N244

Application notice

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Name of court COMMERCIAL COURT (QBD) FINANCIAL LIST	**Claim no.** FL-2020-000018
Fee account no. (if applicable)	**Help with Fees – Ref. no.** (if applicable)
N/A	H W F - -
Warrant no. (if applicable)	N/A
Claimant's name (including ref.) THE FINANCIAL CONDUCT AUTHORITY	
Defendant's name (including ref.) ARCH INSURANCE (UK) LIMITED & OTHERS	
Date	28 September 2020

1. What is your name or, if you are a legal representative, the name of your firm?
   Simmons & Simmons LLP

2. Are you a [ ] Claimant [ ] Defendant [x] Legal Representative
   [ ] Other *(please specify)*

   If you are a legal representative whom do you represent? Second Defendant (Argenta Syndicate Management Limited)

3. What order are you asking the court to make and why?
   The Second Defendant seeks an order granting a certificate pursuant to section 12(1) of the Administration of Justice Act 1969, certifying that the grounds of appeal, as set out in this application notice and the attached continuation sheets, are suitable for an appeal directly to the Supreme Court.

4. Have you attached a draft of the order you are applying for? [x] Yes [ ] No

5. How do you want to have this application dealt with? [x] at a hearing [ ] without a hearing
   [ ] at a telephone hearing

6. How long do you think the hearing will last? 2 Hours 15 Minutes
   Is this time estimate agreed by all parties? [ ] Yes [x] No

7. Give details of any fixed trial date or period
   N/A

8. What level of Judge does your hearing need?
   Flaux LJ and Butcher J

9. Who should be served with this application?
   Claimant, Defendants and Interveners

9a. Please give the service address, (other than details of the claimant or defendant) of any party named in question 9.

10. What information will you be relying on, in support of your application?

☐ the attached witness statement

☐ the statement of case

☒ the evidence set out in the box below

If necessary, please continue on a separate sheet.

Please see the attached continuation sheets for details of the evidence on which the Second Defendant will rely in support of this application.

Statement of Truth

~~(I believe)~~ ~~(~~The applicant believes~~)~~ that the facts stated in this section ~~(~~and any continuation sheets~~)~~ are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed James A. Pollock Dated 28 September 2020

Applicant~~('s legal representative)~~~~('s litigation friend)~~

Full name JAMES ALLISON POLLOCK

Name of applicant's legal representative's firm Simmons & Simmons LLP

Position or office held Partner

(if signing on behalf of firm or company)

11. Signature and address details

Signed Simmons & Simmons LLP Dated 28 September 2020

Applicant~~('s legal representative)~~~~('s litigation friend)~~

Position or office held _____

(if signing on behalf of firm or company)

Applicant's address to which documents about this application should be sent

Simmons & Simmons LLP CityPoint 1 Ropemaker Street London Postcode E C 2 Y 9 S S	If applicable	
	Phone no.	+44 20 7628 2020
	Fax no.	+44 20 7628 2070
	DX no.	12
	Ref no.	N/A
E-mail address	S&STestCase@simmons-simmons.com	

THE FINANCIAL CONDUCT AUTHORITY V ARCH INSURANCE (UK) LIMITED & OTHERS

CLAIM NUMBER: FL-2020-000018

Form N244 – Application Notice – Evidence in support of application notice (continuation sheet)

1. The Second Defendant, Argenta Syndicate Management Limited ("**Argenta**"), intends to apply for permission to appeal against the declarations to be made consequential upon the judgment of the Court dated 15 September 2020 (the "**Judgment**"). The proposed grounds of appeal on which Argenta intends to rely are set out in the continuation sheet titled 'Appendix 1' to this application.

2. Argenta seeks a certificate pursuant to section 12(1) of the Administration of Justice Act 1969 (a "**Leapfrog Certificate**") certifying that the grounds of appeal set out in Appendix 1 hereto are suitable for an appeal directly to the Supreme Court. As explained below, Argenta seeks a Leapfrog Certificate on the basis of the exceptional public importance and urgency of this test case.

3. The Framework Agreement concluded by the Claimant (the "**FCA**") and the eight Defendants, dated 31 May 2020, provides that the parties shall act at all times constructively and in good faith to promote the mutual objective (clause 6.1), namely "*to achieve the maximum clarity possible for the maximum number of policyholders (especially, although not solely SMEs) and their insurers consistent with the need for expedition and proportionality*" (recital I).

4. It was on the basis of that 'mutual objective' that the parties agreed that this test case should be expedited and heard under the Financial Markets Test Case Scheme (which, pursuant to Practice Direction 51M, applies to a claim in the Financial List that "*raises issues of general importance in relation to which immediately relevant authoritative English law guidance is needed*"). The Test Case Scheme permits the Court to sit at first instance, as it did in this case, with a Lord Justice of Appeal as well as a Judge of the Commercial Court. An order to that effect was made by Butcher J at the first Case Management Conference on 16 June 2020.

5. The Framework Agreement expressly provides that the FCA or any of the Defendants may appeal the decision of the Court subject to the normal procedural rules for doing so (clause 8.1), but that any party seeking to appeal "*will seek to have their appeal heard on an expedited basis, and undertakes to take all reasonable steps to ensure that the*

appeal is conducted and determined on an expedited basis as soon as is reasonably practicable" (clause 8.2). Clause 8.3 of the Framework Agreement states as follows:

> "*In particular, and without prejudice to their obligations to seek expedition above, the Parties agree to explore the possibility and appropriateness of seeking a leapfrog appeal to the Supreme Court under PD 1.2.17 and 3.6 of the Practice Direction of the Supreme Court*."

6. The FCA put the Supreme Court on notice of this agreement and Herbert Smith Freehills told the defendants by email on 28 July 2020 that the Registrar of the Supreme Court had told them that:

> "*in principle the Supreme Court could accommodate a hearing on an expedited basis during Michaelmas term 2020, subject to the point that the final decision would be for the President, Lord Reed, at the time. The Registrar also noted that Lord Reed was already aware of this matter and that in appropriate urgent previous cases the Supreme Court has sat out of term time in September*."

7. The grounds of appeal set out in Appendix 1 satisfy the statutory conditions for a Leapfrog Certificate in section 12(3A) of the Administration of Justice Act 1969 Act.

   a. Each of those grounds of appeal involves a point of law of general public importance. In particular, the decision that: (1) the insured peril includes the business interruption and/or interference meaning that proximate causation is only required as between the loss claimed and the interruption to and/or interference with the business; and (2) *Orient Express* was wrongly decided, will impact on many if not all types of business interruption insurance and not just the clauses under consideration in the Test Case.

   b. Further:

      i. this test case "*entail[s] a decision relating to a matter of national importance or consideration of such a matter*" (s.12(3A)(a) of the 1969 Act);

      ii. the result of this test case is "*so significant*", whether considered on its own or together with claims by policyholders that are likely to follow from it, "*that … a hearing by the Supreme Court is justified*" (s.12(3A)(b)); and

      iii. "*the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal*" (s.12(3A)(c)).

8. This test case concerns 21 lead policy wordings and, as noted in paragraph 7 of the Judgment, may potentially affect around 700 types of policies across 60 different insurers and around 370,000 policyholders. Two Argenta policies were selected by the FCA to represent a form of disease wording which will be relevant to large numbers of policyholders, including (but not only) several thousands of holders of those two policies, who are mainly SMEs providing bed and breakfast or holiday accommodation in the UK.

9. Ultimate legal certainty is required in circumstances where neither individual policyholders nor reinsurers are party to the test case or bound by its outcome as a matter of res judicata. It is common ground that very large numbers of policyholders have suffered significant losses as a result of the Covid-19 pandemic and the UK Government's response to it. The issues therefore need to be authoritatively determined as a matter of urgency as reflected in the terms of the Framework Agreement.

10. The witness statement of Matthew Brewis (the Director of General Insurance and Conduct Specialists at the FCA), dated 9 June 2020, included the following:

> "*The matter [i.e. the test case] is urgent because insureds with policies in respect of which legal uncertainties arise as to whether there is cover for business interruption losses, and which are underwritten by the defendants and other insurers that wrote materially similar policies, are suffering widespread financial distress on a very large scale …*" (paragraph 8).
>
> "*It is the FCA's view that it is therefore a matter of compelling public interest to provide urgent legal certainty for the benefit of the FCA, policyholders, the defendant insurers and the wider insurance market*" (paragraph 70).
>
> "… *it is hoped that an early judgment following a trial in July 2020 would allow policyholders' cover, if and where cover is found to exist, to be confirmed as quickly as possible to facilitate the continuation of their businesses (to the extent they have survived in the meantime). This would be subject to the impact of any appeal. I note also that business interruption losses arising from the COVID-19 pandemic may still be incurred by an operating business (for example, due to social distancing requirements), although the extent of any cover will depend on the policy terms. Resolution of the issues in this claim therefore remains urgent even where businesses are entitled to resume operations from June 2020*" (paragraph 72).

11. The grounds of appeal set out in Appendix 1 concern the extent to which policyholders' losses fall within the scope of the Argenta policies. The proposed grounds of appeal

have a realistic prospect of success. If an appeal is required to proceed via the Court of Appeal, that will significantly prolong the length of these proceedings (especially bearing in mind the risk that an appeal to the Supreme Court ultimately occurs in any event). This application has been made within 14 days of the Judgment, i.e. the period specified by section 12(4) of the 1969 Act, and prior to the deadline stated in paragraph 4 of the order made by Flaux LJ and Butcher J dated 15 September 2020. If the Court grants a Leapfrog Certificate as requested, Argenta will promptly apply to the Supreme Court for permission to appeal pursuant to section 13(1) of the 1969 Act.

Appendix 1:

Grounds of appeal

1. The material words of the Argenta policy are: "*The Company will also indemnify the Insured as provided in the Insurance of this Section for such interruption … as a result of … 4 … (d) any occurrence of a Notifiable Human Disease within a radius of 25 miles of the Premises*" (**"Extension 4(d)"**). The Court erred in law by wrongly identifying the insured peril in Extension 4(d) of the Argenta policy:

   (a) The Court held 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)*" [165];

   (b) On the true construction of the Argenta Policy the relevant insured peril is "*any occurrence of a Notifiable Human Disease within 25 miles of the Premises*";

   (c) By contrast, business interruption is the damage to the insured's interest for which indemnity is given if and only if it is proximately caused by an insured peril.

2. The Court further erred in law by failing to find that the words "*as a result of*" were words indicating proximate causation.

   (a) Instead, at [165], the Court held that such words indicated "*effective cause*", but, critically, "*the application of the causal test must give effect to and not thwart the intention of the parties*". This was an error, because the relevant intention of the parties is expressed by the words of this provision which insure against "*such interruption*" when (and only when) it is proximately caused by the defined peril, namely "*any occurrence of a Notifiable Human Disease within a radius of 25 miles of the Premises*".

   (b) The Court accordingly erred in law by overriding the agreed requirement of proximate causation between peril and loss by reference to an "*intention of the parties*" which it failed to identify in terms and which was derived from considerations other than the words of the contract.

3. If the Court intended to identify the "*intention of the parties*" at [161] where it held "*In those circumstances, we consider that the proper construction of the agreement 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" (emphasis added), then it further erred by:

(a) re-writing the parties' bargain in words (emphasised in the above) which were not the words of the policy and did not have the same meaning; and

(b) mis-stating Argenta's construction (which was in the terms of the words of the policy, not the Court's re-formulation in this passage) in order to reject it; and

(c) fallaciously assuming that any matters that the parties could be assumed to have contemplated might occur (which are adumbrated at [160]) must also be assumed to have been insured perils even though not stated to be such; and

(d) failing to give effect to the intention of the parties expressed in the words of the policy that the insurance covered business interruption proximately caused by "*any occurrence of a Notifiable Human Disease within a radius of 25 miles of the Premises*".

4. The Court further erred by holding that Argenta's policy was distinguishable from QBE2, whose operative words were almost identical, on the basis that the latter but not the former referred to the insured matters (properly, but not in the Court's view, perils) as "*the following events*". As the Court rightly held at [231] the word "*events*" "*indicates that what is being insured is matters occurring at a particular time, in a particular place and in a particular way.*" The peril in Argenta's policy was "*any occurrence of …*" as set out more fully above. Contrary to the judgment, the words "*Any occurrence of …*" have at least the same implication of discreteness as the word "*events*". The same may be said of the words of the applicable exclusion in Argenta's policy "*for any loss arising from those PREMISES that are not directly affected by the occurrence discovery or accident*."

5. The Court erred in law in holding that "*the occurrence of the disease within the area was a part of an indivisible cause, constituted by COVID-19*" [165].

(a) There is no concept known to the law of a "*part of an indivisible cause*". One event either is or is not a proximate (or effective, as held by the Court) cause of another.

(b) 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*").

(c) Such an approach is plainly 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 which would count as the proximate cause in any given eventuality.

(d) Even on the Court's findings on the present case, the width of the supposed "*indivisible cause*", "*Covid-19*", is so vague as to be unworkable.

6. The Court erred in law and/or fact in concluding that, alternatively, Extension 4(d) provides cover on the basis that each occurrence of Covid-19 in the UK was an independent, equally effective cause of the loss [165]. The Court said at [533] that this analysis was "*less satisfactory*". It was in fact an absurd analysis. On no reasonable basis of factual or legal reasoning could it be said that any single occurrence of Covid-19 (including many asymptomatic and un-tested occurrences which would forever remain unknown) is an effective or proximate cause of all the consequences of the Covid-19 crisis in the UK.

7. The Court was wrong in its approach to the 'trends' clause. The Court wrongly held that the decision in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd's Rep. I.R. 531 should not be followed and that the 'trends' clause should operate as if the whole Covid-19 pandemic and all its consequences was part of the peril insured against.