Appeal Nos 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 UK LIMITED
(6) ROYAL & SUN ALLIANCE INSURANCE PLC

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

-and-

(1) HISCOX ACTION GROUP
[(2) HOSPITALITY INSURANCE GROUP ACTION]

Interveners

Appeal Nos 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-

(1) HISCOX ACTION GROUP
[(2) HOSPITALITY INSURANCE GROUP ACTION]

Interveners

WRITTEN CASE OF THE SECOND APPELLANT INSURER (ARGENTA)

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*References are in the form **[Bundle/Tab/Page]**.*

A. INTRODUCTION

1. This written case is filed in support of the appeal of Argenta Syndicate Management Limited (**"Argenta"**), which is the managing agent of Argenta Syndicate 2121 at Lloyd's.

2. Argenta and five other insurers (the **"Appellant Insurers"**) have filed appeals against certain declarations made by Flaux LJ and Butcher J on 2 October 2020,[1] following their judgment dated 15 September 2020 (the **"Judgment"**).[2] Argenta's grounds of appeal concern the scope and effect of what was described in the Judgment for convenience as a 'disease clause', i.e. a clause that provides cover for business interruption caused by occurrences of a notifiable disease within a specified radius of the insured premises (in contrast to 'hybrid clauses' and 'prevention of access clauses').

3. The Respondent to those appeals (the **"FCA"**) has also filed its own appeal against certain declarations made by the Court. Only the first ground of the FCA's appeal directly concerns Argenta. However, as explained below, ground 4 of the FCA's appeal raises very similar issues to ground 3 of Argenta's appeal, which highlights the inconsistency between the Court's conclusions concerning: (i) the scope and effect of the 'disease clause' in Argenta's policy wording; and (ii) the scope and effect of two very similar[3] 'disease clauses' in policy wordings issues by the Fifth Appellant Insurer (**"QBE"**).

B. SUMMARY

i. The Argenta policy wording

4. Of the policy wordings selected by the FCA for inclusion in this test case, two are policies issued by Argenta.[4] The business interruption (**"BI"**) section in those two policies is materially identical, and the 'HIUA Guest House and B&B Insurance' policy wording[5]

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1 **[C/1/1]**.

2 **[C/3/30]**.

3 The only real difference is that the 'disease clause' in QBE 3 specifies a radius of 1 mile rather than 25 miles (cf. Argenta 1 and QBE 2).

4 Namely: (i) the 'HIUA Guest House and B&B Insurance' policy wording; and (ii) the 'HIUA Holiday Home and Self-Catering Accommodation' policy wording.

5 **[C/5/259]**.

(referred to in the Judgment as **"Argenta 1"**) was selected as the 'lead' policy for the purposes of the FCA's claim against Argenta.[6]

5. The Judgment refers (at paragraph 53) to seven categories of business affected by the restrictions imposed as a result of the Covid-19 pandemic. The only category that is relevant to Argenta 1 is category 6 (i.e. businesses providing holiday accommodation in the UK). All such businesses in England,[7] insofar as they continued to operate, were required to close on 26 March 2020 as a result of regulation 5(3) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the **"26 March Regulations"**).[8]

6. The primary insuring clause in the BI section of Argenta 1 provides cover for loss caused by property damage. However, the policy includes a number of limited extensions to that cover, almost all of which relate to events occurring at the insured premises or within the immediate vicinity of the insured premises.

7. The *only* insuring clause in Argenta 1 that the FCA argued responds to claims based on loss caused by the Covid-19 pandemic was extension 4(d) in the BI section (**"Extension 4(d)"**). As noted above, that clause is an example of what the Court referred to in its Judgment as 'disease clauses'.[9]

8. For convenience, Extension 4(d) is set out in full below:[10]

> "The **COMPANY** will also indemnify the **INSURED** as provided in The Insurance of this Section for such interruption as a result of
>
> …
>
> **4. Defective Sanitation NOTIFIABLE HUMAN DISEASE Murder or Suicide**
>
> …
>
> (d) any occurrence of a **NOTIFIABLE HUMAN DISEASE** within a radius of 25 miles of the **PREMISES** …"

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6 There is no dispute about the general principles to be applied when interpreting Argenta 1: see paras 61-66 of the Judgment **[C/3/50]**.

7 Equivalent restrictions were imposed in other parts of the UK: see para. 37 of the Statement of Facts and Issues.

8 **[E/3/17]**.

9 See paras 80-81 of the Judgment **[C/3/57]**.

10 **[C/5/316]**.

9. The term 'Premises' is defined as:[11]

> "the **BUILDINGS** and land used for the **BUSINESS** and situate as stated in the Schedule"

10. The term Notifiable Human Disease is defined in Argenta 1 as:[12]

> "illness sustained by any person resulting from
>
> …
>
> (b) any human infectious or human contagious disease an outbreak of which the competent local authority has stipulated shall be notified to them excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition"

11. It is common ground that Covid-19 fell within this definition as from 5 March 2020 in England.[13] It was also common ground at trial that the relevant insured peril in Extension 4(d) is an occurrence of Covid-19 within the relevant policy area (i.e. within 25 miles of the insured premises).[14]

12. The cover provided by Extension 4(d) is subject to, *inter alia*, a specific exclusion that applies to "*any loss arising from those **PREMISES** that are not directly affected by the occurrence, discovery or accident*".[15]

13. The amount of any indemnity to which policyholders may be entitled is to be determined according to the Basis of Settlement clause in the BI section of Argenta 1,[16] which requires the insured's actual gross income during the indemnity period to be compared with its Standard Gross Income. The definition of Standard Gross Income contains a 'trends clause' as follows:[17]

> "the **GROSS INCOME** during that period in the twelve months immediately before the date of the **DAMAGE** which corresponds with the **INDEMNITY PERIOD** to which such adjustments will be made as necessary to take account of the trend of the **BUSINESS** and of the variations in or other circumstances affecting the **BUSINESS** either before or after the **DAMAGE** or which would have affected the **BUSINESS** had the **DAMAGE** not occurred so that the figures thus

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11 **[C/5/271]**.

12 **[C/5/314]**.

13 The relevant date differs in relation to other parts of the UK: see paras 10, 14 and 18 of the Statement of Facts and Issues.

14 See para. 949 of the FCA's skeleton argument for trial **[D/20/1611]**.

15 **[C/5/317]**.

16 **[C/5/318]**.

17 **[C/5/314]**.

adjusted will represent as nearly as may be practicable the results which but for the **DAMAGE** would have obtained during the relative period after the **DAMAGE**."

14. This trends clause confirms the general principle that policyholders can only obtain an indemnity in respect of loss that would not have been sustained but for the insured peril. It was common ground at trial that this trends clause applies to claims under Extension 4(d), notwithstanding the reference to "*Damage*".[18]

ii. The scope of cover provided by Extension 4(d)

15. The short point raised by Argenta's appeal is that Extension 4(d) provides cover only where loss through business interruption occurs "*as a result of … any occurrence of [Covid-19] within a radius of 25 miles of the Premises*". This means that the loss must be proximately caused by an occurrence of the disease within 25 miles of the insured property. The cover does not extend to loss caused by occurrences of the disease elsewhere. In particular, it does not include the governmental or public response to the Covid-19 pandemic generally in the UK or the world. The national restrictions imposed by the UK Government in response to that pandemic were not the 'result of' occurrences within 25 miles of any particular insured premises. The remainder of this written case develops that one key point.

16. Contrary to the conclusion reached by the High Court,[19] Extension 4(d) does not provide cover for any and all consequences of the Covid-19 pandemic in general, subject to an arbitrary trigger condition that there must have been at least one occurrence of that disease within 25 miles of the insured premises (see ground 2 below). That conclusion re-writes the words of Extension 4(d), which expressly require the business interruption to have been sustained "*as a result of*" an occurrence of Covid-19 within 25 miles.

17. The Covid-19 pandemic caused the losses that are the subject of this test case. In the vast majority of cases, the loss sustained by Argenta's policyholders was caused by: (i) the advice given by the UK Government and other public authorities (such as the warnings given by the Prime Minister to avoid all unnecessary travel and to practise 'social distancing'[20]); or (ii) the national restrictions imposed by the UK Government and/or the

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18 See paras 167-168 of the Judgment **[C/3/87]**.

19 See e.g. ibid., paras 161, 168 **[C/3/85]** and 532 **[C/3/179]**.

20 See e.g. the statement made by the Prime Minister on 16 March 2020: para. 24 of the Statement of Facts and Issues.

devolved administrations (such as the 26 March Regulations). However, no occurrence of Covid-19 in any one locality in the UK caused the pandemic, and it was common ground between Argenta and the FCA at trial that no occurrences of Covid-19 in any particular locality caused the national restrictions imposed by the UK Government in response to the pandemic.[21] The FCA accepted that those national restrictions would have been imposed in any event, regardless of whether there were occurrences of Covid-19 within 25 miles of any particular insured premises. Accordingly, the insured peril in Extension 4(d) (an occurrence of Covid-19 within 25 miles) was not even a 'but for'[22] cause, still less a proximate cause, of those national restrictions or governmental advice.

18. In almost all cases, therefore, an occurrence of Covid-19 within 25 miles of the insured premises is not part of the causal chain leading to any policyholder's loss. For such cases, Argenta's appeal does not rest on any counterfactual analysis, nor on any assessment of the relative weights of different causal factors, but on the simple point that the insured peril identified by Extension 4(d) (i.e. an occurrence of Covid-19 within 25 miles) does not feature anywhere on the causal chain either before the Covid-19 pandemic or between that pandemic and the policyholder's loss.

19. This is not to suggest that Extension 4(d) has no application in the context of a pandemic. Argenta accepts that if there is an occurrence of a notifiable disease within 25 miles of the insured property, a policyholder can recover loss directly caused by that occurrence regardless of:

    (1) whether there are *also* widespread occurrences of the disease in other locations (i.e. outside the relevant 25 miles radius); and

    (2) whether a customer who made (or would have made) a booking to stay at the policyholder's guesthouse or other accommodation resides within 25 miles of that property.

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21 See para. 52 of the FCA's Reply **[D/18/1591]**; see also para. 241 of the FCA's skeleton argument for trial **[D/20/1604]**.

22 As to the need to satisfy the 'but for' test in order to establish factual causation, see *Orient-Express Hotels Ltd v Assicurazioni Generali SA* [2010] Lloyd's Rep. 531 paras 20-38 **[E/31/925]** (see further ground 6 below). See also *Assicurazioni Generali SpA v Arab Insurance Group* [2003] Lloyd's Rep. I.R. 131 at para. 187, per Sir Christopher Staughton ("*… in my view, causation cannot in law exist when even the "but for test" is not satisfied*") **[E/9/161]**.

20. Argenta has always accepted that there may be a small number of cases where loss *has* been proximately caused by occurrences of Covid-19 within the relevant 25-mile radius:

    (1) For example, there may be cases where customers cancelled bookings at the relevant accommodation prior to 16 March[23] or 26 March[24] due to a specific occurrence of Covid-19 within 25 miles of the premises (including, for example, cases where the owner of the business or a customer staying at the accommodation was found to have contracted Covid-19). It is possible that such cancellations may also have been caused, in some cases, by reports of occurrences of Covid-19 in a town or city near to the guesthouse or other accommodation (within 25 miles).

    (2) Similarly, there may be cases where the owner of a business terminated bookings prior to 16 or 26 March due to a specific occurrence of Covid-19 within 25 miles of the premises (including, again, cases where the owner of the business or a customer staying at the accommodation was found to have contracted Covid-19).

    (3) Targeted, local restrictions, such as the restrictions imposed in Leicester in response to a surge in Covid-19 cases in that city (the **"Leicester Regulations"**),[25] are also capable of giving rise to loss caused by occurrences of Covid-19 within 25 miles of some policyholders (e.g. where the accommodation is located in the area affected by the restrictions).[26] Unlike the 26 March Regulations, the Leicester Regulations were caused by occurrences of Covid-19 within a specific locality.

21. In such cases, Argenta accepts that Extension 4(d) in principle provides cover. However, in the minority of cases where some loss *was* caused by an occurrence of Covid-19 within 25 miles, the 'but for' test still needs to be applied, by reference to the insured peril, in order to ascertain the extent of the indemnity available.

C. GROUND 1: THE SCOPE OF THE INSURED PERIL

22. The High Court fundamentally misstated the scope of the insured peril in Extension 4(d) in Argenta 1. This is a short but important point; as explained below, the Court's error as

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23 When the UK Government advised everyone to avoid non-essential contact with others and to avoid all unnecessary travel (see para. 26 of the Judgment **[C/3/36]**).

24 When the national 'lockdown' in England was imposed by the 26 March Regulations **[E/3/17]**.

25 See the Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 **[E/4/29]**.

26 Whether the Argenta 1 responds in such cases will depend on the precise reasons for which the local restrictions were imposed.

to the scope of the insured peril in Extension 4(d) contributed to the Court's erroneous approach to the causal test required by that clause.

23. At paragraph 165 of the Judgment, the Court stated as follows:[27]

> "In relation to Argenta's wording … we consider that the insured peril is properly to be regarded as business interruption at the premises ("such interruption") as a result of one of Extensions 1-6. The link "as a result of" is thus within the composite insured peril."

24. That approach was not the subject of argument at the trial in relation to Argenta 1[28] and it is inconsistent with both the structure of Argenta 1 and with the established meaning of the term 'peril'.

25. In general, an 'insured peril' is an event that causes damage to the insured's pecuniary interest in the subject matter insured. In the context of material damage cover, the insured peril is, for example, fire or theft. The 'damage' is the physical damage to the property (e.g. a collapsed roof) or the loss of that property. The loss sustained by the insured is the pecuniary measure of that damage. Subject to the terms of the policy wording, the insured may recover an indemnity for the loss that is the measure of damage proximately caused by an insured peril.

26. This approach is consistent with the material damage section of Argenta 1, which provides cover in respect of "*Damage*" (i.e. "*accidental loss damage or destruction*" of property) caused by any of the "*Perils Insured*" (defined as including "*Fire Lightning Explosion and Perils as fully defined in the Buildings Insurance Section and Contents Insurance Section [e.g. Earthquake, Theft, Storm etc]*").

27. For example, in a marine insurance policy: (i) the insured perils include the perils consequent on, or incidental to, navigation of the sea;[29] (ii) the damage is the physical damage to or loss of the vessel; and (iii) the pecuniary loss sustained by the insured is the cost of repairing that damage or replacing the vessel. The damage itself does not form

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27 **[C/3/86]**.

28 The FCA's skeleton argument for trial, at paragraph 949, stated: "*The insured peril is indeed an occurrence of a disease within 25 miles of the premises*" **[D/20/1611]**. At no stage in these proceedings did the FCA argue that the business interruption itself formed part of the insured peril in Extension 4(d). Argenta in its skeleton argument for trial, and again in its oral submissions, relied upon this common ground as the foundation of its case. Neither the FCA nor the Court, raised any dispute or question about these matters being common ground.

29 See e.g. s.3 of the Marine Insurance Act 1906 **[E/6/93]**.

part of the insured peril.[30] Section 55(1) of the Marine Insurance Act 1906 (which codified the common law as to marine insurance and also reflects the common law as to non-marine insurance[31]) identifies the necessary causal relationship between these elements; save in exceptional circumstances, an insured can recover an indemnity for its pecuniary loss if (but only if) the damage to which it relates has been proximately caused by the insured peril.

28. In the context of BI cover: (i) the insured peril is normally property damage, although the cover may extend beyond this if there are applicable extensions; (ii) the damage is the business interruption (i.e. the damage to the insured's business); and (iii) the pecuniary loss is the reduction in the insured's revenue, as measured in accordance with any applicable basis of settlement clause. The business interruption is thus the economic equivalent of the physical damage covered by a material damage policy (e.g. a collapsed roof) or a marine insurance policy (e.g. a hole in the hull of a vessel). The business interruption, therefore, does not itself form any part of the insured peril; the latter is an event that must be a proximate cause of the former. In other words, the business interruption is the damage to the insured's interest for which an indemnity is given if, and only if, it is proximately caused by an insured peril.

29. Argenta 1 follows this orthodox approach:

    (1) The policy wording principally insures property against "*Damage*" (i.e. physical damage) caused by defined "*Perils Insured*" (e.g. fire).[32] In this part of the policy, the subject matter of the insurance are the "*Buildings*" and their "*Contents*" (as defined); the damage is "*Damage*" as defined; and the perils insured against are the defined "*Perils Insured*".

    (2) In the main insuring clause in the BI section,[33] the subject matter of the insurance is the "*Business*" at the "*Premises*"; the damage is interruption to that "*Business*";

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30 See e.g. Rainey, S., Blackwood, G., and Walsh D. *Chalmers' Marine Insurance Act 1906* (11th ed., 2019), s.3 ("*The result of the operation of maritime perils is to cause 'marine damage' …*") **[F/64/1353]**. For the distinction between a maritime peril and the consequent damage, see e.g. *Thames and Mersey Marine Insurance Co. Ltd v Hamilton* (1887) 12 App. Cas. 484 at para. 498, per Lord Herschell **[F/48/997]**. See also *Seagrave v Union Marine Insurance Co* (1865-66) L.R. 1 C.P. 305 at 320, per Willes J ("*The general rule is clear, that to constitute interest insurable against a peril, there must be an interest such that the peril would, by its proximate effect, cause damage to the assured*") **[F/43/858]**.

31 See para. 94 of the Judgment **[C/3/64]**.

32 **[C/5/273]**.

33 **[C/5/315]**.

and the peril insured against is "*Damage*" (i.e. physical damage) to the "*Premises*" which renders them uninhabitable, as defined in the material damage section of the policy.

(3) In extensions 1-6 in the BI section of the policy, the subject matter of the insurance and the type of damage does not change; they remain, respectively, the "*Business*" at the "*Premises*" and the interruption of that "*Business*". All that changes in the extensions is that an extended list of perils is provided, going beyond "*Damage*" to the "*Premises*" (so as to include, for example, any occurrence of a Notifiable Human Disease within 25 miles of the insured premises).

30. It was common ground, and accepted by the Court,[34] that in order for the Basis of Settlement clause and the definition of Standard Gross Income to be applicable to the extensions in the BI section, the word "*Damage*" must be interpreted as meaning the insured peril. This reasoning recognises that property damage ("*Damage*") is the insured peril under the main BI section and that the only change made in extensions 1-6 is to augment the list of insured perils.

31. The same approach is required to make sense of the definition of Indemnity Period. That definition states that the indemnity period is "*the period beginning when the **DAMAGE** occurs and ending when the results of the **BUSINESS** cease to be affected by the **DAMAGE** but not later than 24 months after such **DAMAGE** occurs*".[35] In the context of a claim under Extensions 1-6, the reference to 'Damage' in this definition (as in the trends clause) must read as a reference to the insured peril. However, this definition would obviously be circular and impossible to apply if it were right that the insured peril under the extensions includes the business interruption itself.

32. This point is not dispositive of Argenta's appeal. However, the Court's error as to the scope of the insured peril in Extension 4(d) of Argenta 1 was significant because it contributed to the further error identified in ground 2 below.

D. GROUND 2: PROXIMATE CAUSATION

33. The second fundamental error made by the Court was its conclusion that the words "*as a result of*" in Extension 4(d) do not require proximate causation. This second error

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34 Judgment, para. 168 **[C/3/87]**.

35 **[C/5/314]**.

explains how the Court felt able to state that Extension 4(d) provides cover for loss caused by occurrences of Covid-19 anywhere and everywhere in the UK.

34. There is no dispute that losses which are the subject of these proceedings have been caused by the Covid-19 pandemic. As the FCA stated in its skeleton argument for trial: "*The single proximate cause is the disease everywhere and the Government and human responses to it*".[36]

35. As explained in ground 1 above, the sole insured peril identified in Extension 4(d) in Argenta 1 is any occurrence of a notifiable disease within 25 miles of the insured premises (and that was conceded by the FCA at trial[37]). Save in a very small number of cases, that insured peril cannot be said to have caused any of the losses which Argenta's policyholders have suffered as a result of the pandemic; in almost all cases, occurrences of Covid-19 within 25 miles of the insured premises are not even a 'but for' cause of the insured's loss, still less are they a proximate cause (see grounds 4 and 5 below).

i. The common ground at trial

36. The editors of *MacGillivray on Insurance Law* note that: "*It is a fundamental rule of insurance law that the insurer is only liable for losses proximately caused by the peril covered by the policy*".[38]

37. This principle is reflected in section 55(1) of the Marine Insurance Act 1906, which states that: "*Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against*".

38. There was no dispute about this at trial. It was also common ground that a proximate cause is a 'dominant' or 'efficient' cause of the loss[39] (i.e. not necessarily the last in

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36 See e.g. para. 225 of the FCA's skeleton argument for trial **[D/20/1603]**.

37 ibid. para. 949 **[D/20/1611]**.

38 Birds, Milnes & Lynch, *MacGillivray on Insurance Law* (14th ed., 2018), para. 21-001 **[E/44/1209]**. See also *Cultural Foundation v Beazley Furlonge Ltd* [2019] Lloyd's Rep. I.R. 12 at para. 171 ("*The starting point is that an insurer is liable only for losses proximately caused by the peril covered by the policy*") **[F/20/337]**.

39 *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] A.C. 350 at 369 **[E/27/895]**.

time), which is to be identified by applying common sense.[40] The words "*as a result of*" (like "*caused by*" or "*arising from*"[41]) are words requiring proximate causation.

39. That the FCA accepted the application of these principles to Argenta 1 is evident from the agreed List of Issues and Common Ground, which recorded that the following was agreed as between the FCA and Argenta:

> "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."[42]
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> "The policyholder must establish that its losses are proximately caused by an insured peril."[43]

40. That was reflected in the FCA's oral submissions at trial, which acknowledged the following:[44]

> "The FCA accepts that the interruption must be directly caused by the occurrence within 25 miles, because the term "resulting from" [sic: 'as a result of'] **imports a proximate cause test**, as Argenta also says in its skeleton …"

41. Argenta expressly referred to this common ground in its oral submissions.[45] However, the Court failed to acknowledge that common ground in its Judgment. Had the Court recognised and appreciated the common ground as stated above, it would not have been possible for the Court to conclude (as it did) that Extension 4(d) provides cover for any and all loss caused by Covid-19, regardless of whether or not the loss was proximately caused by occurrences of that disease within 25 miles of the insured premises.

ii. The Court's flawed approach to the requirement of proximate causation

42. The Court's conclusion that proximate causation was not necessary as between the insured's loss and the occurrence(s) of Covid-19 within 25 miles was based on the Court's (erroneous) suggestion that Extension 4(d) provides cover for a 'composite insured peril' (as to which, see ground 1 above). The Court used that concept to suggest

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40 *ENE 1 Kos Ltd v Petroleo Brasileiro SA ('The Kos')* [2012] 2 A.C. 164 para. 74, per Lord Clarke **[F/26/503]**.

41 See e.g. *Coxe v Employers' Liability Assurance Corporation Ltd* [1916] 2 K.B. 629 at 634, per Scutton J ("*The words in the condition 'caused by' and 'arising from' do not give rise to any difficulty. They are words which always have been construed as relating to the proximate cause*") **[F/19/319]**.

42 List of Issues and Common Ground, para. 16.4 (emphasis added) **[C/47/1970]**.

43 ibid. para. 39.

44 Transcript from Day 3, p.163 (line 24) – p.164 (line 1) (emphasis added) **[D/28/1643]**.

45 See the transcript from Day 7, p.143 (lines 16-21) **[D/31/1647]**.

that proximate causation is only required as between the insured's loss and the business interruption; as explained below, applying proximate causation in this extremely limited way deprives it of any real force, contrary to well established principles.

43. The Court's approach to the requirement of proximate causation is clear from the Court's discussion of the 'disease clause' in RSA 3, at paragraph 94 of the Judgment:[46]

> "… for our part we consider that the "peril insured against" [in extension vii (a) (iii) of RSA 3] is the composite peril of interruption or interference with the Business during the Indemnity Period following one of (a) to (d). Accordingly the requirement of proximate causation, codified in marine insurance by section 55(1) of the Marine Insurance Act 1906, but which is a reflection of the common law, including as to non-marine insurance, **is between the loss claimed by the insured and such "interruption or interference with the Business"**. The requirement that the business interruption or interference should "follow" one of (a) to (d) is, as we see it, a requirement **within the composite peril insured**." (emphasis added)

44. At paragraph 95, the Court stated that the word "*following*" in extension vii of RSA 3 denoted a "*looser form of link*" than that of proximate causation, noting as follows: "*we do not consider that it is a link between the loss and the peril, which is the central case where it is generally to be inferred that the parties intended a test of proximate causation*".[47] The Court's suggestion that the 'disease clause' in RSA 3 provides cover for a 'composite insured peril' was, therefore, an essential part of this reasoning.

45. The Court adopted the same reasoning in relation to Extension 4(d) in Argenta 1; the Court rejected Argenta's argument that, for the purposes of Extension 4(d), a policyholder needs to demonstrate that its loss has been proximately caused by an occurrence of Covid-19 within 25 miles of the insured premises (rather than occurrences elsewhere), "*for essentially the same reasons*" as those given in relation to RSA 3.[48] The Court emphasised that, in its view, "*[t]he link "as a result of" is thus within the composite insured peril*" for the purposes of Extension 4(d).[49] It is implicit that the Court considered that any requirement of proximate causation applicable to claims made under Extension

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46 **[C/3/64]**.

47 The Court stated that this made "*good sense*" because the matters referred to within extension vii in RSA 3 "*would not of themselves directly cause interruption to or interference with the business, but would in almost every case have such effect only via the reaction the authorities and/or the public*" (para. 95 **[C/3/65]**). Insofar as that comment was intended to apply also to Extension 4(d) in Argenta 1, it is irrelevant: the fact that an occurrence of a notifiable disease within 25 miles of the insured premises is, in most cases, likely to cause a business interruption via the reaction of the authorities and/or the public clearly does not prevent the occurrence being the proximate (i.e. dominant or efficient) cause of the loss.

48 Judgment, para. 159 **[C/3/85]**.

49 ibid. para. 165 **[C/3/86]**.

4(d) in Argenta 1 (as with RSA 3) relates only to the connection between the loss and the business interruption.

46. This approach reduces the requirement of proximate causation to an empty form of words, given that the insured's pecuniary loss is the value of the business interruption (see ground 1 above) measured according to definitions in the policy. The relevant loss will, therefore, always be caused by the business interruption. It is the equivalent of asking, in the context of a claim under a material damage policy, whether the insured's loss has been caused by the damage to the building.

iii. The causal test required by the words "*as a result of*" in Extension 4(d)

47. What then of the causal connection required as between the business interruption and the occurrence of Covid-19 within 25 miles? The words "*as a result of*" are as plain an indication of proximate causation as any. If authority is needed, reference may be made to *Lloyds TSB General Insurance Holdings v Lloyds Bank Group Insurance Ltd*[50] in which the Court of Appeal and the House of Lords both held that the phrase "*shall result from*" meant nothing less than proximate cause, a notion which "*does not depend on nice distinctions between the particular varieties of the phrase used to express the causation of the loss*".

48. At paragraph 165 of the Judgment, the Court held that the words "*as a result of*" in Extension 4(d) in Argenta 1 indicated "*effective cause*" but, critically, the Court then stated that "*the application of the causal test must give effect to and not thwart the intention of the parties*".[51] The Court then proceeded to abandon any requirement of proximate causation as between the business interruption and the occurrence(s) of Covid-19 within 25 miles, doing so by reference to an "*intention of the parties*" which the Court failed anywhere to identify and which cannot be reconciled with the wording of the contract.

49. It is not clear precisely what causal test the Court considered is required by the words "*as a result of*", but the Court plainly did not require proximate causation as between the loss

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50 [2002] 1 Lloyd's Rep. I.R. 113 at para. 42, per Potter LJ **[F/36/781]**. The House of Lords at [2003] Lloyd's Rep. I.R. 623 expressly agreed with this part of the judgment, while allowing the appeal on a different point: see para. 23, per Lord Hoffmann, para. 45, per Lord Hobhouse **[F/37/791]**.

51 See also the Court's conclusion as to the meaning of the words "*as a result of*" in the 'disease clause' in RSA 4 (para. 147 of the Judgment) **[C/3/81]**.

and the occurrences of Covid-19 within 25 miles of the insured premises. This is clear from paragraph 532 of the Judgment, where the Court stated: "*in relation to the disease clauses where we have concluded that there is cover in principle, we have done so because we consider that on the correct construction of those wordings,* ***they insure the effects of COVID-19 both within the particular radius and outside it***" (emphasis added).[52]

50. The application of that approach to Extension 4(d) in Argenta 1 can be seen in paragraph 161 of the Judgment:[53]

> "… we consider that the proper construction of the agreement [i.e. Argenta 1] is that the parties were not agreeing that it was the business interruption consequences of a notifiable disease only insofar as it was within the "relevant policy area" that was being insured, but the business interruption arising from a notifiable disease of which there was an occurrence within the relevant policy area."

51. See also paragraph 168 of the Judgment, concerning the trends clause in Argenta 1:[54]

> "… Given that the "trends clause" is intended simply to put the insured in the same position as it would have been had the insured peril not occurred, and given the construction which we have found to be correct in relation to the ambit of the insured peril under Extension 4(d), what this means is that one strips out of the counterfactual that which we have found to be covered under the insuring clause. This means that one takes out of the counterfactual the business interruption referable to COVID-19 including via the authorities' and/or the public's response thereto."

52. In other words, the Court held that there is no need for an insured to demonstrate that its loss has been proximately caused by occurrences of Covid-19 within 25 miles, nor (it seems) did the Court even require such occurrences to be a 'but for' cause of the loss. Instead, the Judgment suggests that an insured is only required to prove that its loss has been caused by the Covid-19 pandemic in general (provided that there has been at least one person with that disease within 25 miles of the premises).

53. As noted above, the Court's conclusion that the phrase "*as a result of*" does not require proximate causation as between the loss and the occurrence(s) of Covid-19 within 25 miles of the premises (i.e. the insured peril) was contrary to the common ground that

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52 **[C/3/179]**.

53 **[C/3/85]**.

54 **[C/3/87]**.

existed as between the FCA and Argenta at trial, as well as being contrary to established authority.

54. The same approach can be seen in relation to the Court's discussion of the scope of the 'disease clause' in RSA 3, where the Court stated as follows:

> "… the clause can and should properly be read as meaning that there is cover for the business interruption consequences of a Notifiable Disease which has occurred, i.e. of which there has been at least one instance, within the specified radius, from the time of that occurrence. The wording of the clause, in other words, indicates that **the essence of the fortuity covered is the Notifiable Disease, which has come near, rather than specific local occurrences of the disease**."[55]

> "… there is cover under RSA 3 for any business interruption which an insured can show **resulted from COVID-19**, including by reason of the actions, measures and advice of the government, and the reaction of the public in response to the disease, from the date when the disease occurred in the relevant 25 mile radius."[56]

55. The Court's statement at paragraph 165 that "*the application of the causal test must give effect to and not thwart the intention of the parties*" appears to have been intended as a reference to a dictum of Lord Atkinson in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*[57] (quoting Lindley LJ in *Reischer v Borwick*[58]), where he stated that the requirement of proximate causation "*must be applied with good sense to give effect to, and not to defeat the intention of the contracting parties*".

56. However, that dictum concerned the task of identifying the (or a) proximate cause from a number of candidates,[59] a task which later authorities have emphasised needs to be approached using common sense.[60] Lord Atkinson was not suggesting that the test of proximate causation can simply be discarded if it is thought to be inconvenient, especially in circumstances (like the present case) where the parties have expressly agreed to the application of that test (by the use of the words "*as a result of*"). Indeed, Lindley LJ in *Reischer* stated that the requirement of proximate causation was "*a cardinal rule*".[61]

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55 Judgment para. 102 (emphasis added) **[C/3/67]**.

56 ibid. para. 113 (emphasis added) **[C/3/69]**.

57 [1918] A.C. 350 at 365 **[E/27/891]**.

58 [1894] 2 Q.B. 548 at 550 **[F/40/831]**.

59 The choice of the proximate cause of the loss of the vessel in that case was between the torpedo and the grounding of the vessel in the outer harbour near the breakwater.

60 *ENE 1 Kos Ltd v Petroleo Brasileiro SA ('The Kos')* [2012] 2 A.C. 164 para. 74, per Lord Clarke **[E/15/297]**.

61 [1894] 2 Q.B. 548 at 550 **[F/40/831]**.

Moreover, Lord Sumner in *Becker, Gray & Co. v London Assurance Corporation*[62] (with whom Lord Atkinson agreed, only around three months before he gave his speech in *Leyland Shipping*) made it quite clear that the requirement of proximate causation "*should be rigorously applied in insurance cases*", and stated that this principle is "*nothing more nor less than the real meaning of the parties to a contract of insurance*".

57. It is obviously correct that the Court is seeking to ascertain the intention of the parties when construing Argenta 1, but that intention is expressed by the clear words of Extension 4(d), which insure against "*such interruption*" when (and only when) it is proximately caused by ("*as a result of*") the defined peril, namely "*any occurrence of a Notifiable Human Disease within a radius of 25 miles of the Premises*".

58. Extension 4(d) is intended to be a limited extension of the primary BI cover provided by Argenta 1, which is confined to loss caused by property damage that renders the insured premises uninhabitable. The limited nature of the cover provided by Extension 4(d) is evident from the fact that the other parts of extension 4 are all confined to loss caused by events occurring *at* the insured premises, namely:

    (1) the discovery of vermin, pests or defective drains/sanitation at the 'Premises' (extension 4(a));

    (2) the occurrence of a 'Notifiable Human Disease' at the 'Premises' or attributable to food or drink supplied from the 'Premises' (extension 4(b));

    (3) the discovery of an organism at the 'Premises' likely to result in the occurrence of 'Notifiable Human Disease' (extension 4(c)); and

    (4) the occurrence of murder or suicide at the 'Premises' (extension 4(e)).

59. In light of the limited nature of the other clauses of extension 4 in Argenta 1, it is inherently unlikely that Extension 4(d) is intended to provide cover for the consequences of a global or national pandemic without any meaningful geographical limit. That limit is provided by the express requirement that the loss must be proximately caused by an occurrence of a notifiable disease within 25 miles of the insured property.

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62 [1917] A.C. 101 at 112 **[E/10/183]**.

60. The Court's approach substantially re-writes the wording of Extension 4(d). Rather than requiring the business interruption to have been proximately caused by an occurrence of Covid-19 within 25 miles of the insured premises, the Court re-writes the clause to state that cover is provided for business interruption caused by a 'Notifiable Human Disease', **provided that there has been** an occurrence of that disease within 25 miles of the insured premises.[63] This is clearly inconsistent with the contractual wording agreed by the parties, which expressly provides cover for business interruption "***as a result of*** *… any occurrence of a Notifiable Human Disease within a radius of 25 miles of the Premises*".

61. The Court's conclusion as to the causal test required by Extension 4(d) removes any requirement for an insured to demonstrate that all (or, indeed, any) of its loss has been proximately caused by an occurrence of the disease within the specified locality. This is clear from the Court's equivalent conclusion concerning the 'disease clause' in QBE 1, where the proximity requirement (a manifestation of the disease within 25 miles) was described by the Court as merely "*an adjectival clause limiting the class of notifiable diseases which, if they interfere with the business will lead to coverage*";[64] i.e. the proximity requirement serves no causal function at all.

62. Rather, the words "*any occurrence … within a radius of 25 miles of the Premises*" in Extension 4(d) in Argenta 1 are – on the Court's interpretation – reduced to an arbitrary precondition to be met before an insured can recover an indemnity for any and all loss caused by the Covid-19 pandemic in general.[65] The Court noted this argument in the context of RSA 3: "*RSA submits that … the FCA's case reduces the requirement that there should have been an occurrence of the disease within 25 miles to a senseless, or least arbitrary, "tick box" condition for cover*".[66] The Court conceded that this was

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63 See, for example, paragraph 161 of the Judgment, where the Court suggested that Extension 4(d) provides cover for "*business interruption arising from a notifiable disease* ***of which there was an occurrence within the relevant policy area***" (emphasis added) **[C/3/85]**.

64 Judgment, para. 226 **[C/3/102]**.

65 This is also clear from the Court's conclusions concerning other 'disease clauses': see, e.g. paragraph 113 (RSA 3) **[C/3/69]** and paragraph 226 (QBE1) **[C/3/102]**. See also paragraph 532 of the Judgment **[C/3/179]**.

66 Judgment, para. 101 **[C/3/66]**.

"*undoubtedly a significant argument*",[67] but it failed to give any adequate answer to this fundamental objection to the case put forward by the FCA.

63. The Court merely stated that the proximity requirement "*has the effect that diseases which make no local appearance cannot lead to there being cover*", and suggested that there may be anomalous results on either interpretation of this requirement.[68] But that entirely fails address or explain the fact that the Court's conclusion ignores a causal requirement expressly stated in Extension 4(d), i.e. the need to demonstrate that the business interruption has been proximately caused by occurrences of the disease within 25 miles of the insured premises.

iv. The Court's reasons

64. The justifications given by the Court for departing from the requirement of proximate causation as between the business interruption and the insured peril (i.e. the occurrence(s) of Covid-19 within the relevant policy area) do not withstand scrutiny.

65. It appears the principal reason for the Court discarding the requirement of proximate causation was the fact that Extension 4(d) does not contain the word "*only*". This was front and centre in the Court's explanation for its conclusion as to the scope of Extension 4(d): "*Critical here again is the fact that Extension 4(d) does not say "any occurrence of a NOTIFIABLE HUMAN DISEASE **only** within a radius of 25 miles of the PREMISES" or anything which dictates such a reading*".[69] The same reasoning was relied on in relation to the 'disease clause' in RSA 3.[70]

66. It is surprising that this formed the principal basis for the Court's conclusion given that elsewhere in the Judgment the Court rightly emphasised that: "*Arguments which rely on what is absent from the drafting of contracts are be treated with caution and in many cases provide little assistance: see Netherlands v Deutsche Bank AG [2019] EWCA Civ 771 at [59]*".[71]

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67 ibid. para. 102 **[C/3/67]**. See also the comment made by Flaux LJ on the first day of the trial: "… *So the 1 mile and the 25-mile limits don't seem to me at least to make any sense at all, if this was epidemic cover*") (Day 1, p.102 (lines 9-20)) **[D/26/1634]**.

68 Judgment, para. 109 **[C/3/68]**.

69 ibid, para. 160 (emphasis added) **[C/3/85]**.

70 ibid. para. 102 **[C/3/67]**.

71 ibid. para. 66 **[C/3/53]**.

67. In any event, there was no need to include the word 'only' in Extension 4(d) given that it expressly confines the cover it provides to business interruption "*as a result of*" occurrences of Covid-19 within 25 miles of the insured premises; it is, therefore, clear that the clause does not provide cover unless (and insofar as) occurrences of Covid-19 within 25 miles of the insured premises are a proximate cause of the loss. Moreover, Argenta has never suggested that Extension 4(d) is confined to cases where the notifiable disease is present only within the relevant 25-mile radius; Argenta accepts that Extension 4(d) can apply where the disease is *also* present outside that area – including in the case of a widespread outbreak of the disease (see paragraph 19 above).

68. The Court's second reason in support of its conclusion was the nature of a notifiable disease. The Court stated that it was "*essential*" to its reasoning that the parties "*knew or must be taken to have known that what was being insured under Extension 4(d) was business interruption deriving from a range of diseases some of which might spread over a wide and unpredictable area*", and that such diseases may provoke a national rather than merely a local response from the public authorities.[72] Again, the Court adopted the same reasoning in relation to RSA 3.[73]

69. However, this also provides no justification for the Court's decision to disregard the requirement of proximate causation. First, the national restrictions imposed in response to the Covid-19 pandemic (such as the 26 March Regulations) were unprecedented; the parties cannot be taken to have anticipated, when the policies were concluded, that such measures were likely to be adopted in response to occurrences of a notifiable disease. The most likely reaction of public authorities in response to such occurrences would have been to take local measures in order to prevent the spread of the disease to other areas (as occurred in response to earlier pandemics in the UK[74]).

70. In any event, the Court's reasoning fallaciously assumes that any matters that the parties can be assumed to have contemplated might occur in the future (such as national restrictions) must, as a necessary consequence, also have been intended to trigger cover under the policy. That proposition only needs to be stated in order to be rejected; parties concluding a contract of insurance contemplate many possible future events, but (save in

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72 ibid. para. 160 **[C/3/85]**.

73 ibid. paras 103-104 **[C/3/67]**.

74 See e.g. para. 3 of Agreed Facts 7 **[D/11/1539]**.

the case of an all risks policy) it is only those which are stated to be insured perils that are intended to trigger cover.

71. Even if the parties anticipated unprecedented national measures in response to the spread of a notifiable disease, Extension 4(d) expressly confines the cover provided by that clause to the consequences of occurrences of the disease within a given locality. That was a method of limiting Argenta's exposure to the economic loss that may be caused by the spread of diseases over a "*wide and unpredictable area*". Extension 4(d) only responds to losses proximately caused by an occurrence of a disease within 25 miles of the insured premises.

72. The final basis on which the Court sought to justify abandoning the requirement of proximate causation was a suggestion that this was necessary in order to avoid anomalous results. Three points should be made about that at the outset.

    (1) First, a desire to avoid anomalies cannot justify departing from the clear words of a contract, such as the requirement in Extension 4(d) that the business interruption must be "*as a result of*" occurrences of Covid-19 within 25 miles of the insured premises.

    (2) Secondly, the purported anomalies identified by the Court would all apply equally to the 'disease clauses' in QBE 2-3, which the Court held were confined to the effects of occurrences of Covid-19 within the relevant policy area (see Ground 3 below).

    (3) Thirdly, as noted below, even if the Court was otherwise correct in relation to these purported anomalies, the Court's approach gives rise to a greater risk of perverse results.

73. The Court identified four alleged anomalies that were said to arise from Argenta's interpretation of Extension 4(d), and from RSA's interpretation of the 'disease clause' in RSA 3:

    (1) First, the Court stated that it would be anomalous if there was cover for loss caused by a 'lockdown' resulting from occurrences of a disease 24 miles away from the insured premises, but no cover if the lockdown was imposed as result of

occurrences of the disease 26 miles away.[75] Whilst the distinction between those cases is not logical or based on any principle, there is nothing objectionable about the distinction; it is simply the consequence of the parties selecting a specific distance (25 miles) for the purposes of the proximity requirement in Extension 4(d) (as opposed to, for example, the more flexible concept of 'vicinity' used in the 'disease clause' contained in RSA 4).

(2) Secondly, the Court suggested that it would be anomalous if the 'disease clauses' provide cover for loss caused by a series of local lockdowns across the country, but do not provide any cover if the disease spreads more quickly and the authorities impose national restrictions instead.[76] However, a series of local lockdowns would not have the same consequences as a unitary national lockdown; it is likely that the various local lockdowns would involve different restrictions, applicable to different business for different periods of time. In any event, it is not clear what the Court's objection is here; there is a clear difference in principle between restrictions imposed as a result of occurrences of a disease within 25 miles of the insured premises, and restrictions imposed nationally because of occurrences of the disease all over the country (regardless of the situation in any given locality). The insured peril in Extension 4(d) is a proximate cause of the former, but not the latter.

(3) Thirdly, the Court stated that customers would have cancelled bookings at holiday accommodation as a result of the presence of Covid-19 in the area even if there had been no national restrictions. The Court then suggested that it would be anomalous if the policyholder would have been "*in a better position under its insurance if the government had not taken steps to prevent the spread of the disease*".[77] However, Argenta accepts that Extension 4(d) provides cover prior to the national 'lockdown' on 26 March 2020 where a policyholder can demonstrate that its loss was specifically caused by occurrences of Covid-19 within 25 miles. It is not anomalous to suggest that loss cannot be recovered after that date and for the duration of the national 'lockdown'. That is simply the result of a standard application of the 'but for' for test; the 26 March Regulations were not caused by occurrences of Covid-

75 Judgment, para. 105 **[C/3/68]**.

76 ibid. para. 106 **[C/3/68]**.

77 ibid. para. 162 **[C/3/86]**.

19 in any particular locality (as the FCA accepted[78]), so a guesthouse in, for example, Leeds would have been required to close on 26 March 2020 in any event, regardless of whether there were any occurrences of Covid-19 in Yorkshire.

(4) Finally, the Court suggested that Argenta's interpretation of Extension 4(d) would create anomalies when applied to loss caused by a local 'lockdown' as compared to loss caused by a regional 'lockdown'. As noted at paragraph 20(3) above, Argenta accepts that, in principle, loss sustained by a guesthouse located in Leicester as result of the restrictions contained in the Leicester Regulations would be covered by Extension 4(d), because those restrictions were proximately caused by occurrences of Covid-19 within 25 miles of that guesthouse. The Court suggested that it would be inconsistent with this if Extension 4(d) did not respond in a case where the loss was caused by a wider, regional lockdown (e.g. one covering the whole of the East Midlands).[79] However, there is nothing anomalous about this at all; it is simply the result of applying the 25-mile limit specified by the parties in Extension 4(d):

    (a) If the premises are near the centre of the restricted area, which is itself no more than 25 miles in radius, then occurrences within the radius would normally be a proximate cause of the restrictions.

    (b) At the other end of the spectrum, if the relevant area is the whole of the UK or England, then it is obvious that occurrences within any particular 25-mile radius were neither a 'but for' nor a proximate cause of the national restrictions.

    (c) In between these two extremes, there may be situations which raise a factual question as to whether occurrences within 25 miles of any particular premises were a proximate cause of the restrictions in question.

74. In any event, all of these purported anomalies equally apply to the 'disease clauses' in QBE 2-3, which the Court held are confined to the effects of cases of Covid-19 within the relevant policy area (see ground 3 below). Moreover, the Court's decision to

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78 See para. 52 of the FCA's Reply **[D/18/1591]**; see also para. 241 of the FCA's skeleton argument for trial **[D/20/1604]**.

79 Judgment, para. 163 **[C/3/86]**.

disregard the requirement of proximate causation in Extension 4(d) of Argenta 1 creates its own highly anomalous results. For example:

(1) On the Court's interpretation of Extension 4(d), a policyholder in Exeter could recover an indemnity for any and all loss caused by a global or national pandemic as a result of the happenstance that one person with the disease drove from Southampton to Newquay without stopping, thus coming within 25 miles of the insured premises. According to the Judgment, cover under Extension 4(d) would be triggered in such case even if there if were no recorded cases of the disease anywhere in Devon or Somerset, and regardless of the fact that the policyholder's loss has clearly not been caused by the mere fact of a person with the disease driving nearby. Indeed, the same analysis would apply if someone with the disease happened to be in aeroplane that passed over Devon *en route* from Paris to Dublin. Such a conclusion is absurd.

(2) Further, the Court's approach means that a policyholder could recover an indemnity under Extension 4(d) for all loss caused by a global or national pandemic even if it was not known at the time that there was any occurrence of the disease within 25 miles of the insured premises. The availability of cover may depend on an *ex post facto* investigation long after the loss was suffered, which investigation may reveal that there was in fact an occurrence of the disease at the relevant time within 25 miles of the insured premises. It would be bizarre if cover under Extension 4(d) could be triggered in such circumstances, given that the occurrence of the disease within the relevant policy area was unknown at the time and, therefore, caused no loss.

(3) The flaws in the Court's approach are exposed if one applies it to extension 4(b) in Argenta 1, which provides cover for business interruption as a result of "*any occurrence of a **NOTIFIABLE HUMAN DISEASE** at the **PREMISES** or attributable to food or drink supplied from the **PREMISES***". The insured peril in this clause is significantly narrower than the insured peril in Extension 4(d). However, the Judgment suggests that the requirement for the disease to be present on the premises in extension 4(b) is merely an arbitrary precondition that serves no causal function; according to the Judgment, once that precondition is satisfied, a policyholder can then recover an indemnity for any and all loss caused by the

Covid-19 pandemic in general (including the consequences of the national lockdown).[80] A reasonable person would not consider this to be the intended consequence of a single person with Covid-19 entering the insured premises.

(4) According to the Judgment, it would make no difference to the quantum of any indemnity available under Extension 4(d) if the proximity requirement in that clause specified a radius of 1 mile rather than 25 miles.[81] In the Court's view, there is no need for any causal connection between occurrences within the relevant policy area and the loss; provided that the proximity requirement is satisfied by the presence of at least one person with the disease within that area, the policyholder can then recover an indemnity for any and all loss sustained as a result of the pandemic. That cannot be right, given that a reasonable person would expect the quantum of the indemnity available under Extension 4(d) to reflect the specified radius, and to compensate a policyholder for losses sustained "*as a result of*" occurrences of the disease within that policy area.

(5) The declarations made by the Court make it clear that the counterfactual for the purposes of Extension 4(d) must assume that "*there was no Covid-19* ***in the UK****, or any public authority or public response thereto*".[82] In other words, the counterfactual assumes the absence of occurrences of Covid-19 anywhere in the country, not just within the relevant 25-mile radius. However, once one moves beyond that 25-mile radius there is no principled reason why the counterfactual should not also assume the absence of Covid-19 anywhere in the world. That demonstrates the fallacy of the FCA's case; it clearly cannot be correct that a policyholder in Lancashire can recover an indemnity under Extension 4(d) for loss proximately caused by, for example, occurrences of Covid-19 in Italy (which prompted the Italian authorities to impose travel restrictions, thereby causing a customer in Milan to cancel a booking at the policyholder's accommodation). Not even the FCA suggests that such loss is caught by Extension 4(d). Occurrences of

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80 It is clear that this analysis applies equally to extension 4(b) in Argenta 1; see, e.g. para. 227 of the Judgment relating to the 'disease clause' in QBE 1 (which includes a reference to the manifestation of a disease "*by any person whilst in the premises*") **[C/3/102]**.

81 Although the Court took account of the fact that a radius of 25 miles produces a large area (almost 2,000 square miles: see para. 160 of the Judgment **[C/3/85]**), that fact was not essential to its reasoning (see e.g. paras 231 and 237 of the Judgment **[C/3/103]**).

82 See para. 11.2(a) of the order of Flaux LJ and Butcher J dated 2 October 2020 (emphasis added) **[C/1/7]**. See also para. 532 of the Judgment **[C/3/179]**.

Covid-19 abroad are plainly not within the scope of the insured peril in Extension 4(d), and the fact that there may also have been people with Covid-19 within 25 miles of the insured premises does not change this.

E. GROUND 3: INCONSISTENT CONCLUSIONS CONCERNING ARGENTA 1 AND QBE 2-3

75. The Court held that the cover provided by the 'disease clauses' in QBE 2-3 is confined to the consequences of occurrences of Covid-19 within the relevant policy area, i.e. those clauses only provide cover insofar as occurrences of Covid-19 with that area are a proximate cause of the loss. However, the Court held that the same could not be said of the 'disease clause' in QBE 1. The Court thus drew a distinction between QBE 1 and QBE 2-3 that no party (whether the FCA, the 'Hospitality Insurance Group Action' interveners or QBE) sought to draw.

76. This issue is relevant to Argenta because the Court held that Extension 4(d) in Argenta 1 was also distinguishable from the 'disease clauses' in QBE 2-3, whose operative words (especially in QBE 2) are almost identical. It did so on the basis that the latter but not the former refer to the insured matters as "*the following events*".

77. The Court stated that the word "*events*" in QBE 2-3 indicates "*that what is being insured is matters occurring at a particular time, in a particular place and in a particular way*" and that the cover is "*intended to be confined to the results of specific (relatively) local cases*".[83] It was fundamentally inconsistent for the Court not to apply the same conclusion to Extension 4(d) in Argenta 1; the fact that Extension 4(d) does not include the word 'events' is irrelevant. Ground 4 of the FCA's appeal suggests that the FCA agrees with this.

78. The Court stated the following in relation to QBE 2:[84]

> "… In the first place, the insuring clause [in QBE2] itself identifies the matters in (a) to (f) as "events". This indicates that what is being insured is matters occurring at a particular time, in a particular place and in a particular way: see the dictum of Lord Mustill in *Axa Reinsurance v Field* [1996] 1 WLR 1026 at 1035 as to the meaning of "event". This is the context within the clause in which Clause 3.2.4(c) refers to "any occurrence of a notifiable disease". Given the reference to "events", and taken with the nature of the other matters referred to in (a), (b) and (d) to (f),

83 Judgment, para. 231 **[C/3/103]**.

84 ibid. (emphasis added).

> **the emphasis in (c) appears to us in this clause not to be on the fact that the disease has occurred within 25 miles, but on the particular occurrences of the disease within the 25 miles. It is the "event" which is constituted by the occurrence(s) of the disease within the 25-mile radius which must have caused the business interruption or interference.** If there were occurrences of the disease at different times and/or different places then these would not constitute the same "event", and the clause provides no cover for interruption or interference with the business caused by such distinct "events"."

79. Similarly, in relation to QBE 3, the Court stated:[85]

> "The "disease clause" in QBE 3 shares with QBE 2's the reference to cover being for the consequence of any of the "events" in (a) to (f), and the phrasing of (c) in terms of "an occurrence" of a notifiable disease. Proviso (i) to Clause 3.4.8 refers to an "incident". On these bases we consider that **this clause too is confining cover to the consequences of certain happenings, in particular specific occurrences of the disease within the radius, as opposed to other happenings or events, including instances of people contracting the disease outside the radius** …"

80. These passages are fundamentally inconsistent with the Court's conclusions as to the effect of Extension 4(d) in Argenta 1. The insured peril in Argenta 1 is "*any occurrence of* …", as set out more fully in ground 1 above. Contrary to the Judgment, the words "*any occurrence of* …" in Extension 4(d) have at least the same implication of discreteness as the word "*events*" in QBE 2-3.

81. No party at trial sought to suggest that the use of the word 'events' in QBE 2-3 had any dramatic effect on the scope of cover. As the Court noted, it is well established that the term 'event' refers to a something happening at a particular time and place. As Lord Mustill stated in *Axa Reinsurance (UK) Ltd v Field*:[86] "*In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way*". In *Countrywide Assured Group Plc v Marshall*,[87] Morison J suggested that this applies equally to the term "*occurrence*". Moreover, the 'disease clauses' in QBE 2-3 refer to an "*occurrence*" (e.g. of a notifiable disease, murder or suicide) as a type of "*event*". It cannot reasonably be suggested that the parties intended anything different in Argenta 1 by the use of the term "*any occurrence*"[88] in Extension 4(d) but omitting the word "*event*".

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85 ibid. para. 237 (emphasis added) **[C/3/104]**.

86 [1996] 1 W.L.R. 1026 at 1035 **[E/8/120]**.

87 [2003] Lloyd's Rep 195 at para. 15 **[E/13/208]**. See also: *Kuwait Airways Corporation v Kuwait Insurance Co. SAK* [1996] 1 Lloyd's Rep. 664 at 683-686 **[E/26/859]**.

88 As to the meaning of "*occurrence*" see, e.g., *Caudle v Sharp* [1995] C.L.C. 642 at 648 (per Evans LJ), which concerned claims under reinsurance contracts ("*The relevant occurrence, strictly, is the making of*

82. The *Oxford English Dictionary* states that the primary meaning of "*occurrence*" is: "*A thing that occurs, happens, or takes place;* ***an event, an incident***".[89] Moreover, it is clear that this is the sense in which the word "*occurrence*" is used in Argenta 1. Extension 4(e) refers to any "*occurrence*" of murder or suicide at the premises, which is clearly a reference to a specific event. The same is true of the use of the word "*occurrence*" in Extension 4(d) in Argenta 1. Whilst that word is also capable of meaning something more general (e.g. the fact of occurring), that is plainly not the sense in which it is used in Extension 4(d) of Argenta 1 given that it is immediately preceded by the word "*any*" (so it can only be a reference to a specific event or events).

83. The Court appeared to recognise that this is the meaning of the word "*occurrence*" when discussing the scope of the 'disease clauses' in MSA 1-2. At paragraph 196 of the Judgment, the Court stated:[90]

> "… The MSA "disease clauses" are not expressed in terms of the "occurrence" or "manifestation" of the disease, but rather in terms of there being the disease within 25 miles … the fact that the relevant MSA clauses **do not refer to an "occurrence"** makes it, to our minds, relatively straightforward to conclude that the cover extended to the effects of a notifiable disease if and from the time it is within the 25 mile radius and is not limited to the specific effects only of the instances of the disease within the radius." (Emphasis added)

84. This passage demonstrates that there is no justification for distinguishing Argenta 1 from QBE 2-3 on the mere basis that the former uses the word "*occurrence*" and the latter uses the word "*events*".

85. Indeed, in paragraph 231 of the Judgment (quoted above), the Court stated that "*the emphasis*" of the 'disease clause' in QBE 2 "*appears to us in this clause not to be on the fact that the disease has occurred within 25 miles, but on the* ***particular occurrences*** *of the disease within the 25 miles*" (emphasis added).[91] The use of the phrase "*any occurrence*" in Extension 4(d) of Argenta 1 leads to the same conclusion.

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a claim or the discovery of a loss by the original insured, but the word more readily means the occurrence out of which a claim arises, for loss suffered by the original insured, such as storm damage, flood damage or the like, or in the case of professional indemnity losses, the negligent act or omission of the insured") **[F/16/281]**. See also *Countrywide Assured*, ibid. fn. 87.

89 Emphasis added **[F/69/1367]**.

90 **[C/3/94]**.

91 **[C/3/103]**

86. The same may be said of the words of the third specific exclusion attached to Extension 4(d), which applies to: "*any loss arising from those PREMISES that are not directly affected by* ***the occurrence discovery or accident***" (emphasis added). When considering the effect of a very similar exclusion attached to the 'disease clause' in of QBE 2, the Court stated:[92]

> "This focus of the clause is then emphasised by the fact that in (h), it is stated that the insurer is only liable for loss arising at those premises which are directly subject to the "incident", and that in (i) there is a limitation per "incident". These uses of the word "incident" appear to us to reinforce the fact that the clause is concerned with specific events, limited in time and place."

87. Again, the same must apply to Argenta 1, given that "*an occurrence, discovery or accident*" (i.e. the matters referred to in the exclusion attached to Extension 4(d)) can only fairly be described as "*incidents*".

88. For these reasons the Court was wrong not to apply its reasoning as to the 'disease clauses' in QBE 2-3 when considering the scope and effect of Extension 4(d) in Argenta 1.

F. GROUND 4: THE ALLEGED 'INDIVISIBLE CAUSE'

89. As a result of the errors made by the Court identified in grounds 1 to 3 above (which vastly expanded the scope of the cover provided by Extension 4(d) in Argenta 1), it was unnecessary for the Court to consider issues of causation in any detail for the purposes of the claim against Argenta. As the Court stated at paragraph 164 of the Judgment: "*we consider that questions of causation are largely answered by the issue of construction, because it determines what can and cannot be regarded as independent causes*".[93]

90. The Court nevertheless stated that the causal test which it purported to apply (but did not), i.e. that of 'effective cause', was satisfied "*on the basis that the occurrence of the disease within the area [i.e. within a radius of 25 miles of the insured premises] was a part of an indivisible cause, constituted by COVID-19*".[94] It is clear from the Court's comments concerning RSA 3 that the Court considered that any test of proximate causation would be satisfied on this basis: "*we consider that the right way to analyse the*

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92 Judgment, para. 232 **[C/3/103]**.

93 See also para. 503 of the Judgment **[C/3/170]**.

94 ibid., para. 165 **[C/3/86]**.

matter is that the proximate cause of the business interruption is the Notifiable Disease of which the individual outbreaks form indivisible parts".[95]

91. There is no concept known to the law of a "*part of an indivisible cause*", and the Court cited no authority in support of its reliance on that concept. One event either is or is not a proximate cause of another. The test of causation is not satisfied by characterising the relevant event ("*the occurrence of the disease within the area*") as being "*part of*" a wider event or concept ("*COVID-19*").

92. Such an approach is obviously wrong, because every event is part of wider circumstances and it would be impossible for the parties or the Court to determine the right scope of the wider circumstances that should count as the proximate cause in any given eventuality. In the present case, it is obvious that the Covid-19 pandemic caused the losses sustained by policyholders, and that was common ground.[96] However, as noted in ground 1 above, the insured peril in Extension 4(d) is <u>not</u> a Notifiable Human Disease *per se*; the insured peril in Extension 4(d) is expressly stated to be an occurrence of the disease <u>within a radius of 25 miles</u> of the insured premises**.**

93. The FCA accepted that no occurrences of Covid-19 in any particular locality caused the national restrictions imposed by the UK Government (e.g. the 26 March Regulations);[97] those restrictions would have been imposed in any event regardless of whether or not there were occurrences of Covid-19 within 25 miles of any given policyholder.

94. The FCA's assertion that the pandemic is "*no more than an aggregate of local occurrences of COVID-19 throughout the UK*"[98] (upon which the Court's 'indivisible cause' finding was based) is plainly wrong:

    (1) An individual occurrence of a disease is clearly an identifiable event, distinct from the pandemic that may have caused it. It is also obviously possible to distinguish an occurrence of a disease sustained by one person from an occurrence of the same disease sustained by another. The Court itself recognised this when it referred to

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95 ibid. para. 111 **[C/3/69]**.

96 FCA's trial skeleton, para. 225 **[D/20/1603]**.

97 See the FCA's Reply. para. 52 ("*As to the second sentence of Argenta's Defence paragraph 56, it is not alleged that the advice given and/or restrictions imposed by the UK Government (or any of the devolved administrations) were caused by any particular local occurrence of COVID-19*") **[D/18/1591]**.

98 ibid (emphasis added).

an occurrence of Covid-19 as 'incident' for the purposes of the 'disease clause' in QBE 2, noting that occurrences of Covid-19 within 25 miles of the insured premises are (at least for the purposes of QBE 2) "*specific events, limited in time and place*".[99]

(2) The flaw in the Court's finding that Covid-19 constitutes one 'indivisible cause' is demonstrated by its own conclusions concerning QBE 2:[100]

> "In the context of this clause [i.e. the 'disease clause' in QBE 2], it does not appear to us that the causation requirement could be satisfied on the basis that the cases within the area were to be regarded as part of the same cause as that causing the measures elsewhere, or as one of many independent causes each of which was an effective cause, because this clause, in our view, limits cover only to the consequences of specific events.

If the Covid-19 pandemic really is one 'indivisible cause' which cannot be separated into particular occurrences, then this finding would make no sense at all. However, the Court's conclusions concerning QBE 2 were correct and equivalent conclusions should have been reached in respect of Argenta 1.

(3) In any event, the language of Extension 4(d) expressly requires one to draw a distinction between the pandemic and particular occurrences of the disease. Extension 4(d) clearly identifies the insured peril as an occurrence of an infectious disease within a specified locality (within 25 miles of the insured premises). The insured peril is not the 'underlying cause' of that particular occurrence (e.g. a pandemic, or some other way of describing the overall prevalence of a given disease in a wider area or over a longer period of time).

(4) The Court's finding that Covid-19 constitutes one 'indivisible cause' is also inconsistent with the FCA's inevitable concession that the pandemic caused the occurrences of Covid-19 in each locality;[101] the FCA thus recognises that there is a distinction between: (i) occurrences of Covid-19 in any given locality (e.g. within 25 miles of the insured premises); and (ii) the "*underlying cause*" of those occurrences (i.e. the global or national pandemic).

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99 Judgment, para. 232 **[C/3/103]**.

100 ibid. para. 235 **[C/3/104]**.

101 See para. 58.1 of the FCA's Reply ("… *one of the things (COVID-19 in the UK) is the underlying cause of the other (such as the presence of the disease within the Relevant Policy Area*") **[D/18/1593]**.

(5) Moreover, the FCA and the Court themselves seek to divide up the global Covid-19 pandemic, because they both appear to accept that Extension 4(d) does not provide cover for loss caused by occurrences of Covid-19 in other countries,[102] regardless of whether or not there has *also* been an occurrence of the same disease within 25 miles of the insured premises. Accordingly, Extension 4(d) does not, for example, provide cover for loss caused by the Italian regulations referred in paragraph 74(5) above. For the same reason, Extension 4(d) does not provide cover for loss caused by occurrences of Covid-19 in other parts of the UK (i.e. more than 25 miles from the policyholder's premises).

95. Moreover, the width of the supposed "*indivisible cause*", namely "*Covid-19*", is so vague as to be unworkable. How is one to identify the limits in either space or time of that 'indivisible cause'?

96. For example, if there are further occurrences of Covid-19 in Liverpool in December 2021, but no occurrences anywhere else in the UK, can a policyholder in Cornwall recover an indemnity under Extension 4(d) for loss caused by any national restrictions imposed by the UK Government in order to prevent the further spread of the disease – even if there have been no occurrences of Covid-19 in Cornwall for over a year? Such loss would have been caused by Covid-19, but that cannot sensibly be regarded as the same 'indivisible cause' as occurrences of the disease in Cornwall during the previous year.

G. GROUND 5: SEPARATE CONCURRENT CAUSES

97. The alternative basis on which the Court suggested that that the causal test which it purported to apply (but did not), i.e. that of 'effective cause', was satisfied was a suggestion that each occurrence of Covid-19 across the UK was a concurrent proximate cause of the national restrictions: "*each of the cases of the disease was an independent cause, and they were all equally effective in producing the government response*".[103] That finding was also plainly wrong.

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[102] See e.g. the declaration at para. 11.2(a) of the 2 October 2020 order **[C/1/6]**, which suggests that the counterfactual scenario should assume only the absence of Covid-19 in the UK.

[103] Judgment, para. 165 **[C/3/86]**. See also para. 533 **[C/3/179]**.

98. The Court conceded that this analysis is "*less satisfactory*".[104] It is in fact an absurd analysis. On no reasonable basis of factual or legal reasoning could it be said that each particular individual occurrence of Covid-19 (including many asymptomatic and un-tested occurrences which would forever remain unknown) was an effective or proximate cause of all the subsequent national restrictions imposed by the UK Government and the devolved administrations. There was no evidence before the Court to support any such assertion, and no legal basis upon which the Court could draw such a conclusion.

99. As the Court itself stated elsewhere in the judgment: "*it simply cannot be said that any … localised incident of the disease caused the imposition by the government of the restrictions*".[105] Further, when introducing the issues concerning the 'disease clauses', the Court framed the issue as follows:[106]

> "In relation to each [of the 'disease clauses'], there arises the question of whether there is cover in respect of a pandemic **where it cannot be said that the key matters which led to business interruption, and in particular the governmental measures, would not have happened even without the occurrence of COVID-19 within the specified radius**, as a result of its occurrence or feared occurrence elsewhere."

100. In any event, whilst it is possible to have two or three equally effective proximate causes,[107] it defies common sense to suggest that it is possible to have 11,658[108] or more equally effective proximate causes. If one is driven to that conclusion, then the analysis must have gone wrong.

101. Quite apart from that objection in principle, there was no evidence to support the Court's finding concerning 'equally effective' causes. The Court pointed to two matters that it suggested provide support for this absurd conclusion: (i) the minutes of the 'SAGE' group,[109] which the Court said "*show that the government response was the reaction to information about all the cases in the country, and that the response was decided to be national because the outbreak was so widespread*";[110] and (ii) a statement by the

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104 ibid. para. 113 **[C/3/69]**.

105 ibid., para. 418 **[C/3/149]**.

106 ibid. para. 81 **[C/3/57]**.

107 See e.g. *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32 **[E/23/580]**.

108 The number of cumulative positive Covid-19 test results in the UK as at 26 March was 11,658: see Appendix B to Agreed Facts 3 **[C/45/1935]**.

109 The 'Scientific Advisory Group for Emergencies'.

110 Judgment, para. 112 **[C/3/69]**.

Secretary of State for Health on 28 April 2020, in which he stated that the Government thought about "*moving with London and the Midlands first*" but that national measures were adopted because "*the shape of the curve … has been very similar across the whole country*".[111]

102. However, neither of those matters provides support for the Court's finding. Whilst the SAGE minutes[112] and the statement by the Secretary of State for Health suggest that the Government adopted national measures because Covid-19 had spread across most of the country, neither gives any support to the suggestion that those national measures would not have been adopted 'but for' each individual case or the occurrences of Covid-19 within any particular 25-mile radius. It is significant, for example, that the 26 March Regulations were adopted despite the fact that there had been no reported cases in North Devon as at 23 March. If the national measures would have been adopted in any event regardless of the occurrences of Covid-19 in any particular locality, the occurrences in that locality cannot possibly be described as concurrent proximate causes of those national measures.

103. The Court stated that "*it is not unrealistic to say that all the cases were equal causes of the imposition of national measures*".[113] For the reasons noted above, Argenta disagrees. In any event, this passage appears to suggest that, given the obvious difficulty in suggesting that each local occurrence of Covid-19 was a 'but for' cause of any subsequent national government action, the Court may have been applying something akin to a 'material contribution' test.[114] In other words, it appears that the Court may have been suggesting that it was sufficient if each occurrence of Covid-19 throughout the UK materially contributed to the Government's decision to adopt the national restrictions, even though those measures would have been adopted in any event but for each such occurrence. If so, that approach was wholly inappropriate, not least because this argument formed no part of the FCA's case, it has no support in the policy wording and

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111 See row 76 of Agreed Facts 1 **[C/43/1900]**.

112 See e.g. the minutes of the SAGE meeting on 16 March 2020, which stated that "*London has the greatest proportion of the UK outbreak*" but also noted that it was possible that there were around "*5,000-10,000 new cases in the UK per day*" **[D/6/592]**.

113 Judgment, para. 113 **[C/3/69]**.

114 See, by analogy, *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 A.C. 32 **[E/17/304]**.

the parties expressly agreed to the application of the 'but for' test (as demonstrated by the trends clause quoted at paragraph 13 above).

104. Rather, the Court should have applied orthodox principles of causation as they apply in the insurance law context; these principles require the relevant insured peril (i.e. the occurrence of the disease within 25 miles of the insured premises) to have been both the 'factual' and 'legal' cause of the loss complained of (here, the interruption of the policyholder's business).

105. In terms of 'factual' causation, the Court should have applied the orthodox *'but for'* test and should, therefore, have asked whether, but for the relevant insured peril, the policyholder would have suffered the same loss in any event. If the answer to this question is 'yes', then the insured peril was not the true factual cause of that loss and there is no cover under the policy. If the answer to this question is 'no', then consideration turns to whether the relevant insured peril is the 'legal', or 'proximate', cause of the loss. Applying those tests, it is clear that occurrences of Covid-19 in any particular locality are not even a 'but for' cause of the national measures adopted by the UK Government, still less can they be said to be a proximate cause of those measures.

H. GROUND 6: THE *ORIENT-EXPRESS*

106. The Court correctly noted that the term "*Damage*" in the trends clause in the definition of Standard Gross Income in Argenta 1 is to be read as "*a reference to the insured peril*", and that the trends clause "*is intended simply to put the insured in the same position as it would have been had the insured peril not occurred*".[115] That was all common ground at trial.

107. It follows that the only thing that should be subtracted in the counterfactual scenario is the insured peril. As explained in relation to ground 1 above, the correct counterfactual for Extension 4(d) in Argenta 1 assumes the absence of occurrences of Covid-19 within the relevant 25-mile radius. The Court is not required or permitted to strip out any other facts, such as the Covid-19 pandemic or occurrences of that disease *outside* the relevant policy area (i.e. more than 25 miles away).

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115 Judgment, paragraph 168 **[C/3/87]**. See also paras 121-122 **[C/3/71]**.

108. The Court failed to apply this principle correctly, holding that: "*one takes out of the counterfactual the **business interruption referable to Covid-19** including via the authorities' and/or the public response thereto*".[116] It can be seen that this passage contains no reference at all to the proximity requirement in Extension 4(d) in Argenta 1 (i.e. the 25-mile radius). In other words, the Court held that one should subtract the entire pandemic from the counterfactual.

109. It is in this context that the decision of Hamblen J in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* is relevant.[117] Argenta adopts the submissions of the Fourth Appellant Insurer (**"MSA"**) concerning that case: see MSA's third ground of appeal.

I. CONCLUSION

110. It is respectfully submitted that the Court should allow Argenta's appeal and declare that:

(1) Extension 4(d) in Argenta 1 provides cover for loss caused by Covid-19 only insofar as occurrences of that disease within 25 miles of the insured premises are a proximate cause of the loss; and

(2) the correct counterfactual required by Extension 4(d) in Argenta 1 assumes the absence of occurrences of Covid-19 within 25 miles of the insured premises, but it does not require or permit other facts to be disregarded (such as the wider consequences of the Covid-19 pandemic, or occurrences of the disease in other locations).

111. Argenta's appeal should thus be allowed for the following reasons:

(1) the Court wrongly stated that the insured peril identified in Extension 4(d) in Argenta 1 includes the business interruption itself;

(2) the Court wrongly concluded that there is no requirement in Extension 4(d) in Argenta 1 for the business interruption to be proximately caused by occurrences of a Notifiable Human Disease within 25 miles of the insured premises;

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116 ibid. para. 168 **[C/3/87]**.

117 [2010] Lloyd's Rep. I.R. 531 **[E/31/921]**.

(3) there are no proper grounds on which to distinguish Extension 4(d) in Argenta 1 from the 'disease clauses' in QBE 2-3, which provide cover only for the consequences of occurrences of a notifiable disease within the relevant policy area;

(4) the Court wrongly stated that Covid-19 constitutes one "*indivisible cause*" of the loss sustained by policyholders;

(5) the Court wrongly held, as an alternative, that each occurrence of Covid-19 throughout the UK was a separate, equally effective cause of the loss sustained by policyholders; and

(6) the Court erred by suggesting that the decision of Hamblen J in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA*[118] was wrong and that it should not be followed.

3 November 2020[119]

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[118] [2010] Lloyd's Rep. I.R. 531 **[E/31/921]**.

[119] Updated on 9 November 2020 to include references to the hearing bundle.