IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
FINANCIAL LIST

Claim No. FL-2020-000018

BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Claimant

- and -

(1) ARCH INSURANCE (UK) LIMITED

(2) ARGENTA SYNDICATE MANAGEMENT LIMITED

(3) ECCLESIASTICAL INSURANCE OFFICE PLC

(4) HISCOX INSURANCE COMPANY LIMITED

(5) MS AMLIN UNDERWRITING LIMITED

(6) QBE UK LIMITED

(7) ROYAL & SUN ALLIANCE INSURANCE PLC

(8) ZURICH INSURANCE PLC

Defendants

(1) MURRAY & EMILY PULMAN T/A THE POSH PARTRIDGE

(2) BLUEBERRY ENTERPRISES LIMITED

(3) OTHERS INSURED BY QBE UK LIMITED OR AVIVA INSURANCE LIMITED

The 'HIGA' Interveners

(1) COMFOMATIC LIMITED

(2) 368 OTHERS INSURED BY HISCOX INSURANCE COMPANY LIMITED

The 'Hiscox' Interveners

SKELETON ARGUMENT OF THE SECOND DEFENDANT (ARGENTA) FOR THE TRIAL COMMENCING ON 20 JULY 2020

References to the trial bundle are in the form ***[Bundle/Volume/Page]***

A. INTRODUCTION

1. This skeleton argument is filed on behalf of the Second Defendant, Argenta Syndicate Management Limited (**"Argenta"**), which is the managing agent of Argenta Syndicate 2121 at Lloyd's.

2. The Claimant (the **"FCA"**) has commenced these proceedings in accordance with a Framework Agreement, dated 31 May 2020,[1] which was signed by each of the eight defendant insurers. The Framework Agreement acknowledges that it is in the interests of all the parties to achieve certainty in respect of the legal issues raised in these proceedings as soon as possible, in light of the large number of business interruption (**"BI"**) claims based on Covid-19 which have been received by insurers. The Framework Agreement also states that the parties agree to act at all times in good faith to promote the 'mutual objective', namely "*to achieve the maximum clarity possible*" for policyholders and insurers, subject to the need for expedition and proportionality.[2]

3. The FCA is seeking declarations in these proceedings relating to whether certain policy wordings respond to BI claims based on Covid-19. It has stated that it is seeking to advance arguments in these proceedings which it believes represent the views of affected policyholders.[3] The FCA has also made it clear that this test case is not intended to determine any issues relating to:

   (1) policies that provide BI cover only in respect of property damage;

   (2) policies that provide BI cover in respect of infectious diseases, where such diseases are defined by reference to an exhaustive list that does not include Covid-19;

   (3) policies that provide BI cover in respect of infectious diseases, but which require the disease to be present on the insured premises; or

---

[1] **[F/1/1]**. Please note that the date on the first page of the Framework Agreement (28 May 2020) is incorrect.

[2] See recital I and clause 6.1 of the Framework Agreement **[F/1/3]**.

[3] See para. 3 of the Amended Particulars of Claim **[A/2/3]**. See also para. 6 of the FCA's skeleton argument for trial.

(4) the measure of indemnity, quantum, aggregation or issues that are only of 'individual or specific application'.[4]

4. Two groups of policyholders have been granted permission to intervene in these proceedings. These interventions should not directly affect Argenta, as they are directed at policy wordings issued by the Fourth, Sixth and Seventh Defendants (i.e. Hiscox, QBE and RSA).

B. SUMMARY

5. Only two of Argenta's policies have been included within the FCA's 'Representative Sample of Policy Wordings'.[5] Those two policy wordings provide cover for: (i) businesses that operate a guesthouse or bed and breakfast; or (ii) businesses that operate holiday homes or other self-catering accommodation. The only category within the Defendants' assumed factual scenarios[6] and the FCA's 'Assumed Facts'[7] which is relevant to Argenta is category 6 ('hotel or other holiday accommodation').

6. The BI sections of the two relevant Argenta policies are materially identical and relate primarily to loss sustained as a result of property damage. The <u>only</u> insuring clause in those policies which the FCA contends responds to claims based on Covid-19 is extension 4(d) in the BI section of each policy (**"Extension 4(d)"**) which provides cover in respect of loss sustained:[8]

> "as a result of … any occurrence of a **NOTIFIABLE HUMAN DISEASE** within a radius of 25 miles of the **PREMISES**"

7. This extension provides cover in relation to BI claims based on Covid-19 only if (and insofar as) a proximate cause of the loss is an occurrence of that disease within 25 miles of the insured premises. That is confirmed by the specific exclusion attached to this extension, which excludes any loss arising otherwise than by the 'direct' effect on the

---

[4] See para. 29.7 of the Amended Particulars of Claim **[A/2/23]**.

[5] **[B/1/4]**.

[6] See appendix 1 to this skeleton argument.

[7] **[A/4/12].**

[8] **[B/3/59]**.

insured premises of an occurrence of Covid-19 within 25 miles (see paragraph 17 below).

8. The Argenta policies which are the subject of these proceedings raise only very limited issues. As *MacGillivray* puts it: "*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*".[9] The FCA at times appears to suggest that the insured peril covered by Extension 4(d) is a notifiable infectious disease *per se*.[10] That is not correct. The sole insured peril identified in Extension 4(d) in the Argenta policies is an occurrence of a notifiable infectious disease *within 25 miles of the insured premises* (as the FCA accepts[11]). Save in a 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.

9. In summary, for the reasons set out below, the Argenta policies do not respond to the vast majority of BI claims based on Covid-19:

   (1) The global or national Covid-19 pandemic is likely to have caused a 'local'[12] occurrence of that disease within 25 miles of many insured premises by a relevant date, but the converse of this proposition is not true; it is obvious that any given local occurrence in the UK (i.e. the insured peril) did not cause the pandemic, and it is common ground between Argenta and the FCA that no individual local occurrence of Covid-19 caused the advice given or restrictions imposed by the UK Government or the devolved administrations in response to the pandemic.[13]

---

9 *MacGillivray on Insurance Law* (14th ed., 2018), para. 21-001.

10 See e.g. para. 81 of the FCA's trial skeleton ("*the policies refer to matters such as … disease*"). See also para. 225 ("*The single proximate cause is the disease everywhere*").

11 ibid. para. 949.

12 The FCA objects to the use of the term 'local', on the basis that the relevant 25-mile zone is a large area (see para. 921 of the FCA's skeleton argument). However, 'local' is a relative term, and it is a convenient label for the purposes of distinguishing between occurrences of Covid-19 within the relevant 25-mile zone (i.e. the insured peril) and occurrences of that disease in other parts of the UK or in other countries (which do not form any part of the insured peril). The FCA unfairly traduces Argenta's Defence and Counterclaim in this respect, which is explicit that this is the only sense in which 'local' is being used at paragraphs 17, 20, 51(1), 63(6) and 67(6).

13 See para. 52 of the FCA's Reply **[A/14/27]**.

(2) Accordingly, in almost all cases, a local occurrence of Covid-19 is not part of the causal chain leading to any policyholder's loss. For such cases, Argenta's case 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) does not feature anywhere on the causal chain between the Covid-19 pandemic and the policyholder's loss.

(3) The FCA has stated that the pandemic is "*<u>no more than</u> an aggregate of local occurrences of COVID-19 throughout the UK*".[14] The FCA asserts that, as a result, the local occurrences and the pandemic cannot be separated, and must be viewed as one and the same.[15] That approach is inappropriate:

(a) First, it is false as a matter of fact and common sense. In whatever way one might define the global pandemic of Covid-19, it would not be as an aggregate of local occurrences in the UK on or before the date when a given policyholder suffers loss. It plainly is something "*more*" than that, because the local occurrences have a common cause in the virus itself, its propensity to spread and the fact that it has spread all over the world including – but not limited to – the UK. Extension 4(d) clearly does not provide cover for loss caused by occurrences of Covid-19 in other countries, regardless of whether or not there has *also* been an occurrence of the same disease within 25 miles of the policyholder's premises. The cover is limited to loss proximately caused by the local occurrence(s). 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 (more than 25 miles from the policyholder's premises).

(b) Secondly, the FCA's approach is inconsistent with its concession that the pandemic caused the local occurrences of Covid-19;[16] that concession makes it clear that the FCA itself recognises that there is a distinction between: (i) local occurrences of Covid-19 (within 25 miles of the insured

---

14 ibid (emphasis added).

15 See paras 53-54 of the Amended Particulars of Claim **[A/2/35]**. See also paras 215.2 and 941-942 of the FCA's trial skeleton.

16 See para. 58.1 of the FCA's Reply **[A/14/29]**.

premises); and (ii) the "*underlying cause*" of those local occurrences (i.e. the global or national pandemic).

(c) Thirdly, even if it is accepted that as well as causing local occurrences, the pandemic also 'comprises' those same occurrences,[17] the fallacy in the FCA's approach is exposed at paragraph 941 of its skeleton argument. The FCA states that the "*pandemic is comprised of them*", where "*them*" denotes "*occurrences within 25 miles of different premises*." On this hypothesis, the pandemic both causes and comprises of occurrences all over the world, many of which, no doubt, are within 25 miles of "*different premises*". But the Argenta policies insure one particular Premises (or set of Premises), not all of the "*different premises*" that might be found anywhere in the world.

(d) Fourthly, the language of Extension 4(d) expressly requires one to draw a distinction between the pandemic and local occurrences of the disease. Extension 4(d) clearly identifies the insured peril as a local occurrence of an infectious disease (within 25 miles of the insured premises) – not as an "*underlying cause*" of that local occurrence (such as the global or national pandemic), nor occurrences of the disease in other locations, or the response of the UK Government and/or the public to the pandemic. Notwithstanding the FCA's own recognition of the distinction referred to above, the FCA simultaneously appears to suggest that this distinction is 'unrealistic'.[18] That assertion is incorrect (an individual occurrence of a disease is clearly an identifiable event), but it is in any event irrelevant given that the parties expressly identified the insured peril as an occurrence of an infectious disease within a specified locality (i.e. within 25 miles),[19] rather than as an infectious disease *per se* or a pandemic.

(4) Argenta has always accepted that there may be a small number of cases where loss *has* been caused by a local occurrence of Covid-19 (for example, where a

---

17 Whether this is right depends on precisely what is meant by "*the pandemic*". A scientist would give a quite different answer to the question 'of what does the pandemic comprise?' from the one given by the FCA.

18 See para. 183.2 of the FCA's trial skeleton.

19 The FCA accepts that the insured peril is limited in this way: see para. 949 of the FCA's trial skeleton.

guesthouse closed because the owner, or a customer staying there, contracted Covid-19[20]). However, in all other cases the loss sustained by Argenta's policyholders is attributable to other causes, such as:

(a) the global or national Covid-19 pandemic;

(b) the advice given by the UK Government (and other public authorities) in response to that pandemic (such as the warnings against all unnecessary travel, and the advice to practise 'social distancing');

(c) the mandatory restrictions imposed by the UK Government and/or the devolved administrations (such as the regulations which came into force on 26 March 2020 and required all holiday accommodation in England to close, subject to very limited exceptions);

(d) the advice given and/or restrictions imposed by foreign governments in response to the pandemic, which may be relevant in relation to customers who live outside the UK;[21] and/or

(e) the public response to the pandemic (such as the significant reduction in consumer demand due to concerns about the spread of Covid-19 in public places).

(5) None of these other causes is an insured peril under the Argenta policies. That is the short answer to nearly all of the claims Argenta has received. Indeed, it appears that only a very small percentage of the claims received by Argenta identify any specific local occurrence of Covid-19 as a potential cause of any loss. Argenta is investigating the details of those exceptional claims. Insofar as the FCA suggests that Argenta has rejected 'outright' all claims under Extension

---

[20] For the avoidance of doubt, Argenta does not suggest that Extension 4(d) requires an occurrence of Covid-19 at the insured premises; that is merely the clearest example of a case in which loss may have been caused by a local occurrence.

Another example of such a case may be where a customer cancelled a booking and specifically stated that they were cancelling because of reports that there had been a number of cases of Covid-19 in a town or city near to the guesthouse (within 25 miles). Losses caused by the recent local restrictions imposed in Leicester may be a further example of such a case (see para. 56(3) below).

[21] For example, customers who live in Italy and cancelled a booking at a guesthouse in England due to travel restrictions imposed by Italian public authorities.

4(d) based on Covid-19, or that Argenta has issued 'blanket denials' of claims, this is simply not correct.[22]

10. In the minority of cases where some loss *was* caused by a local occurrence of Covid-19 (within 25 miles), all or substantially all of that loss would have been sustained by policyholders in any event (certainly after 26 March 2020), as a result of one or more of the factors noted above. In respect of these few cases, Argenta refers to the 'trends clause' in its policies (set out at paragraph 22 below), which is similar to that in other insurers' policy wordings. That 'trends clause' reflects general principles of causation, according to which an insured is only entitled to an indemnity in respect of loss that would not have been sustained but for the insured peril – no more, and no less.

11. For the purposes of applying the counterfactual scenario required by the 'but for' test (in the few Argenta cases where that is necessary), it is appropriate to ignore only the insured peril, i.e. the occurrence of Covid-19 within 25 miles of the insured premises. The Court is not required or permitted to ignore other facts, such as an underlying, or remote, cause of the insured peril (e.g. the global or national pandemic), or the other consequences of such a remote cause (such as occurrences of Covid-19 in other locations, and the response of the UK Government and the public to such occurrences).

12. Applying that 'but for' test, much of the loss suffered by Argenta's policyholders would have been suffered in any event (even in the minority of cases where a local occurrence can be said to be a proximate cause of any loss), at least as from:

    (1) 16 March 2020, when the Prime Minister advised that everyone in the UK should stop non-essential contact with others and should avoid all unnecessary travel;[23]

    (2) alternatively, 24 March 2020, when the UK Government advised all holiday accommodation in the UK to close, subject to limited exceptions;[24]

---

[22] See e.g. paras 2-5 and 1011 of the FCA's trial skeleton. Indeed, it is notable that the Argenta letter which the FCA has chosen to quote at para. 3 of its trial skeleton is not an 'outright' denial of the policyholder's claim at all; rather, that letter explained to the policyholder what he/she would need to prove in order to establish cover.

[23] See e.g. para. 47.4 of the FCA's trial skeleton.

[24] See e.g. para. 62 of the FCA's trial skeleton.

(3) alternatively, 26 March 2020, when all holiday accommodation in England[25] was required to close pursuant to national regulations imposed by the UK Government, subject to very limited exceptions.[26]

13. In respect of the very small number of cases in which a local occurrence of Covid-19 (within 25 miles) was a cause of any loss, and to the extent that such loss passes the 'but for' test, Argenta accepts that Extension 4(d) covers such loss.

C. THE ARGENTA POLICIES

14. The two Argenta policy wordings that have been included in the 'Representative Sample of Policy Wordings' are:

(1) the 'HIUA Guest House and B&B Insurance' policy wording (the **"Argenta Lead Policy"**);[27] and

(2) the 'HIUA Holiday Home and Self-Catering Accommodation' policy wording (the **"Holiday Home Policy"**).[28]

15. The BI section of these two policy wordings is materially identical,[29] and the Argenta Lead Policy has been selected as a 'lead' policy wording for the purposes of this test case. References in this skeleton argument are therefore to the latter policy.[30]

---

25 The relevant dates for policyholders whose premises are located in other parts of the UK differ: see paragraph 79 below.

26 See the limited exceptions set out in regulation 5(4) of the 26 March Regulations (as defined in paragraph 41(2) below) **[J/16/3]**.

27 **[B/3/1]**.

28 **[B/25/1]**.

29 Save that the basis of settlement clause in the Argenta Lead Policy **[B/3/60]** refers to "*the amount by which the GROSS INCOME during the INDEMNITY PERIOD falls short of the STANDARD GROSS INCOME due to the DAMAGE*", whereas the same clause in the Holiday Home Policy **[B/25/55]** refers to "*the amount by which the ACCOMMODATION CHARGES during the INDEMNITY PERIOD falls short of the STANDARD ACCOMMODATION CHARGES in consequence of the DAMAGE*".

30 Unless otherwise stated, all references to the Argenta Lead Policy below apply equally to the Holiday Home Policy (subject to the minor differences in language noted at footnote 29 above).

16. The only insuring clause in the Argenta Lead Policy which the FCA contends responds to claims based on Covid-19 is Extension 4(d), which is set out in full here for convenience:[31]

> "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** …"

17. The cover provided by Extension 4(d) is subject to the following specific exclusions (in addition to the general exclusions set out in the policy wording):[32]

> "The **COMPANY** will not be liable for
>
> …
>
> (i) for any amount in excess of £25,000
>
> (ii) for any costs incurred in the cleaning repair replacement recall or checking of the property
>
> (iii) for any loss arising from those **PREMISES** that are not directly affected by the occurrence …"

18. The FCA appears to accept that these exclusions are valid and effective.[33] The third of those exclusions is significant for the causation analysis (as noted below), as it confirms that policyholders are only entitled to an indemnity for loss directly caused by the insured peril (i.e. an occurrence of a 'Notifiable Human Disease' within 25 miles of the Premises).

19. The term 'Notifiable Human Disease' is defined in the Argenta Lead Policy as:

> "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

---

31 **[B/3/58]**.

32 **[B/3/59]**.

33 See para. 915 of the FCA's trial skeleton. See also paras 8.2(c) and 54 of the Reply **[A/14/4]**: the FCA advances no positive case that any of these exclusions are ineffective for any reason.

Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition"

20. The term 'Premises' is defined as:[34]

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

21. 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 the Argenta Lead Policy, which is also set out here in full for convenience:[35]

> "The **COMPANY** will pay as indemnity the amount of the loss sustained by the **INSURED** as follows
>
> A) in respect of the reduction in **GROSS INCOME**
>
> the amount by which the **GROSS INCOME** during the **INDEMNITY PERIOD** falls short of the **STANDARD GROSS INCOME** due to the **DAMAGE**
>
> B) In respect of additional expenses (Increase in Cost of Working)
>
> the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in **GROSS INCOME** which but for that expenditure would have taken place during the **INDEMNITY PERIOD** due to the **DAMAGE** but not exceeding the total of the amount of the reduction in **GROSS INCOME** thereby avoided had such additional expenditure not been incurred
>
> C) The additional expenditure necessarily and reasonably incurred for the provision of Alternative Accommodation for paying guests who are staying at the **PREMISES** at the time of the **DAMAGE** if this **DAMAGE** means the **PREMISES** is uninhabitable. Costs are provided up to a maximum amount of £5,000."

22. The definition of 'Standard Gross Income' contains a 'trends clause' as follows:[36]

> "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

---

34 **[B/3/13]**.

35 **[B/3/60]**.

36 **[B/3/56]**.

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**."

23. As noted further below, this 'trends clause' simply 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.

D. RELEVANT LEGAL PRINCIPLES

24. The Defendants have filed a joint skeleton argument which summarises the general legal principles concerning contractual interpretation (the **"Joint Skeleton on Contractual Interpretation"**). Argenta set outs below a number of points that are specific to the interpretation of the Argenta Lead Policy.

25. As noted in the Joint Skeleton on Contractual Interpretation, when interpreting an insurance policy (or any other contract) the Court may only take into account matters that were known or were reasonably available to both parties at the time the contract was concluded. If wider, this extends to matters that were known or were reasonably available to the class of persons to whom the contract is addressed.

26. It is relevant to this latter point that the FCA has accepted that *all* cover under the Argenta Lead Policy (and the Holiday Home Policy) was sold via authorised insurance brokers (acting on behalf of policyholders); no such policy was sold by Argenta directly to policyholders.[37] The Argenta Lead Policy is therefore to be read as addressed to authorised insurance brokers, and to individual policyholders advised by such brokers, but not to the public more generally.[38] The admissible factual background therefore includes material that was known or was reasonably available to both underwriters and insurance brokers.

27. Pursuant to the FCA's 'Insurance: Conduct of Business Sourcebook' (ICOBS), insurance brokers have a duty in all cases (at a minimum) to: (i) identify the demands and needs of prospective policyholders; and (ii) ensure that any proposed policy is

---

37 See para. 4 of Agreed Facts 9 **[C/15/2]**. See also para. 39 of the FCA's Reply **[A/14/20]**.

38 As to the addressees of the document, see, by analogy, *Pathway Finance SARL v Defendants Set Out in Annex 1 to the Claim* [2020] EWHC 1191 (Ch), paras 25-37.

consistent with those demands and needs.[39] That necessarily involves an assessment by the broker of the scope of cover provided by a proposed policy (including the relevant causal test required by the policy wording), and whether that cover is appropriate for their client.[40] As a result, even if some policyholders may have been "*unsophisticated purchasers of insurance*"[41] – as to which there is no evidence[42] – that is irrelevant to the claim against Argenta.

28. Further, it is well established that parties may be taken to have contracted against a background that includes previous decisions of the courts of the England and Wales relating to contracts with the same or similar wording.[43] Given the duties of insurance brokers referred to in paragraph 27 above, authorised insurance brokers (acting on behalf of policyholders) can be taken to have been aware of, or at least to have had available to them, general principles of causation in the context of claims made under insurance policies, and significant judgments applying those principles – including the judgment of Mr Justice Hamblen in *Orient-Express Hotels Ltd v Assucurazioni Generali SA*.[44]

29. The fact that individual policyholders may not themselves have been aware of that judgment is not relevant, given that the knowledge of the insurance brokers who acted on their behalf is to be attributed to them.[45] Furthermore, even if (which Argenta does not accept) *Orient-Express* is not a 'longstanding, established and authoritative' decision (as alleged by the FCA[46]), that judgment is over 10 years old and has been the

---

[39] See ICOBS paras 5.2.2 to 5.2.2D. See also *Eurokey Recycling Ltd v Giles Insurance Brokers Ltd* [2015] Lloyd's Rep. I.R. 225, para. 86(2) ("… *the broker will need to take reasonable steps to ascertain the nature of the client's business and its insurance needs*").

[40] An insurance broker is expected to have at least a basic knowledge of insurance law: see e.g. *Jackson & Powell on Professional Liability* (8th ed., 2016), para. 16-047.

[41] See para. 4 of the FCA's Reply **[A/14/2]**. See also para. 1 of the FCA's trial skeleton.

[42] The FCA's 'thematic review of handling insurance claims for SMEs' (see para. 8 of the FCA's skeleton argument) does not constitute evidence of the extent to which any of Argenta's policyholders have knowledge of general concepts of insurance law. In any event, that review merely stated that SMEs are "*less likely*" to be 'sophisticated' customers.

[43] *Toomey v Eagle Star Insurance Co. Ltd* [1994] 1 Lloyd's Rep. 516 at 520, per Hobhouse LJ; *Sunport Shipping Ltd v Tryg-Baltica International (UK) Ltd (The Kleovoulos of Rhodes)* [2003] 1 Lloyd's Rep 138 at paras 25-28, per Clarke LJ.

[44] [2010] Lloyd's Rep. I.R. 531.

[45] See e.g. *Bowstead & Reynolds on Agency* (21st ed., 2017), para. 8-208.

[46] See para. 40 of the FCA's Reply **[A/14/21]**. See also paras 82-83 of the FCA's trial skeleton.

subject of a significant amount of commentary and attention (including in every major insurance law textbook). The implications of the judgment in the *Orient-Express* case are set out in further detail in the Defendants' joint skeleton on causation (the **"Joint Skeleton on Causation"**). Further reference to that case is made at paragraph 76 below.

30. Insurance brokers acting on behalf of prospective policyholders can therefore be taken to have been aware of the judgment in *Orient Express*, and the fact that it suggests, for example, that policyholders can only obtain an indemnity in respect of loss that would not have been sustained but for the insured peril identified in the relevant policy wording – and that it is not sufficient for a policyholder merely to establish that both the loss and an insured peril are attributable to the same 'underlying cause' (see paragraph 76 below).

31. It should also be uncontroversial that the Argenta Lead Policy needs to be construed independently from different policies issued by other insurers. The Court must be guided by the specific language contained in each policy wording when determining the scope of cover, and the relevant causal test.

32. The FCA seems to recognise this. In its skeleton argument for the second CMC (on 26 June 2020), the FCA stated the following, in relation to a proposed application by the Seventh Defendant (RSA) to rely on an additional policy wording: "*The FCA does not understand why the selected policy wordings before the Court should be construed in light of other policy wordings which have different insuring triggers and different provisions ... This is not likely to be of any assistance to the Court*".[47]

33. The FCA has sought to rely on the *contra proferentem* principle. As noted in the Joint Skeleton on Contractual Interpretation, insofar as that principle still exists it is rarely of any significance. In any event, it has no application to the FCA's claim concerning the scope and/or effect of Extension 4(d). The *contra proferentem* principle applies only if there is ambiguity in the relevant contractual provisions.[48] There is no ambiguity as to the insured peril identified in Extension 4(d), which is expressly stated to be an

---

[47] See para. 37 of the FCA's main skeleton argument for the second CMC **[F/17/12]**. See also para. 2 of the FCA's trial skeleton ("*… other policies are not an aid to construction of the Wordings which are the subject of the test case*").

[48] See *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2017] A.C. 73 at para. 6 **[J/132/7]**.

occurrence of Covid-19 within 25 miles (as the FCA accepts[49]). There is also no ambiguity in the third specific exclusion attached to Extension 4(d), or the 'trends clause' in the definition of 'Standard Gross Income', which make it clear that the policyholder is only entitled to an indemnity insofar as the relevant insured peril is both a proximate cause of the loss and insofar as the loss would not have been sustained in any event.

34. The Joint Skeleton on Causation sets out the general principles governing causation in the context of insurance claims. In summary, Argenta relies on the following general propositions, which are well established and should be uncontroversial:

(1) The legal (or 'persuasive') burden of proof is at all times on the policyholder to establish that the loss claimed has been caused by a peril for which the policy provides cover.[50]

(2) The words "*as a result of*" require the insured peril to be a proximate cause of the loss. This appears to be common ground, although the FCA has avoided stating this expressly. As noted in *Cultural Foundation v Beazley Furlonge Ltd*: "*The starting point is that an insurer is liable only for losses proximately caused by the peril covered by the policy*".[51]

(3) A proximate cause is a dominant or effective cause of the loss (which is to be identified by applying common sense[52]).

(4) Even in the absence of an express reference in the policy wording, the requirement for proximate causation requires an assessment of what would have happened to the policyholder 'but for' the insured peril.[53] If all or some of the

[49] See para. 949 of the FCA's trial skeleton.

[50] See e.g. *Rhesa Shipping Co. SA v Edmunds (The Popi M)* [1983] 2 Lloyd's Rep. 235 at 244. See also *MacGillivray on Insurance Law* (14th ed., 2018), para. 21-006.

[51] [2019] Lloyd's Rep. I.R. 12 at para. 171. See also *McGillivray on Insurance Law* (14th ed., 2018), para. 21-001.

[52] See *ENE 1 Kos Ltd v Petroleo Brasileiro SA ('The Kos')* [2012] 2 A.C. 164 para. 74, per Lord Clarke **[J/116/16]**.

[53] See e.g. *Orient-Express Hotels Ltd v Assucurazioni Generali SA* [2010] Lloyd's Rep. I.R. 531, paras and 17 and 58 **[J/106/1]**.

loss would have been suffered in any event, then such loss will not be covered by the policy.

E. AN 'OCCURRENCE' OF COVID-19

35. There is essentially no dispute between the FCA and Argenta as to the nature of Covid-19 and what constitutes an 'occurrence' of that disease for the purposes of Extension 4(d):

(1) In relation to England, as from 5 March 2020, Covid-19 was added to the list of notifiable diseases set out in Schedule 1 to the Health Protection (Notification) Regulations 2010.[54] Argenta accepts that Covid-19 thereby became a 'Notifiable Human Disease' as defined in the Argenta Lead Policy.[55] The relevant date on which Covid-19 became a 'Notifiable Human Disease' for other parts of the UK is as follows: (i) 22 February 2020 in Scotland; (ii) 29 February 2020 in Northern Ireland; and (iii) 6 March 2020 in Wales.[56] This all appears to be common ground.[57]

(2) Further, Argenta accepts that an 'occurrence' of Covid-19 for the purposes of Extension 4(d) requires there to be at least one person within the relevant 25-mile zone on the relevant date who has contracted Covid-19 such that it is diagnosable (whether or not it has been verified by medical testing, and whether or not it is symptomatic). The evidence that will suffice to prove such an occurrence in any particular case, if the matter is disputed, is a question of fact.

36. The insured peril under Extension 4(d) of the Argenta Lead Policy is an occurrence of a 'Notifiable Human Disease' within 25 miles of the policyholder's premises (as the FCA accepts[58]); there can therefore be no cover for loss sustained <u>before</u> the disease became 'notifiable'.[59] The FCA's skeleton argument has (for the first time) suggested

---

54 S.I. 2010/659 **[J/11/1]**.

55 As a result of reg. 2(2) of the Health Protection (Notification) (Amendment) Regulations 2020 (SI 2020/237) **[J/19/1]**.

56 See paras 40 and 916 of the FCA's trial skeleton.

57 ibid. paras 124-125.

58 FCA's trial skeleton, para. 949.

59 The position is put beyond doubt by the judgment of the Hong Kong Court of Final Appeal in *New World Harbourview Hotel Co. Ltd v ACE Insurance Ltd* [2012] 1 Lloyd's Rep. I.R. 537 at para. 45 **[J/114/7]**

that it is unwilling to agree this point. The FCA now states that "*it does not in this test claim seek to establish a trigger prior to the disease becoming notifiable under the UK legislation*", but that it 'remains open' for policyholders in other 'fora' to argue that cover is "*triggered by the earlier occurrence of a disease which later becomes notifiable*".[60]

37. That is inconsistent with the suggestion elsewhere in the FCA's skeleton argument that it is "*conceded*" by the FCA that Extension 4(d) does not respond to loss sustained prior to a disease becoming notifiable.[61] In any event, it is clearly in the interests of the 'mutual objective' as defined in the Framework Agreement (i.e. achieving the "*maximum clarity possible*" for both Argenta and its policyholders[62]) for this point to be determined. Argenta will therefore seek a slightly modified version of the first declaration sought in its counterclaim (see paragraph 82(1) below).

F. THE PREVALENCE OF COVID-19 WITHIN THE UK

38. Argenta accepts that there will have been an occurrence of Covid-19 within 25 miles of many of its policyholders by at least the end of April 2020. There will, however, be some policyholders who operate holiday accommodation in rural areas to whom this proposition is not applicable. Whether or not there has been an occurrence of Covid-19 within the relevant 25-mile zone for any particular policyholder, and the date of that occurrence, is a matter for policyholder to prove in each case. It is common ground that this may be proved by reference to the best available scientific evidence at the time of the trial of a policyholder's claim, including relevant government data relating to reported cases of Covid-19. Argenta does not dispute that inferential proof may be appropriate in relation to this issue.

39. The FCA has relied on studies conducted by teams at the University of Cambridge and Imperial College London as a basis for making various assertions about the prevalence

---

(which concerned a BI claim for loss caused by the outbreak of SARS in Hong Kong in 2003). The Argenta Lead Policy contains no clause equivalent to the definition of 'notifiable disease' in RSA4, which deems a disease to be notifiable "*from its initial outbreak*" (cf. para. 127 of the FCA's trial skeleton; see the RSA4 policy wording at **[B/1/38]**).

60 FCA's trial skeleton, para. 126.

61 ibid. para. 309.

62 See recital I and clause 6.1 of the Framework Agreement **[F/1/3]**.

of Covid-19 within the UK on any given date. Whether or not the analysis contained in those studies is sufficiently reliable to support the FCA's assertions is not an issue for this test case (pursuant to the ruling made by the Court at the second CMC[63]). As to the issues concerning prevalence that *are* within the scope of this test case (such as general issues concerning methodology), Argenta adopts the submissions of the Third and Fifth Defendants (Ecclesiastical and Amlin).

G. AN 'INTERRUPTION'

40. The FCA's skeleton argument for trial contains a section seeking to explain the nature of an 'interruption'.[64] There is very little (if any) dispute between the FCA and Argenta on that issue.[65] However, the existence of an 'interruption' alone is irrelevant. That amounts to no more than identifying loss without assessing the cause of the loss. An interruption is relevant only if and insofar as it has been proximately caused by an insured peril.

41. It is relevant to distinguish between governmental advice and mandatory restrictions:

    (1) Advice and recommendations issued by the UK Government and other public authorities (such as the Prime Minister's advice on 16 March 2020 for everyone in the UK to avoid non-essential contact with others and to avoid all unnecessary travel[66]) was <u>capable</u> of causing an interruption to many businesses (including businesses operating holiday accommodation in the UK). For example, bookings at a guesthouse may well have been cancelled as a result of the Prime Minister's announcement on 16 March. However, it is not compulsory to follow the advice of public authorities, and many people chose not to do so.[67] Indeed, the assumed facts relied on by the FCA as against

---

63 See 'ruling 4' of the Court at **[A/21/3]**. See also para. 12 of the order from the first CMC **[A/20/3]**.

64 FCA's trial skeleton, paras 158ff.

65 For the avoidance of doubt, Argenta does <u>not</u> contend that the term 'interruption' in the BI section of the Argenta Lead Policy requires a "*complete cessation of business*" (cf. para. 158 of the FCA's skeleton argument). See para. 41 below. Paras 925 and 928-929 of the FCA's trial skeleton are therefore misconceived (and they ignore the clear admission contained in para. 59(2) of Argenta's Defence and Counterclaim **[A/8/15]**).

66 See e.g. the FCA's trial skeleton, para. 47.4.

67 It is nothing to the point that the advice was not expressed to be 'optional' (cf. para. 17 of the FCA's Reply **[A/14/11]**). The FCA has referred to a meeting between certain insurers and the UK Government concerning the potential impact of government advice on insurance claims (see e.g. para. 49 of the FCA's

Argenta are based on individuals *not* following the guidance issued by the UK Government on 16 March 2020 (i.e. that bookings continued unaffected until 26 March).[68] Whether or not that government advice did in fact cause an interruption to any particular business (and, if so, on what date, and to what extent) is a question of fact to be determined in each case.

(2) Mandatory restrictions fall into a different category, for obvious reasons. Argenta therefore accepts the following:

(a) The mandatory restrictions imposed in England on 21 March 2020 (the **"21 March Regulations"**)[69] prohibited guesthouses and other holiday accommodation operating bars and restaurants. Those regulations were likely[70] to have caused an 'interruption' to the business of policyholders located in England, but only insofar as those policyholders operated a bar and/or restaurant in their accommodation and only insofar as such business was otherwise continuing.

(b) The mandatory restrictions imposed in England on 26 March 2020 (the **"26 March Regulations"**)[71] required all guesthouses and other holiday accommodation to close, subject to very limited exceptions.[72] Argenta has already admitted that those regulations did in fact cause an 'interruption' to the business of policyholders located in England insofar as such business was otherwise continuing (and insofar as bookings did not fall

---

trial skeleton) but that is irrelevant to the claim against Argenta, which was not involved in (or represented during) that meeting or any relevant discussions with the UK Government (see Argenta's Defence and Counterclaim, para. 42 **[A/8/10]**).

68 See p.300 of the FCA's trial skeleton.

69 See the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (S.I. 2020/327), which came into force on 21 March 2020 **[J/15/1]**.

70 It is possible that there was no such interruption in particular cases: for example, where a guesthouse operated a restaurant only for use by guests, and the guesthouse provided all meals by way of room service after 21 March 2020 (as permitted by regulation 2(2) of the 21 March Regulations) **[J/15/2]**.

71 See the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (S.I. 2020/350), which came into force on 26 March 2020 **[J/16/1]**. See also para. 64 of the FCA's trial skeleton.

72 See the limited exceptions in regulation 5(4) of the 26 March Regulations **[J/16/3]**.

within any of the exceptions).[73] It is noted that the FCA has chosen to ignore this admission in its skeleton argument.[74]

(c) The equivalent regulations in Wales and Scotland (which came into force on 26 March) and Northern Ireland (which came into force on 28 March) also required all guesthouses and other holiday accommodation in those parts of the UK to close, subject to very limited exceptions. Those regulations also caused an 'interruption' to the business of policyholders located in those parts of the UK respectively, insofar as such business was otherwise continuing.

42. As explained below, however, the existence of such an 'interruption' is irrelevant to coverage under the Argenta Lead Policy, because such interruption (insofar as it was a result of the governmental advice and/or restrictions referred to above) was not caused by the insured peril in Extension 4(d).

H. CAUSATION

43. The general legal principles concerning causation are set out in the Joint Skeleton on Causation. The remainder of this skeleton argument seeks to apply those general principles to the specific wording contained in the Argenta Lead Policy.

i. The relevant causal test

44. The extensions in the BI section of the Argenta Lead Policy, including Extension 4(d), provide cover for loss sustained through business interruption "*as a result of*" a number of specific insured perils. In order to make a successful claim under any of those extensions, a policyholder is required to demonstrate that an identified insured peril is a proximate cause of the loss claimed. This appears to be common ground.

45. As stated above, the only insured peril identified in Extension 4(d) for the purposes of these proceedings is "*any occurrence of [Covid-19] within a radius of 25 miles of the **PREMISES***". The insured peril is <u>not</u> a global or national pandemic, or a notifiable disease as such. That the FCA disregards this fundamental point is evident from the

---

[73] See para. 59(2) of Argenta's Defence and Counterclaim **[A/8/15]**.

[74] See e.g. paras 923-928 of the FCA's trial skeleton.

following statement in its skeleton argument for trial: "*The single proximate cause [of the loss] is the disease everywhere and the Government and human responses to it*".[75] That entirely ignores the fact that (even on the FCA's own case[76]) none of those matters is an insured peril under Extension 4(d). Rather, the insured peril is expressly stated to be the occurrence of a notifiable disease in a particular locality, namely within 25 miles of the policyholder's premises.[77]

46. The FCA contends that the 25-mile limit in Extension 4(d) serves a limited function; the FCA asserts that the Argenta Lead Policy "*provide[s] cover for losses caused by a disease ... occurring over a wide area providing it was not solely remote but instead (as in the case of COVID-19) extended in its manifestation to the specified locale as well as its occurrence further afield*".[78] However, that ignores the fact that the only insured peril within the scope of Extension 4(d) is a local occurrence of an infectious disease. As noted at paragraph 9(3) above, Extension 4(d) does not provide cover for loss caused by measures taken by the UK Government in response to occurrences of Covid-19 in other parts of the UK (i.e. outside the relevant 25-mile zone), or the response of the public to such occurrences.

47. This is demonstrated by the fact that, on the FCA's case, there is essentially no difference in the scope of coverage between policies which identify the insured peril as: (i) an occurrence of an infectious disease within 1 mile; (ii) an occurrence of an infectious disease within 25 miles; and (iii) certain public authority action due to an 'emergency' likely to endanger life. That cannot be right, given that the specified insured perils are clearly different, and the policies will have been priced accordingly.

48. Argenta agrees that if there is a local occurrence of the disease (within 25 miles of the insured property), a policyholder can recover loss directly caused by that local occurrence regardless of:

---

75 FCA's trial skeleton, para. 225

76 ibid. para. 949.

77 The definition of "*within*" in the *New Oxford English Dictionary* includes "*not further off than*". In other words, occurrences of Covid-19 in other geographical locations (i.e. further than 25 miles from the policyholder's premises) are not an insured peril under Extension 4(d).

78 See e.g. para. 4.5 of the Amended Particulars of Claim **[A/2/5]**.

(1) whether there are *also* widespread occurrences of the disease in other locations;[79] 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.

49. However, contrary to the FCA's position, the Argenta Lead Policy does not provide BI cover for loss caused by occurrences of Covid-19 in any <u>other</u> geographical location(s) (i.e. locations outside the relevant 25-mile zone), or the response of the UK Government (or any other public authority) to the pandemic. In all cases, the policyholder must establish that the loss claimed has been sustained "*as a result of*" the occurrence of Covid-19 within the relevant 25-mile zone, rather than as a result of any uninsured/excluded cause (such as any of the factors noted in paragraph 9(4) above).

50. Insofar as any loss has been caused by advice given and/or restrictions imposed by the UK Government (or the devolved administrations) in response to the Covid-19 pandemic (such as the measures referred to in paragraph 41 above), such loss has not been sustained "*as a result of*" an occurrence of Covid-19 within 25 miles of the policyholder's insured premises. Rather, such loss has been sustained "*as a result of*" national measures taken to combat a global or national pandemic, and/or the public response to the global or national pandemic. That is not sufficient to bring such loss within the scope of Extension 4(d).

51. The pandemic may be the cause of local occurrences of the disease (as the FCA accepts[80]). But there is no suggestion that any individual local occurrence in the UK caused the pandemic. There is therefore no basis on which a single local occurrence can be treated as a cause of the pandemic, or of the response of the UK Government (or

---

79 Para. 144(2) of the skeleton argument of the 'HIGA' interveners (which suggests that it would be 'nonsense' if occurrences of Covid-19 outside the relevant policy area would deprive the insured of cover that might otherwise exist) is therefore irrelevant as applied to the Argenta Lead Policy. That paragraph clearly does not reflect the position adopted by Argenta (nor is it intended to). The statement in para. 81 of the FCA's trial skeleton that there is no provision in the Argenta Lead Policy stating "*that cover will be lost by widespread ... disease*" is, for the same reason, equally irrelevant. See to similar effect para. 215.2 of the FCA's trial skeleton.

80 See para. 58.1 of the FCA's Reply **[A/14/29]**. It is notable that the FCA has now sought to resile from that concession: see para. 941 of its trial skeleton.

any other public authority) or consumers to the pandemic.[81] Indeed, this is common ground between the FCA and Argenta.[82] All of these things have a common cause in the pandemic itself, but not in the occurrence of cases within a specific locality. Having accepted that the national restrictions imposed by the UK Government were not caused "*by any particular local occurrence of COVID-19*",[83] it is not open to the FCA now to assert (with no evidential basis) that "*the outbreak in each locality made its own concurrent causative contribution*" to those national restrictions.[84] In any event, this ignores the effect of the specific exclusion attached to Extension 4(d) (see paragraphs 60 to 65 below).

52. The relevant causal chains are as follows:

(1) There is a global or national pandemic (Event A).

(2) That pandemic (Event A) – i.e. widespread occurrences of Covid-19 across the country, and the rest of the world – caused the UK Government and the devolved administrations to:

(a) issue advice (e.g. on 16 March 2020) warning everyone in the UK against non-essential contact with others and advising everyone to avoid all unnecessary travel (Event B); and

(b) impose mandatory restrictions (e.g. on 26 March 2020 in England) requiring all guesthouses and other holiday accommodation to close, and prohibiting all unnecessary travel (Event C).

(3) The pandemic (Event A), and possibly also the UK Government's response to it (Events B and C), also caused public concern in the UK and elsewhere about

---

81 The FCA suggests that the logical conclusion of this is that "*no occurrences anywhere*" caused the UK Government's response to the pandemic (see para. 942 of the FCA's skeleton argument). That is not correct, and in any event that result would merely reflect the FCA's decision not to adduce any evidence as to which specific occurrences caused the Government to issue advice and impose restrictions.

82 See the FCA's Reply. para. 52 **[A/14/27]**.

83 ibid.

84 See para. 215.2(b) of the FCA's trial skeleton.

the spread of Covid-19 in public places, with the result that there was reduced demand for holiday accommodation in the UK (Event D).

(4) In addition, the pandemic (Event A) also caused, at least in most cases, local occurrences of Covid-19 within 25 miles of the insured property (Event E).

53. The fallacy of the FCA's case is that it treats all of the above (Events A, B, C, D and E) as insured perils. However, as the FCA itself accepts,[85] the only insured peril covered by Extension 4(d) is Event E. In almost all cases, the loss sustained by policyholders has been caused by Events A, B, C, and/or D. The loss has not been caused by Event E (the relevant local occurrence(s)).

54. Whilst those local occurrences are a consequence of the pandemic, there is no evidence that any specific local occurrence caused either: (i) the pandemic (Event A); or (ii) the governmental or public response to it (Events B, C and D). In other words, in almost all cases the local occurrence of Covid-19 (Event E) is not any kind of cause – still less a proximate cause – of the loss sustained by policyholders. Event E is simply not on the causal chain at all.

55. Indeed, the FCA accepts that the pandemic (Event A) caused the local occurrences (Event E),[86] not *vice versa*. There is no principled or evidential basis on which to attribute the national restrictions (or the advice given by the UK Government) to any particular local occurrence(s).[87] Accordingly, the fact that loss may have been sustained by policyholders as a result of those national restrictions (or the Government's advice) is clearly not sufficient to bring that loss within the scope of Extension 4(d) – which identifies the insured peril as an occurrence of Covid-19 within 25 miles of the insured premises.

---

[85] ibid. para. 949.

[86] See para. 58.1 of the FCA's Reply **[A/14/29]**.

[87] The position is therefore equivalent to the hypothetical example given by the FCA in para. 59 of its Reply **[A/14/31]**, which the FCA appears to accept would not give rise to an indemnity under Extension 4(d): "*It is also admitted that if there was no incidence of a disease in a particular part of the country at the time of any Government action, that Government action could not be causally attributed to any subsequent incidence of the disease in that part of the country*". This concession exposes the flaw in the FCA's case, especially if one replaces the words 'particular part of the country' with 'specific locality'.

56. However, Argenta accepts that there may be cases where that insured peril *has* caused some loss:

(1) For example, there may be cases where customers cancelled bookings at the relevant accommodation prior to 16 March 2020[88] 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 March 2020 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) Argenta also accepts that targeted, local restrictions, such as the recent restrictions imposed in Leicester[89] (which Argenta understands were imposed in response to a surge in Covid-19 cases in that city), 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 Leicester).[90] Consideration of this type of 'local lockdown', confirms that loss caused by the <u>national</u> restrictions imposed by the UK Government is not covered by Extension 4(d).

---

88 When the UK Government advised everyone to avoid non-essential contact with others and to avoid all unnecessary travel (see e.g. para. 47.4 and 927 of the FCA's trial skeleton).

89 See reg. 4(3) and (4) of the Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020, S.I. 2020/685 (the **"Leicester Regulations"**).

90 Whether the Argenta Lead Policy responds in such cases will depend on the precise reasons for which the local restrictions were imposed. If the Leicester Regulations were imposed as a result of occurrences of Covid-19 within 25 miles of a policyholder's premises, that policyholder would, in principle, have a valid claim in respect of loss proximately caused by those regulations (subject to the application of the 'but for' test). However, if the Leicester Regulations were imposed as a result of occurrences of Covid-19 in a wider area or in the UK generally, Extension 4(d) will not respond.

57. In such cases, and subject to the application of the 'but for' test (see paragraphs 67 to 77 below), Argenta accepts that the Argenta Lead Policy provides cover. The FCA's assertion that Argenta's position would render the cover provided by Extension 4(d) 'illusory'[91] is therefore incorrect. Furthermore, that assertion ignores the fact that Extension 4(d) would apply to loss caused by local occurrences of an infectious disease for which no national restrictions are adopted – which is likely to be what was contemplated by the parties when the policies were concluded, given the unprecedented nature of the UK Government's response to Covid-19.

58. However, save in the aforesaid cases, which represent a tiny proportion of the Covid-19 BI claims received by Argenta, a local occurrence of Covid-19 is not even on the causal chain. In all cases other than those noted above the proximate causes of the loss include:

(1) the global or national Covid-19 pandemic;

(2) the advice given and/or restrictions imposed by the UK Government (and/or the devolved administrations) in response to the pandemic; and/or

(3) the advice given and/or restrictions imposed by foreign governments in response to the pandemic (in relation to customers who live outside the UK); and/or

(4) the public response to occurrences of Covid-19 in the UK and elsewhere.

59. Extension 4(d) provides cover only for loss sustained "*as a result of*" a specific insured peril, namely a local occurrence of an infectious disease (within 25 miles of the policyholder's premises); it does not provide cover for loss sustained "*as a result of*" any of the other causes listed above.

ii. The Exclusion

60. The FCA has relied on the fact that the Argenta Lead Policy does not include an exclusion for loss caused by a 'pandemic'.[92] Such an exclusion is unnecessary, because

---

[91] See e.g. para. 58.3 of the FCA's Reply **[A/14/30]**.

[92] See paragraphs 4.2 and 33 of the Amended Particulars of Claim **[A/2/4]**, and para. 42 of the Reply **[A/14/22]**. The FCA relies on the presence of exclusions relating to pandemics elsewhere in policies issues

the policy wording provides cover only for specific insured perils – which do not include a global or national pandemic. Moreover, the FCA accepts that BI policies do not generally provide cover for loss caused by 'pandemics'.[93] The absence of an exclusion for 'pandemics' is therefore unsurprising.

61. In any event, there is a specific exclusion attached to Extension 4(d), which expressly excludes any loss arising from premises that are "*not directly affected*" by the occurrence of Covid-19 within 25 miles, i.e. the local occurrence of that disease. In other words, loss that is not directly[94] caused by a local occurrence of Covid-19 (such as loss caused by the wider global or national Covid-19 pandemic and/or governmental responses to that pandemic and/or the public response to that pandemic) is not covered by Extension 4(d). The FCA accepts (as it must) that this clause excludes loss that is not, at least in part, caused directly by a local occurrence of Covid-19 (within 25 miles of the premises).[95]

62. Any suggestion by the FCA that this exclusion should be read narrowly is misconceived;[96] this exclusion, together with Extension 4(d) to which it is attached, defines the scope of cover provided by the Argenta Lead Policy – it does not exclude or limit a liability that would otherwise arise by operation of law.[97] The exclusion is also unambiguous; it confirms in clear terms that Extension 4(d) only provides cover for losses that are proximately caused by an occurrence of Covid-19 within 25 miles of the policyholder's premises.[98]

---

by other Defendants (Hiscox and Zurich) (see e.g. para. 184 of the FCA's trial skeleton). There is, however, no such exclusion in any part of the Argenta Lead Policy.

93 See para. 41 of the FCA's Reply **[A/14/21]**.

94 The FCA accepts that this word is a synonym for proximate causation (see para. 325.1 of the FCA's trial skeleton).

95 ibid, para. 54 **[A/14/27]**. See also para. 934 of the FCA's trial skeleton. Argenta denies that loss caused by, for example, the advice given and/or restrictions imposed by the UK Government in response to the pandemic is loss arising from premises that were 'directly affected' by the insured peril (i.e. an occurrence of Covid-19 within 25 miles).

96 Cf. paras 88-91 of the FCA's trial skeleton.

97 See *Impact Funding Solutions Ltd v Barrington Support Services Ltd* [2017] A.C. 73 at paras 7 and 35-36 **[J/132/7]**.

98 If (which Argenta does not accept) *all* occurrences of Covid-19 in the UK – including at least one occurrence within 25 miles of each policyholder's premises prior to the relevant date – are somehow to be treated as concurrent causes of the UK Government's advice and/or the national restrictions (see para. 241 of the FCA's trial skeleton) – notwithstanding the absence of any evidential basis for that assertion, and despite the FCA's concession in para. 52 of the Reply **[A/14/27]** – then only the occurrence(s) *within* the

63. The FCA's interpretation of this exclusion clause is revealing. If bookings at a guesthouse were cancelled as a result of the national measures adopted by the UK Government, rather than as a result of an occurrence of Covid-19 within 25 miles of the accommodation, the position is essentially the same as the example given by the FCA in paragraph 54 of its Reply.[99] In that paragraph, the FCA refers to a hypothetical business that closes *all* of its holiday cottages because of an occurrence of an infectious disease at only one of them. The FCA appears to concede that loss arising from the closure of 'cottage A' would not be covered by Extension 4(d) if that closure is a result of an occurrence of a disease at 'cottage B' more than 25 miles away; in that example, 'cottage A' is not "*directly affected*" by that occurrence. Equally, loss arising from the closure of 'cottage A' would not be covered by Extension 4(d) if that closure was caused by occurrences of Covid-19 in another part of the country; again, 'cottage A' is not "*directly affected*" by those occurrences and the exclusion applies.

64. For the avoidance of doubt, Argenta does not contend that this exclusion clause removes cover if losses have been proximately caused by an occurrence of Covid-19 within the relevant 25-mile zone and there are *also* occurrences of the disease outside that zone.[100] As stated at paragraph 48 above, Argenta accepts that Extension 4(d) would respond in such a case, subject to the application of the 'but for' test (see paragraphs 67 to 77 below).

65. As such, Argenta accepts that the Argenta Lead Policy *does* cover loss ultimately caused by a pandemic to some extent; the policy covers loss directly caused by a local occurrence of a notifiable disease, even if that local occurrence was in turn caused by a wider outbreak (and even if that wider outbreak could be characterised as a 'pandemic'). For this reason, an exclusion relating to 'pandemics' would narrow the cover beyond that for which Argenta contends in these proceedings. That demonstrates that the omission of such an exclusion is entirely consistent with Argenta's case. It is

---

25-mile zone for each policyholder are relevant; occurrences outside that zone are not merely uninsured, they are expressly excluded by this exclusion clause. As to the effect of an exclusion clause in relation to concurrent interdependent proximate causes, Argenta refers the Court to the Joint Skeleton on Causation. See *Wayne Tank and Pump Co. Ltd v Employers Liability Assurance Corp. Ltd* [1974] Q.B. 57 at 67 and 74 **[J/58/11]**.

99 **[A/14/27]**. See also para. 933 of the FCA's trial skeleton.

100 Subject to footnote 98 above.

noted that the FCA has ignored this point in both its Reply and its skeleton argument for trial.

iii. The correct counterfactual scenario

66. As explained above, the relevant insured peril (a local occurrence of Covid-19 within 25 miles) will be a proximate cause of loss suffered by the policyholder in only a small number of cases. As such, it is unnecessary to consider the correct counterfactual scenario in the vast majority of cases.

67. However, in the limited number of cases for which claims have been made where a local occurrence of Covid-19 may be said to be a proximate cause of any loss, it is likely that substantially the same loss, or at least much of it, would have been suffered in any event, regardless of that local occurrence.

68. As noted above, the definition of 'Standard Gross Income' in the Argenta Lead Policy provides as follows:[101]

> "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 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**."

69. This definition: (i) confirms that the relevant insured peril (i.e. a local occurrence of an infectious disease within 25 miles of the policyholder's premises) must be a proximate cause of any loss claimed by the policyholder; and (ii) expressly states that a policyholder is only entitled to recover an indemnity in respect of loss that would not have been suffered "*but for*" that specific insured peril.

70. That 'trends clause' is of general application to all claims under the BI section of the Argenta Lead Policy:

    (1) The term 'Damage' in that definition reflects the fact that the BI section of the Argenta Lead Policy is primarily intended to cover loss sustained through

---

101 **[B/3/56]**.

business interruption caused by property damage. However, that definition (and the 'basis of settlement' clause) applies to all cover provided in the BI section of the policy.

(2) When applied to a claim under Extension 4(d), which does not require property damage, the meaning of the term 'Damage' is the insured peril which has caused the relevant business interruption.[102]

(3) In relation to a claim based on Covid-19 made under Extension 4(d), therefore, the term 'Damage' in the definition of 'Standard Gross Income' should be read as 'an occurrence of Covid-19 within 25 miles of the Premises'. Accordingly, the 'trends clause' provides that policyholders are only entitled to an indemnity in respect of loss that would not have be sustained 'but for' an occurrence of Covid-19 within 25 miles.

71. The FCA accepts that this 'trends clause' applies to claims made under Extension 4(d).[103] It also accepts (as it must) that the insured peril in Extension 4(d) is expressly stated to be an occurrence of an infectious disease within 25 miles.[104] In the space of three paragraphs of its skeleton argument, the FCA concedes (at paragraph 947) that "*unless one proceeds on the premise that the peril in each Extension (if it does not involve Damage) is to be treated as if it was damage for the purposes of the policy, there is no indemnification provision*" but then states (at paragraph 949) "*that does not mean that DAMAGE can be replaced by something overly narrow.*"

72. Whilst the FCA appears to be suggesting that 'Damage' in the 'trends clause' should not be read simply as a reference to the relevant insured peril, it provides no coherent alternative interpretation of that clause. Instead, the FCA merely asserts that "*it cannot be intended that the counterfactual should exclude anything or everything which is inextricably tied up with those diseases*".[105] The broad phrase "*those diseases*" discloses the flawed approach: the FCA implies that national government restrictions

---

[102] This was stated in Argenta's Defence and Counterclaim at para. 26 **[A/8/7]** and has not been the subject of contradiction by the FCA.

[103] FCA's trial skeleton, para. 947.

[104] ibid. para. 949.

[105] ibid.

are "*inextricably tied up with those diseases*", whereas it could not sensibly allege that such restrictions are "*inextricably tied up with*" an occurrence of Covid-19 within 25 miles of any particular policyholder's premises. The FCA has to radically redefine what is actually covered by Extension 4(d) if it is to establish its case. This is another form of the FCA's equally fallacious argument that the pandemic and the local occurrences are one and the same, as to which Argenta refers to paragraph 9(3) above. See also paragraph 77 below.

73. In any event, the 'trends clause' merely makes explicit what would otherwise be the test applying general principles of causation, namely that an insured is only entitled to an indemnity in respect of loss that would not have been sustained but for the insured peril (as explained in the Joint Skeleton on Causation). Accordingly, the test referred to above is applicable in any event due to the requirement that an occurrence of Covid-19 within the relevant 25-mile zone must be a proximate cause of any loss claimed under Extension 4(d).

74. Applying this test, it is clear that "*but for*" the insured peril (i.e. an occurrence of Covid-19 within 25 miles of the relevant premises) policyholders would in all or almost all cases have suffered the same or substantially the same loss in any event, irrespective of any local occurrence of the disease, as a result of:

(1) the global or national Covid-19 pandemic (i.e. occurrences of Covid-19 in <u>other</u> locations);

(2) the advice given and/or the restrictions imposed by the UK Government in response to that global or national pandemic;

(3) the advice given and/or the restrictions imposed by foreign governments in response to that pandemic (in relation to customers who live outside the UK);

(4) the public response to that global or national pandemic in the UK and/or elsewhere (e.g. the significant reduction in consumer demand due to concerns about the spread of Covid-19 in public places).

75. The correct counterfactual scenario should ignore <u>only</u> the insured peril (i.e. a local occurrence of the disease). The Court is not required or permitted to ignore any other

facts or circumstances – such as an underlying or remote cause of that insured peril (e.g. the global or national pandemic), or the response of the UK Government (or any other public authority) to occurrences of Covid-19 elsewhere. As noted above, the FCA itself recognises that there is a distinction between: (i) the local occurrences of Covid-19; and (ii) the 'underlying cause' of those local occurrences (the pandemic).[106] The language in Extension 4(d) expressly requires that distinction to be drawn, because only the former (not the latter) is an insured peril.

76. This is confirmed by the *Orient-Express* case, where Mr Justice Hamblen made it clear that the appropriate counterfactual scenario should ignore only the insured peril (the damage to the insured's hotel), not the underlying cause of that peril (the hurricane) or the wider consequences of that underlying cause (the damage to *other* properties in the city).[107] The FCA seeks to adopt a counterfactual scenario in this case which disregards the policy wording and the need to identify loss caused directly by a specific insured peril, namely a local occurrence of an infectious disease within 25 miles of the policyholder's premises.

77. The FCA appears to contend that if a policy "*contemplates (expressly or impliedly)*" that an insured peril may be the result of an "*underlying cause*" (e.g. the pandemic, or a hurricane), that underlying cause should itself be treated as an insured peril – regardless of the wording of the policy.[108] That approach is self-evidently incorrect, as it ignores the language chosen by the parties to delimit the cover provided by the policy. There will *almost always* be an 'underlying cause' of an insured peril – whether that is, for example, a pandemic that causes local occurrences of a disease, a hurricane that causes damage to a specific property, or heavy rainfall that causes a flood. The fact that there is a 'underlying cause' of the insured peril does not mean that that underlying

---

106 See para. 58.1 of the FCA's Reply **[A/14/29]**.

107 *Orient-Express*, paras 46-47 and 57 **[J/106/10]**.

108 See para. 58.3 of the Reply **[A/14/30]**. See also paras 271 and 275 of the FCA's trial skeleton. This is also the effect of the argument advanced by the 'HIGA' Interveners: in para. 19(4) of their skeleton argument, they assert that policies that provide cover for loss resulting from an occurrence/manifestation of Covid-19 in a specific locality will respond "*if there is a case of Covid-19 in the relevant area and that was a part of the wider Covid-19 picture which caused the government to act as it did [i.e. the national restrictions] ... that is enough for the 'causal' link required*". As applied to Argenta, that would effectively re-write Extension 4(d) so as to remove the requirement for a local occurrence of Covid-19 (for the purposes of causation), and instead treats the 'underlying cause' (i.e. the pandemic) as the insured peril. That plainly does not reflect the policy wording.

cause should itself be treated as an insured peril for the purpose of the counterfactual, especially where that would be inconsistent with the language chosen by the parties to define the scope of the insurance cover.

iv. Limits to cover

78. In summary, in almost all cases the relevant insured peril (an occurrence of Covid-19 within 25 miles of the insured premises) is not even on the causal chain. For those cases, that is a complete answer to the FCA's claim.

79. In any event, there are certain clear limits to the cover provided by Extension 4(d):

(1) If and insofar as Extension 4(d) does respond to any claims based on Covid-19, a policyholder whose premises are located in England can recover only in respect of loss sustained **on or after 5 March 2020**, when Covid-19 became a 'Notifiable Human Disease'. Loss sustained before that date cannot on any view be covered. For policyholders in other parts of the UK, the equivalent date is: (i) 22 February 2020 in Scotland; (ii) 29 February 2020 in Northern Ireland; and (iii) 6 March 2020 in Wales.

(2) Extension 4(d) does not provide cover for any loss that would have been sustained in any event as a result of anyone complying with the UK Government's advice given on: (i) **16 March 2020** (when the Prime Minister announced that everyone in the UK should stop non-essential contact with others and should avoid all unnecessary travel[109]); or (ii) **24 March 2020** (when the UK Government advised that all category 6 businesses in the UK should "*remain closed for leisure related stays*").[110] That loss would have been sustained in any event, regardless of the local occurrence.

(3) Extension 4(d) does not provide cover for any loss based on Covid-19 sustained by policyholders in England, Wales and Scotland after **26 March 2020**,[111] when

---

109 See e.g. para. 47.4 of the FCA's trial skeleton.

110 See e.g. para. 62 of the FCA's trial skeleton.

111 See e.g. reg. 5(3) of the 26 March Regulations **[J/16/3]**. Save insofar as the policyholder is able to prove that an occurrence of Covid-19 within 25 miles of their premises has prevented them earning revenue after 26 March 2020 by providing accommodation to any individuals within the exceptions set out in regulation 5(4) of the 26 March Regulations **[J/16/3]**.

businesses providing holiday accommodation in those parts of the UK were required to close their premises (subject to the very limited exceptions) – because such loss would have been sustained in any event. The equivalent date for policyholders in Northern Ireland is 28 March 2020.

(4) Accordingly, even if there is any recoverable loss, for policyholders in England that is likely to be limited to loss sustained in the period from **5 to 16 March** (alternatively **5 to 24 or 26 March**). As noted above, these dates will differ for policyholders in other parts of the UK.

(5) An important qualification to this is that the Argenta Lead Policy will respond in principle to BI losses caused by the more recent (or future) targeted, local restrictions imposed in Leicester (or elsewhere), in response to an increase in local Covid-19 cases,[112] for policyholders whose premises are located within 25 miles of that city – and subject to the application of the 'but for' test. As noted above, this qualification simply reinforces the fact that loss caused by the national restrictions imposed by the UK Government is not covered by Extension 4(d).

(6) The specific exclusion attached to Extension 4(d) limits any recoverable loss to a maximum of £25,000 per claim.

80. In order to illustrate how these principles apply in practice: (i) Appendix 1 to this skeleton argument includes a set of assumed facts for category 6 businesses; and (ii) Appendix 2 explains how the principles set out above apply to that set of assumed facts.

I. COUNTERCLAIM

81. For the reasons stated above, Argenta seeks the limited declarations set out below in relation to BI claims based on Covid-19 made under the Argenta Lead Policy. These declarations further the 'mutual objective' referred to in recital I to the Framework Agreement, which (as noted above) is "*to achieve the maximum clarity possible*" for

[112] Whether the Argenta Lead Policy responds in such cases will depend on the precise reasons for which the local restrictions were imposed. See footnote 90 above.

policyholders and insurers, consistent with the need for expedition and proportionately.[113]

82. The Court has discretion to grant declarations where it is in the interests of justice to do so and the declarations will serve a useful purpose.[114] In order to achieve maximum clarity in respect of the scope and effect of the Argenta Lead Policy, Argenta respectfully asks the Court to grant the following declarations:

(1) Extension 4(d) provides cover if and insofar as a proximate cause of the loss claimed by the policyholder is an occurrence of Covid-19 (after it became 'notifiable' under the applicable UK legislation) within 25 miles of the insured Premises. Extension 4(d) does not respond to loss sustained as a result of such an occurrence prior to the date on which Covid-19 became 'notifiable' in the part of the UK in which the Premises are located.

(2) Extension 4(d) is subject to a valid and applicable exclusion of any loss arising otherwise than by the direct effect on the insured Premises of the occurrence of Covid-19 within 25 miles of such Premises.

(3) Extension 4(d) is subject to a valid and applicable exclusion of any loss in excess of £25,000.

(4) Extension 4(d) does not provide cover on the basis that the proximate causes of any loss include:

(a) the Covid-19 pandemic or epidemic; and/or

(b) an occurrence (or occurrences) of Covid-19 in other locations, i.e. other than within 25 miles of the policyholder's premises; and/or

(c) the response of the UK Government (and/or the devolved administrations and/or any foreign government) to the Covid-19 pandemic or epidemic; and/or

113 **[F/1/3]**.

114 See e.g. *Financial Services Authority v Rourke* [2002] C.P. Rep. 14.

(d) the response of the public in the UK and/or elsewhere about the Covid-19 pandemic or epidemic.

(5) Extension 4(d) does not provide cover for loss that would have been sustained by a policyholder in any event but for an occurrence of Covid-19 within 25 miles of the policyholder's premises (including as a result of any of the matters stated in sub-paragraph (4) above).

83. Declarations 1 to 3 above ought to be common ground. In any event, all of the declarations above reflect the principles set out in this skeleton argument, the language used in Extension 4(d) (and the specific exclusion attached to it), and thus the objective intention of the parties when the policies were concluded.

14 July 2020

SIMON SALZEDO Q.C.
MICHAEL BOLDING

Brick Court Chambers
7-8 Essex Street
London,
WC2R 3LD
020 7379 3550

APPENDIX 1:

CATEGORY 6 ASSUMED FACTS*

<table>
<tr><td>Facts:</td><td>Business FF is a holiday lettings company with 6 short-term let holiday cottages in rural locations in England:
Cottage 1 – continued unaffected until mandated to close on 26 March 2020.
Cottage 2 – booking due to commence on 21 March 2020 was cancelled on 19 March 2020, with the customer providing no reason for cancelling.
Cottage 3 - booking due to commence on 5 March 2020 was cancelled on 3 March 2020 due to customer's suspected Covid-19.
Cottage 4 – the occupant was diagnosed as suffering from COVID-19 on 18 March 2020 and further bookings for that cottage were cancelled for the next 7 days.
Cottage 5 - booking due to commence on 18 March 2020 was cancelled on 16 March 2020, with the customer specifically citing the Government's social distancing advice.
Cottage 6 - booking due to commence on 11 March 2020 was cancelled on 9 March 2020, with the customer explaining that she lived in Italy and was prohibited by Italian regulations from travelling to the UK as a result of COVID-19.
Business FF's terms and conditions entitle customers to a full refund if they cancel more than 24 hours before the booking is due to commence. Business FF has provided refunds to the customers referred to above, and 40 customers whose bookings started on or after 24 March 2020 (until, at present, 31 May 2020) and/or were ended prematurely.

Other than at Cottage 4, there have been no confirmed cases of COVID-19 at any of Business FF's holiday cottages.</td></tr>
<tr><td>Claims:</td><td>Business FF has submitted a claim for:
Loss of revenue as a result of the cancellation/termination of bookings due to commence between 1 and 25 March 2020;</td></tr>
</table>

* This appendix differs slightly from the agreed version of this document. The minor differences are intended to help illustrate the application of the Argenta policies more clearly.

	2. Loss of revenue as a result of the cancellation/termination of bookings due to commence on or after 26 March 2020.

APPENDIX 2:

APPLICATION OF THE ARGENTA POLICIES TO THE CATEGORY 6 ASSUMED FACTS

1. This appendix seeks to apply the principles set out in Argenta's skeleton argument to the set of assumed facts for category 6 businesses contained in Appendix 1 (the **"Category 6 Assumed Facts"**).

2. This appendix is for illustrative purposes only and is subject to the content of Argenta's Defence and Counterclaim, and this skeleton argument. References to paragraph numbers below are to paragraphs of the main body of Argenta's skeleton argument.

3. The Category 6 Assumed Facts refer to 'Business FF', which operates a holiday lettings company with six short-term let holiday cottages in England. The relevant Argenta policy wording for that business would be the Argenta Holiday Home Policy. However, the same principles would apply under the Argenta Lead Policy if 'Business FF' operated a guesthouse instead (see paragraphs 14 and 15). For the purposes of the Category 6 Assumed Facts, it is to be assumed that there has been at least one occurrence of Covid-19 within 25 miles of each cottage prior to any cancellation.

4. As to the loss of revenue sustained by Business FF referred to in the Category 6 Assumed Facts:

   (1) Cottage 1: Loss of revenue from the closure of this cottage would not be covered under Extension 4(d):

      (a) an occurrence of Covid-19 within 25 miles of cottage 1 was not a proximate cause of this loss; bookings for cottage 1 were terminated due to national restrictions which required all holiday accommodation in England to close (subject to limited exceptions), i.e. the 26 March Regulations (see paragraphs 44 to 65); and

      (b) this loss would have been sustained by Business FF in any event, as a result of the 26 March Regulations (see paragraphs 67 to 77).

   (2) Cottage 2: Loss of revenue resulting from the cancellation of this booking may potentially be covered under Extension 4(d) depending on the reason for the

cancellation. However, the burden would be on Business FF to demonstrate that the cancellation was proximately caused by an occurrence of Covid-19 within 25 miles of cottage 2 (rather than being caused by, for example, the UK Government's advice concerning social distancing). Further, loss sustained after 26 March would not be covered by Extension 4(d), because that loss would have been sustained by Business FF in any event as a result of the fact that the 26 March Regulations required Business FF to close all of its holiday cottages on that date[115] (see paragraphs 67 to 77).

(3) Cottage 3: Loss of revenue resulting from the cancellation of this booking would not be covered under Extension 4(d):

(a) an occurrence of Covid-19 within 25 miles of cottage 3 was not a proximate cause of the cancellation of this booking – unless the relevant customer happened to live within 25 miles of the cottage (see paragraphs 44 to 65); and

(b) in any event this booking was cancelled before Covid-19 became a 'Notifiable Human Disease' in England for the purposes of Extension 4(d) (see paragraph 35(1));

(4) Cottage 4: Some loss of revenue caused by the cancellation of this booking would be covered by Extension 4(d), because a proximate cause of at least some of the loss was an occurrence of Covid-19 within 25 miles (i.e. the fact that a customer was diagnosed as suffering from Covid-19 whilst staying at the cottage): see paragraph 56(1). However, loss sustained after 26 March 2020 would not be covered by Extension 4(d), because that loss would have been sustained in any event as a result of the fact that the 26 March Regulations required Business FF to close all of its holiday cottages on that date[116] (see paragraphs 67 to 77).

115 Subject to the very limited exceptions set out in regulation 5(4) of the 26 March Regulations **[J/16/3]**.

116 See fn 115 above.

(5) Cottage 5: Loss of revenue resulting from the cancellation of this booking would not be covered under Extension 4(d):

(a) an occurrence of Covid-19 within 25 miles of cottage 5 was not a proximate cause of the cancellation of this booking; the cancellation was caused by the advice issued by UK Government on 16 March 2020 concerning 'social distancing' (see paragraphs 44 to 65); and

(b) this loss would have been sustained by Business FF in any event, as a result of the aforesaid advice issued by the UK Government on 16 March 2020 and/or the 26 March Regulations (see paragraphs 67 to 77).

(6) Cottage 6: Loss of revenue resulting from the cancellation of this booking would also not be covered under Extension 4(d):

(a) an occurrence of Covid-19 within 25 miles of cottage 2 was clearly not a proximate cause of the cancellation of this booking; the cancellation was caused by the Italian regulations, which is not an insured peril under Extension 4(d) (see paragraphs 44 to 65); and

(b) this loss would have been sustained by Business FF in any event, as a result of: (i) the Italian regulations; and possibly also (ii) the advice issued by the UK Government on 16 March 2020 and/or the 26 March Regulations (see paragraphs 67 to 77).

5. In summary, some of the loss caused by the cancellation of bookings for cottages 2 and 4 may be recoverable under Extension 4(d). The other cancellations would not give rise to a valid claim under Extension 4(d).

6. As to the claims submitted by Business FF

(1) '*Loss of revenue as a result of the cancellation/termination of bookings due to commence between 1 and 25 March 2020*':

(a) Business FF cannot recover any loss in respect of the cancellation/termination of bookings for the period from 1 to 4 March 2020. Covid-19 only became a 'Notifiable Human Disease' in England

for the purposes of the Argenta Holiday Home Policy on 5 March 2020 (see paragraph 35(1)).

(b) The loss of revenue sustained by Business FF in the period from 5 to 25 March 2020 would be only covered by Extension 4(d) insofar as set out in paragraph 4 above.

(2) '*Loss of revenue as a result of the cancellation/termination of bookings due to commence on or after 26 March 2020'*:

(a) It is very unlikely that any loss of revenue sustained as a result of the cancellation/termination of bookings due to commence on or after 26 March has been proximately caused by an occurrence of Covid-19 within 25 miles of any of the cottages; that loss has been caused by the fact that the 26 March Regulations required Business FF to close all of its holiday cottages on that date.[117]

(b) In any event, even if any of that loss can be said to have been proximately caused by a local occurrence of Covid-19, that loss would have been sustained in any event as a result of the 26 March Regulations. Accordingly, subject to the proviso noted below, Business FF cannot recover any loss in respect of the cancellation/termination of bookings due to commence on or after 26 March (see paragraphs 67 to 77).

(c) The proviso referred to above is that Extension 4(d) would provide cover for loss sustained after 26 March 2020 if Business FF is able to prove that an occurrence of Covid-19 within 25 miles of its holiday cottages prevented it providing accommodation to one or more persons falling within the exceptions set out in regulation 5(4) of the 26 March Regulations (e.g. a person who needed accommodation whilst moving house). However, Business FF would need to prove that (i) such individuals wished to stay at one or more of its holiday cottages after 26

---

117 Subject to the very limited exceptions set out in regulation 5(4) of the 26 March Regulations **[J/16/3]**.

March, and (ii) those individuals were unable or unwilling to do so because of a local occurrence of Covid-19 (within 25 miles).