347 **[C/3/132]**, the Court appears to have reached its conclusion by reference to the Arch trends clause, although as explained in Section (2) below, there is nothing in the Arch trends clause which permits such radical recasting of the insured peril. On the contrary, the Arch trends clause compels the opposite conclusion. Looking at other parts of the Judgment (e.g §§278, 342 and 530 **[C/3/144] [C/3/130] [C/3/178]**), it appears that the Court was treating the GLAA Extension as a "composite peril" (see §342 **[C/3/130]**). The "composite peril" which the Court appears to have had in mind for the Arch wording presumably consists of the emergency, the government action or advice taken in response, and the prevention of access. But to treat the qualifying causes of the prevention of access as (in effect) additional insured perils, in the event that premises are required to close, is novel and unprincipled. It rewrites the GLAA Extension so that it provides that where there is a qualifying prevention of access, Arch agrees to indemnify not only the loss resulting from the specified causal sequence but also the business interruption losses caused by the emergency, including all government action and advice taken in response to the emergency. The effect is to widen the indemnity from the consequences of a

prevention of access to all the consequences of a national emergency. This is not what the parties have agreed.

34. The Court was, therefore, wrong to hold that the comparison required for the assessment of the business interruption loss, of a business which was required to close by the relevant government actions or advice, was with the hypothetical performance of the business had there been no emergency and thus no government actions or advice and no prevention of access to the premises. The correct counterfactual, to reflect the agreement to indemnify, is to assume only that the premises had not been required to close. Everything else remains equal, including the emergency. The counterfactual reverses out one consequence of the emergency (the prevention of access caused by government action taken or advice given in response to the emergency), but does not require the assumption that there is no emergency.

35. The error of the Court's reasoning is illustrated by the following hypothesis. Assume that the GLAA Extension had been more generous, so as to provide an indemnity against <u>any</u> prevention of access to the Premises, however caused. The more generous wording would not involve a "composite peril" as defined by the Court. It would respond to indemnify any policyholder whose business was closed by the UK Government advice of 20 and 23 March and the 21 and 26 March Regulations. On the Court's reasoning, in the absence of a "composite peril", the insurer of the more generous wording would be permitted to exclude from its adjustment the consequences of the emergency or the government response. The loss would be adjusted as if only the prevention of access had not occurred. The result is that the insurers of a more generous wording would end up in a better position than is Arch under the narrower GLAA Extension.

36. By reference to the Court's analysis of *Orient-Express* (at §§523-524 **[C/3/176]**), it may be that the Court's concept of a "composite peril" is another way of making the point that one should treat whatever it is that has caused the operation of an insured peril as "an integral part of the insured peril" (see §§526-527 of the Judgment **[C/3/177]**) which must also be reversed out when considering the appropriate counterfactual.

37. But if that is what the Court had in mind, it is also wrong in law. It misconstrues the scope of the indemnity. The emergency is not an insured peril nor for that matter "an integral part of the insured peril" (whatever that means). It is the necessary first step in the specified causal sequence which leads to a covered prevention of access. The fact that the emergency is the first part of the sequence (emergency leading to government action or advice leading to prevention of access to the Premises) does not mean that the other effects of the emergency fall to be excluded from consideration when examining what would have been the position if the insured peril had not operated. Arch did not agree to indemnify the policyholder against all business interruption losses caused by the emergency in the event that the emergency led to government action or advice which led to the prevention of access to the Premises. There is no principle of law which requires the cause(s) of the insured peril to be ignored when considering the counterfactual.

38. The Court's legal analysis was therefore flawed.

39. Insofar as the Court found support for its flawed analysis by reference to considerations of the "commercial and practical reality" (see §348 **[C/3/132]**), such considerations point the other way and in any event could not support a conclusion derived from flawed analysis. Likewise, the "nature of the pandemic emergency" is incapable of dictating a different answer to that which follows from the construction of the indemnity provisions.

40. There is no lack of commercial or practical reality in Arch's position. Every day of the year insurers are required to calculate the loss suffered by businesses whose premises have been forced to close. Assume that an insured business suffered a fire in January 2020 and its premises were closed for eighteen months of reinstatement works. The indemnity would be calculated as if the business had remained open throughout the pandemic, and the "counterfactual" would assume that all aspects of the pandemic had occurred. If, for example, the insured business specialised in the provision of personal protective equipment (PPE), the adjusted loss would be significantly greater than its usual trading experience owing to the increased demand for PPE during the pandemic. If, for example, the business was a restaurant, the adjusted loss would be significantly lower owing to the government restrictions and reduced consumer activity which would inevitably have occurred during the period of

indemnity. That is straightforward adjusting practice. It does not lack commercial or practical reality.

41. The commercial and practical reality of Arch's position is further illustrated by the following:

(1) Many businesses whose premises were required to close between 20 and 26 March 2020 suffered a measurable loss of turnover (compared to the previous year) due to the effects of the emergency before the closure took effect (see §349 **[C/3/132]** and Agreed Facts 8 at para 1 **[D/12/1545]**).

(2) Many businesses whose premises were not required to close and which remained open also suffered a reduction in turnover (compared to earlier years) because of the emergency, Regulation 6 of the 26 March 2020 Regulations, social distancing rules and guidelines, etc. (see §369 **[C/3/138]**).

(3) Many businesses whose premises were required to close in March 2020 but which reopened when the rules changed in June 2020 suffered reduced turnover in subsequent months (compared to previous years) because of the continuing emergency, social distancing rules, reduced consumer confidence and suchlike (see §344 **[C/3/131]**), none of which constituted an insured peril under the Arch wording.

42. There is therefore nothing uncommercial or impractical in Arch's position that it is entitled to adjust the claim of a business whose premises were required to close by reference to the economic effects that would have been felt by that business if it had remained open.

43. There is nothing artificial about reversing out the insured peril but not the various components of the specified causal sequence. It is what the policy, properly construed, provides for. The exercise of identifying and isolating only the loss caused by the insured peril is inherent in the policyholder's claim that it has suffered loss caused by the peril insured against (and therefore caused by the insurer's breach of its promise to hold harmless against that peril).

44. If the selection of what to reverse in the counterfactual is driven by a subjective perception of events in the real world, rather than by the terms of the parties' bargain expressed in the policy, the result of the exercise will not achieve compensation for the breach of the contractual promise.

(2) THE TRENDS CLAUSE

45. The same conclusion is compelled by considering the terms of the Arch trends clause. This clause positively requires the application of "but for" causation and the reversing out of the insured peril (and no more). The Arch trends clause does not require the reversing out of the (uninsured) cause(s) of the insured peril.

46. As explained above, in the event of a qualifying prevention of access under the GLAA Extension, the measure of the available indemnity in the Gross Profit cover starts with a comparison between the turnover achieved by the insured business during the indemnity period and the turnover in the 12-month period before the operation of the insured peril. The Arch trends clause recognises that this starting point may require to be adjusted by reference to trends or circumstances applying either before or during the indemnity period.

> *"Rate of Gross Profit and Standard Turnover may be adjusted to reflect any trends or circumstances which (i) affect The Business before or after the Damage (ii) would have affected The Business had the Damage not occurred.*
>
> *The adjusted figures will represent, as near as possible, the results which would have been achieved during the same period had the Damage not occurred."* **[C/4/224]**

The underlined words confirm that loss of turnover which would have happened in any event, but for the Damage, is not indemnified under the Gross Profit cover. The final sentence confirms that the intention is that the combination of the prior turnover benchmark, and the adjustment to reflect trends and circumstances, will produce ("as near as possible") an assessment of the loss of gross profit which would have been achieved but for the Damage.

47. The Court accepted the common ground between the FCA and Arch that notwithstanding that the word "Damage" is used in the Gross Profit cover, including

the Arch trends clause, the parties must have intended this quantification machinery wording to apply to the non-Damage situations covered by the Extensions, such as the GLAA Extension (see §341 **[C/3/130]**). The Court therefore substituted for the word "Damage" in the Arch trends clause the phrase "*the Prevention of access to The Premises due to the actions or advice of government due to an emergency which is likely to endanger life*": see §346 **[C/3/131]**.

48. The Court then misinterpreted the effect of the "trends" clause in §347 **[C/3/132]**. The natural meaning of the "trends" clause is that one makes the comparison with what the performance would have been if there had been no prevention of access caused by actions or advice of government due to an emergency which is likely to endanger life. The comparison is with the hypothetical performance of the business if the qualifying prevention of access had not occurred. The comparison is not with what the hypothetical performance if there had been no emergency, no government action/advice, and no prevention of access. The language does not require the assumption that neither the government action or advice, nor the emergency, had occurred.

49. Far from leading to the conclusion set out at §347 of the Judgment **[C/3/132]**, the language of the Arch trends clause, as manipulated, does not require any assumption in the counterfactual that there is no emergency and no government action or advice taken in response. The Arch trends clause requires that what is reversed out in the counterfactual is the qualifying prevention of access only.

50. The Court should therefore have held that the Arch trends clause, when applied to a business whose premises had been required to close by government action taken or advice issued in response to the pandemic, positively requires loss to be calculated by reference to what the position would have been if the premises had not been required to close, with everything else remaining equal. The Arch trends clause, properly construed, therefore compels the opposite conclusion to that reached in §347 **[C/3/132]**.

51. There is nothing artificial or uncommercial about that conclusion: see Paragraphs 42 and 43 above.

52. At §351 of the Judgment **[C/3/133]**, the Court held that any reduction in turnover suffered by the policyholder as a result of the pandemic before the date when the Premises closed pursuant to government advice or action was a trend or circumstance which affected the business before the Damage. As a result, the Court made the declaration at Paragraph 11.4(c) of the Order **[C/1/7]**.

53. The FCA's proposed appeal seeks to challenge §351 of the Judgment **[C/3/133]** and Paragraph 11.4(c) **[C/1/7]**. On Arch's case, the final sentence of §351 **[C/3/133]** is correct, because the Arch trends clause requires loss to be calculated by reference to what the position would have been if the premises had not been required to close. A measurable downturn in turnover, as a result of the pandemic, in the weeks before the business was required to close by government action or advice, is indeed a trend which the Arch trends clause requires to be taken into account. In particular, it is evidence that the business would have continued to suffer a loss of turnover if, contrary to the fact, it had not been required to close its premises on 21 or 26 March 2020 as the case may be. Of course, depending on the facts, the loss of turnover in (say) April or May 2020 may have been significantly worse, even if the premises had remained open, than it was in March 2020 before the advice or orders to close, because of the social distancing guidance, Regulation 6, declining consumer confidence etc, which affected businesses which remained open.

54. The Court's reasoning at §351 of the Judgment **[C/3/133]** (reflected in Declaration 11.4(c) **[C/1/7]**) indicates that the Court considered that one does not reverse out the emergency and the government actions and advice for all purposes when calculating the indemnity once there has been a qualifying prevention of access to the Premises, notwithstanding the Court's conclusion at §347 **[C/3/132]**. The FCA's proposed appeal suggests that §351 **[C/3/133]** final sentence is incorrect and inconsistent with the Court's conclusion on the counterfactual. Arch's case is that the Court's conclusion in the final sentence of §351 **[C/3/133]**, and the Court's treatment of the example at §389 **[C/3/142]**, are plainly correct. It is the Court's reasoning leading to the conclusion in §347 **[C/3/132]** which is incorrect.

(3) ORIENT EXPRESS

55. The Court's concept of a "composite peril" and misconstruction or misapplication of the Arch trends clauses meant that the Court concluded that the reasoning in the decision in *Orient-Express* was "clearly distinguishable from the present case": para. 529 **[C/3/178]** which applies generally. The Court held also that, in any event, the case was "wrongly decided": para. 529 **[C/3/178]**.

56. Both of these conclusions were wrong:

(1) First, the reasoning of the tribunal (correctly described as a "distinguished panel" at §509 **[C/3/171]**) and of the Court in *Orient-Express*, both as to the requirement of "but for" causation generally and as a result of the language of a trends clause, was directly applicable and correct as a matter of principle. The trends clause in *Orient-Express* is materially the same as the trends clause in the Arch wording.

(2) The Court was wrong to conclude that the tribunal, and the Court, in *Orient-Express* had both misidentified the insured peril: §523 **[C/3/176]**. The insured peril was not misidentified. The relevant peril was accidental damage to the hotel (see §504 **[C/3/170]**). The hurricanes were not "an integral part of the insured peril" – cf. §523 **[C/3/176]**. The Policy in that case did not insure all business interruption losses suffered by the policyholder and caused by the hurricanes. The Court, and the tribunal, in *Orient-Express* were right to identify the relevant insured peril as the accidental damage to the hotel and not as, or including, the cause of that damage.

(3) If (as it clearly does in the case of the Arch trends clause) the trends language compels the conclusion that "but for" causation is required, then the Court's duty is to give effect to the parties' bargain, regardless of whether the Court finds the ultimate loss on that basis to be "illusory" (at §526 **[C/3/177]**).

57. Arch adopts the submissions of the other Insurers on this Ground, which is common to all Insurers.

THE DECLARATIONS

58. If Arch's appeal is allowed, the declarations at paragraph 11.1 and 11.2(b) **[C/1/6] [C/1/7]** made by the Court fall to be deleted from the Order, at least as against Arch.

59. The Court should declare that: the correct counterfactual required by the GLAA Extension and/or the trends clause in the Arch wording assumes the absence of prevention of access to the insured premises, but it does not require or permit other facts to be disregarded (such as the existence or wider consequences of the Covid-19 pandemic).

CONCLUSION

60. The Appellant therefore invites the Court to allow this appeal for the following

REASONS

(1) The Court erred in law in concluding that the insured peril in the GLAA Extension in the Arch wording was a "composite peril" which included (1) the prevention of access; (2) the actions or advice of government and (3) the emergency or incident.

(2) The Court erred in law in concluding that upon a qualifying prevention of access under the GLAA Extension, the Arch trends clause required any assumption in the counterfactual that there is no emergency and no government action or advice taken in response.

(3) The Court erred in law by concluding that *Orient-Express* was distinguishable from the present case and/or wrongly decided in any event. The Court should have followed the reasoning in that decision.

JOHN LOCKEY QC
JEREMY BRIER

30 October 2020

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