Claim No: FL-2020-000018

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

Between:

THE FINANCIAL CONDUCT AUTHORITY

Claimant

– and –

(1) ARCH INSURANCE (UK) LIMITED

(2) ARGENTA SYNDICATE MANAGEMENT LIMITED

(3) ECCLESIASTICAL INSURANCE OFFICE PLC

(4) HISCOX INSURANCE COMPANY LIMITED

(5) MS AMLIN UNDERWRITING LIMITED

(6) QBE UK LIMITED

(7) ROYAL & SUN ALLIANCE INSURANCE PLC

(8) ZURICH INSURANCE PLC

Defendants

OPENING SUBMISSIONS
OF THE THIRD AND FIFTH DEFENDANTS

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INTRODUCTION

1. The last four months have brought death and illness through Covid-19 to an alarmingly large number of people, each death a personal tragedy, each illness a personal affliction. The same disease has brought suffering and anxiety to very many more.

2. While loss of money bears no comparison with loss of life, the severity of the economic damage has itself been terrible. Almost no sector of the national economy has been immune. Many businesses and their owners have suffered severely, and through no fault of their own. Many individuals have invested time, money and effort, often over many years, into building a business for themselves and their families. For many, the immediate past and the uncertainty of the immediate future present the most serious of challenges. For others, they represent a catastrophe.

3. Nothing in these outline submissions is intended to deny or minimise that reality. Both Ecclesiastical Insurance Office PLC ("**EIO**") and MS Amlin Underwriting Limited ("**MSA**"), on whose behalf these submissions are served, are acutely conscious of the impact of the last four months on their insureds.

4. EIO and MSA recognise that many businesses which purchased policies of insurance now look to their insurers to pay. Some will say that, having paid a premium for some form of business interruption cover and then having suffered some form of business interruption loss, their insurers ought to pay. Others will simply suggest that insurers covering business interruption should "*do the right thing*".

5. This case is not, however, about providing sympathy to SME businesses (or charities or churches) for their economic sufferings of the past or for what they may suffer economically in the future. Nor is it about who deserves more sympathy as between

the Insurer Defendants and their Insureds. The FCA does not suggest (nor could it) that these are the issues which can concern the Court.

6. This case is about doing justice as between insureds and insurers on the terms of the policies that the former purchased and the latter sold. As Lord Sumption has said,

> "…it goes without saying that insurers are as much entitled to justice as mesothelioma victims."[1]

7. Lord Sumption's statement is as true of business interruption insurers and their SME insureds as it was in the context in which he said it.

8. Shortly stated, the real issue in this case – and the only real issue – is this:

> **whether EIO and MSA are, by reason of their respective policy wordings and general principles of law, obliged to indemnify their insureds for losses assumed to have been suffered in recent months and which, assumedly, might be suffered in the future.**

9. This issue, so far as it affects EIO and MSA, turns on the wording of EIO's and MSA's relevant policies and the general law. The Insureds are entitled to the cover they purchased, and EIO and MSA must abide by the terms of the cover they provided. But the Insureds are not entitled to cover they did not purchase, and EIO / MSA are not bound by promises they never made. The question is: what risks did EIO and MSA promise to insure? And what (if any) loss did those insured risks cause?

10. There will be no reason for surprise if the Court were to conclude that EIO's and MSA's policies do not respond to what has happened in the last four months. It is not the case that EIO and MSA are refusing to pay claims which all their competitors in the market

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1 *International Energy Group Ltd v. Zurich Insurance PLC* [2015] UKSC 33; [2016] AC 509 at 565E, [114] **{K/158}**.

are accepting and paying; and the FCA has publicly stated that most SME business interruption insurance policies do not respond at all.[2]

11. The position of each of EIO and MSA falls, therefore, to be judged with reference to their wordings, and their wordings alone. The purpose of these proceedings is to achieve some degree of legal certainty over (i) the scope of cover under the wordings presented to the Court for its consideration, and (ii) the general questions of causation.

12. EIO and MSA welcome the opportunity for legal certainty to be achieved for the benefit of all concerned.

INTRODUCTORY POINTS REGARDING EIO'S AND MSA'S POLICIES OF INSURANCE

13. A number of simple (even obvious) points need to be made, laying the basic foundation on which the detail of the case is then built.

14. First, **the Court is not dealing with consumer insurance but with business insurance**.

    14.1 This point is worth emphasising, because the claim is brought by the FCA, not by insureds themselves. It is tempting for the FCA to portray itself as coming to the rescue of helpless insureds, but that would be an inappropriate portrayal.

    14.2 EIO's and MSA's insureds are businesses (or, in the case of EIO, sometimes charities or churches). They might (or might not) be SMEs within the jurisdiction

[2] Brewis WS paragraph 7 **{F/2/3}**.

of the FOS,[3] but they are businesses nonetheless. The policies in question were purchased by businesses in order to protect businesses.

14.3 Such policies are often purchased through brokers, to whom the insureds will have looked for professional advice and guidance about the most suitable product for their needs.

14.4 The FCA seeks to contend that the relevant policies were sold "*not to a sophisticated policyholder, but rather (in most cases, and as follows from their standard form nature) an SME which is the business equivalent of a consumer, i.e. a business with little experience of the insurance market, potentially limited broker advice and discussion …, and no knowledge of previous insurance case law.*" – Reply, paragraph 40 **{A/14/21}**. There is no evidence for any of this. In any event, it is legally irrelevant.

(a) It is common ground that the policyholders were businesses, not consumers. The special legal rules applicable to consumers do not apply.

(b) As set out in the Insurers' joint submissions on principles of construction of contracts, paragraph 10, the expression SME as defined by the EU covers a very wide spectrum of businesses, ranging from tiny businesses to those with up to 250 employees, a turnover of up to €50m and a balance sheet total of €43m **{I/5/5-6}**. The FCA Handbook Glossary identifies firms which have an average market cap of less than €200m as SMEs.

[3] There is no evidence as to how many Insureds of either EIO or MSA are or are not entitled to make a complaint to the FOS. The FSA's pleaded point at paragraph 4(1) of its Reply **{A/14/2}** is without evidential foundation. In any event, if (as is likely) some insureds are and some are not entitled to make a complaint to the FOS, it is irrelevant: the court must construe the wording. It is no part of the exercise to consider what approach the FOS might or might not take.

(c) It makes no difference that the policies were in a standard form marketed by insurers, rather than a bespoke wording negotiated with each insured.

(d) Either the business engaged a broker (in which case it was professionally advised) or it did not (in which case it took its own decision that it was sufficiently knowledgeable to make up its own mind about what it needed / wanted and what it was prepared to accept in way of insurance; and whether what it was buying, at the premium it was prepared to pay, was acceptable).

(e) EIO and MSA sold their policies on an arm's length basis. The normal principles as to the applicable law, matrix and principles of contract construction apply.

14.5 There is no room for the FCA to argue that the policies must be made to work otherwise than in accordance with their terms.

(a) Where the policy leaves the usual rules untouched, there is no justification for watering down what those rules require.

(b) Where, for example, a claim under the policy would (even on the FCA's own argument) require the Insured to prove certain facts, it is no answer for the FCA to contend that it would be difficult for an SME insured to prove those facts. On the contrary, that difficulty might indicate that the policy was never intended to respond to the situation in question; or it might simply be that the facts are difficult to prove. But none of that is to justify any re-writing of the policy or any watering down of what the Insured must prove under it. The Insureds must be taken to have agreed what the policy requires of them to bring a successful claim.

(c) Business interruption policies have never been simple instruments. They are complex documents, both in terms of what they insure (and do not

insure) and in terms of how any loss is properly to be calculated. Their legal nature and the issues inherent in their operation are well-known.

(d) If, in hindsight, the policies do not provide the protection an insured would have wished for or even in one sense required, or do not provide it in the manner (or with the ease) an insured anticipated, that is no justification for rewriting the policy after the event.

14.6 It is irrelevant if the policy provided a relatively low limit or sub-limit for the coverage clause in question – c.f. the FCA's Reply at paragraph 4(3) **{A/14/2}**. This does not justify any different approach to the process of construing the contract.

14.7 Lastly, and if there is any doubt or dispute about it, there is no room for the Court to approach the issues other than on the basis of applying the law. This Court is not the FOS. The Court is being invited to provide legal certainty as to what the terms of the policies require – *i.e.* the correct construction of the policies: see the Framework Agreement at recital E **{F/1/2}**. If, having achieved legal certainty either way, the FCA or any insureds seek a different approach in a different forum, that is a matter for another day, but it is irrelevant to the approach this Court should take: this Court must apply the law.

15. Secondly, **the Court is dealing with contracts of indemnity, whose legal nature and mode of operation are well-known**.

15.1 To the extent of the insuring agreement, the insurer promises (i) to prevent the insured from suffering damage caused by the insured perils, and (ii) to hold the insured harmless against specified loss caused by the insured perils – *Firma C-Trade SA v. Newcastle Protection and Indemnity Association (The Fanti); Secony Mobil Oil Inc v. West of England Shipowners Mutual Association (The Padre Island)* [1991] 2 AC 1 at 35 **{K/76}**.

15.2 Upon the occurrence of loss caused by the insured perils, the insurer is in breach of the promise to hold harmless against such loss – *ibid*., *Ventouris v. Mountain (The Italia Express (No 2))* [1992] 2 Lloyd's Rep. 281, 292 **{K/78}**; *Sprung v. Royal Insurance* [1997] CLC 70; [1999] Lloyd's Rep. IR 111 **{K/88}**.

15.3 This is a legal fiction, in as much as in most cases the Insurer cannot in practice prevent the harm against which it promised to hold the insured harmless. It is recognised both as surprising[4] and well-established.[5]

15.4 Its shortcomings with regard to late payment have now been addressed in the Enterprise Act 2016 **{K/20}**, amending the Insurance Act 2015 (section 13A) **{K/18}**. This issue is not relevant to the present case.

15.5 For present purposes, the significance of the hold harmless principle is that it sets the legal and analytical framework within which the coverage and causation issues arise – *Endurance Corporate Capital Ltd v. Sartex Quilts & Textiles Ltd* [2020] EWCA Civ. 308 at [34] – [36] **{K/184}**.

15.6 The implication of this legal characterisation is that the insured's claim (often described as the claim for indemnity) is for damages for breach of contract – to be quantified in the amount necessary to put the Insured in the position in which it would have been if the contract had been performed (that is, but for the insurer's failure to hold harmless against loss caused by the insured peril).

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4 In that Insurers do not regard themselves as daily breaching all their policies on which losses occur and claims are made – *Transthene Packaging Co Ltd v. Royal Insurance (UK) Ltd* [1996] Lloyd's Rep. IR 32 at 40 **{K/82}**.

5 And as convenient in some respects – for example, the ease of determining the point at which the limitation period starts to run and the point at which interest beings accruing: Law Commission Report on Insurance Contract Law (Law Com No. 353, July 2014) at page 261, paragraph 26.7 **{K/212}**. The Law Commission ultimately concluded that the hold harmless principle should not be repealed – *ibid.* at page 277, paragraph 27.12.

16. Thirdly, **the Court is not dealing with policies of all risks insurance**.

16.1 None of EIO's or MSA's policies provides all risks insurance.

16.2 Insureds are not simply or even *prima facie* entitled to (re)cover upon the occurrence of any fortuitous loss.

16.3 It follows, as a general proposition, that, in the context of policies providing only limited cover in the first place, the absence of a particular exclusion clause (for example, in this case, a pandemic (or epidemic) exclusion) has no significance.[6] By contrast, in an all risks insurance which covers against loss or damage from any external fortuity, express exclusions in the policy are the only means by which the scope of the cover is cut back.[7] In those policies, the absence of an express exclusion of a specific peril means that cover for that peril is provided.

17. Fourthly, **the Court is dealing with policies of defined risk insurance**.

17.1 EIO and MSA only insured the risks identified in their policies.

17.2 The Court's task is to construe the relevant coverage provisions and to apply those provisions to the facts.

17.3 The Court should not approach this task with any preconceived inclination in favour of or against Insurers, nor against or in favour of the Insureds.

17.4 The issues are to be approached objectively. The subjective expectations which Insureds (through the FCA) may claim to have, or to have had, are irrelevant.

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6 C.f. the FCA's APoC, paragraph 33 **{A/2/23}**.

7 "'*All risks' has the same effect as if all insurable risks were separately enumerated*": Lord Sumner in *British and Foreign Marine Ins. Co. Ltd. v. Gaunt* [1921] 2 A.C. 41, 57 **{K/48}**.

17.5 It is equally irrelevant that EIO or MSA could have underwritten on different terms, possibly putting any serious issue under discussion beyond doubt.

17.6 The FCA's pleaded case that EIO and MSA (amongst other Defendant insurers) "*elected not to adopt*" epidemic or pandemic exclusion clauses is a thoroughly bad point.

(a) First, it is bad because each of EIO's and MSA's policies is to be construed on its own terms, not by comparison with the wordings of other insurers or other policies.

(b) Secondly, it is bad because it begs the fundamental question: did EIO and MSA agree to cover the epidemic / pandemic as an insured peril in the first place?

(i) If, on the true construction of their insuring agreements, they did not, it is irrelevant that they did not exclude something they did not agree to cover.

(ii) The FCA approaches the issue from the wrong end. The FCA's logic appears to be that, since there was no exclusion for epidemics / pandemics, therefore they were covered. It is a logic which implicitly invites the Court to ignore the coverage language altogether and reach a conclusion simply based on the absence of the FCA's preferred exclusion. It is a false logic and a wrong approach.

(c) Thirdly, it is bad because it reveals a fundamental inconsistency in the FCA's approach. The FCA accepts, in relation to those insurers who issued policies only covering business interruption consequent upon property damage, that those policies do not respond. The FCA's acceptation is not because those policies might have epidemic / pandemic exclusion clauses. It is simply because, as the FCA has acknowledged, coverage limited to BI

consequent upon property damage is coverage which does not go far enough. In other words, the conclusion was reached by a proper consideration of the coverage provisions which the policies contained (and not because of extraneous clauses that the policies happened not to contain).

18. Fifthly, **the policies of defined risk insurance with which the Court is dealing do not include, as an insured peril, epidemic or pandemic disease**. Before the accusations of begging the question start to fly, the following limited points are made at this introductory stage:

18.1 Paragraph 53.1 of the FCA's APoC **{A/2/35}** states that:

> "there is only one proximate, effective, operative or dominant cause of the assumed losses, namely the (nationwide) COVID-19 disease including its local presence or manifestation, and the restrictions due to an emergency, danger or threat to life due to the harm potentially caused by the disease"

18.2 There is no defined perils cover for nationwide disease. EIO and MSA did not agree to insure against the peril of business interruption losses caused by nationwide disease.

18.3 The short answer to the FCA's case is that EIO and MSA did not agree to insure what has in fact occurred and what the FCA says caused the loss in every proximate, effective, operative and dominant sense.

18.4 There is, however, an issue as to whether EIO or MSA agreed to insure any part or strand of what has occurred. This issue is addressed in detail below with reference to each of the coverage clauses on which the FCA relies. Lest the suspense be unbearable, to the extent that EIO and MSA provided cover at all (i) they certainly did not agree to insure all aspects of what occurred; (ii) they only agreed to insure specific and, in the event, minor aspects of what occurred; and, even then, (iii) they did not agree to insure any aspect which is likely to have

caused any Insured any significant loss (although causation is inherently fact-sensitive and essential to be investigated factually in every individual case).

18.5 If and to the extent that EIO or MSA agreed to insure in respect of illness or disease in any limited geographical area (as to which, see below), the minor part they agreed to insure was eclipsed by the epidemic or pandemic disease outside that area and which they indubitably did not insure. This assertion can be tested in a given factual context by removing from the equation the minor part which EIO or MSA agreed to insure and ascertaining the loss which the Insured would have suffered from the uninsured major part in any event.

18.6 On the footing that EIO and MSA do not insure epidemic or pandemic disease and *if* (let it be assumed) EIO and MSA only insured some minor part of all that has occurred, it is not a surprising conclusion if any minor part which EIO and MSA did insure was not causative of any of the Insureds' loss, or, at the most, in limited circumstances was causative of a very small part.

19. The task upon which the Court is required to embark is, therefore, the traditional task of construing the language of certain insurance policies, in the same way as the Court would approach it in any other case.

20. Before turning to the Policies themselves, a brief introduction to the facts is required (based on the evidence in the form of agreed and assumed facts before the Court) and the FCA's case with reference to the facts.

THE FACTS

21. The Test Case is not designed to resolve disputed fact.[8] Rather, the Court is to use 'agreed facts' ("**the Agreed Facts**") and 'assumed facts' ("**the Assumed Facts**") to resolve issues of English law[9] as to the interpretation and application of sample policy wordings.[10]

22. There are three categories of factual material before the Court:

22.1 Agreed Facts: These are facts to be taken as common ground when resolving disputed issues about the sample terms.[11] For example, Agreed Facts 1 ("**AF1**") contains a chronology of events about the governmental response to COVID-19.[12] There are ten Agreed Facts documents, all of which appear in the Core Bundle. There are also supporting materials for the Agreed Facts in Bundle C.

22.2 Assumed Facts: These are illustrative factual assumptions which appear in a table[13] and are intended to be drawn upon by the Court and the parties in order to assist with the resolution of the issues.[14] The Assumed Facts cover seven categories of business ("**the Categories**"): (1) food and drink businesses closed in whole or in part by the 21 March/26 March Regulations; (2) leisure businesses closed in whole or in part by the same; (3) shops carved out of the closures in the 26 March Regulations; (4) shops closed in whole or in part by the same; (5)

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8 PD51M, paragraph 2.5(b).

9 PD51M, paragraph 2.3.

10 Framework Agreement, clause 1.1 **{F/1/4}**.

11 Framework Agreement, clause 1.2 **{F/1/4}**.

12 AF1 is at **{C/1/1}**. Agreed Facts references will be in the format ("**AF#**").

13 **{E/1/1}**

14 Framework Agreement, clause 1.3 **{F/1/4}**.

businesses never required to close; (6) hotel and holiday accommodation providers closed in whole or in part by the 26 March Regulations; and (7) schools and places of worship.

22.3 Witness statements: There are brief witness statements from a small number. of witnesses. The statements potentially relevant (but, in all likelihood, largely irrelevant) to the case against EIO and MSA are as follows:

(a) Statement of **Matthew Brewis**, the FCA's Director of General Insurance and Conduct Specialists **{F/2/1}**. It supported the FCA's application for expedition and admission to the Financial Markets Test Case Scheme. Small parts of it may prove relevant at trial.

(b) Statement of **Samantha Nicholas of EIO {D/4/1}**. It addresses certain remarks of the Chancellor of the Exchequer and of Mr Brewis, but the Court has already indicated that EIO need not deal with the issues it addresses.[15]

(c) Statement of **Frederick Foreman of MSA {D/6/1}**. It was adduced for the same reason as Ms Nicholas' statement and need not detain the Court for the same reason.[16] It is referred to here only for completeness.

23. No more need be said about the witness statements for now, and they need not form part of the Court's pre-reading for trial.

24. The Agreed Facts documents should all form part of the Court's pre-reading. Agreed Facts 9 is not relevant to EIO and MSA. A brief introduction to the facts follows.

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15 As confirmed by the Court at the second CMC in this case (Second CMC Transcript, page 7/lines 17-24 **{F/29/3}**).

16 The Court's confirmation at the second CMC concerned both EIO and MSA.

Introduction to the factual background

25. The factual background is the subject of a chronology of events contained in Agreed Facts 1 **{C/1}** and reference to a supporting bundle **{C/2}**. The key events for the purposes of the claims against EIO and MSA concern the making of Regulations by statutory instrument and the publication of UK Government guidance.

26. In brief:

26.1 COVID-19 is a disease within the family of diseases known as coronaviruses.[17] Its causative agent is a virus now known as severe acute respiratory syndrome coronavirus 2 ("**SARS-CoV-2**").[18]

26.2 The first two confirmed cases of COVID-19 in England (and the UK) were discovered by testing on 31 January 2020, at a time when the disease was described in UK Government publications as the "*Wuhan novel coronavirus*".[19]

26.3 On 10 February 2020, the Secretary of State for Health and Social Care ("**the Secretary of State**") made regulations in the exercise of powers under the Public Health (Control of Disease) Act 1984 ("**the 1984 Act**").[20] These dealt specifically with the possibility of imposing a detention requirement on any person potentially infected with coronavirus (including because of recent travel from an infected area); but no automatic mandatory restrictions applied to any individuals

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17 In general terms, coronaviruses are known to cause illness ranging from the common cold to more severe diseases which can lead to death: AF2, paragraph **2 {C/3/2}**.

18 AF2, paragraph **5 {C/3/2}**.

19 AF1, row 6 **{C/1/3}**.

20 Health Protection (Coronavirus) Regulations 2020 (SI 2020/129) **{J/14/1}**.

in the absence of the intervention of the Secretary of State or a registered public health consultant.[21] There was no specific provision in relation to businesses.

26.4 The first cases in Northern Ireland, Wales, and Scotland were confirmed several weeks later, on 27 February 2020,[22] 28 February 2020,[23] and 1 March 2020,[24] respectively.

26.5 COVID-19 became a Notifiable Disease in Scotland on 22 February 2020,[25] in Northern Ireland on 29 February 2020,[26] in England on 5 March 2020,[27] and in Wales on 6 March 2020.[28]

26.6 The first death in the UK occurred on 2 March 2020,[29] with the UK Government publishing an action plan the following day.[30]

26.7 By no later than 11 March 2020 (as the parties agree), there was already a more than *de minimis* economic impact from COVID-19 within the UK on many of the businesses in each Category of business relevant to these proceedings.[31] The

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21 AF1, row 8 **{C/1/3}**. The measures for potentially infected individuals included the issuance of travel guidance and self-isolation advice targeted at such individuals: *ibid* **{C/1/4}**.

22 AF1, row 12 **{C/1/6}**.

23 AF1, row 13 **{C/1/6}**.

24 AF1, row 15 **{C/1/6}**.

25 **{J/20/1}**

26 **{J/21/1}**

27 **{J/19/1}**

28 **{J/18/1}**

29 AF1, row 16 **{C/1/6}**.

30 AF1, row 18 **{C/1/7}**.

31 AF8, paragraph 1 **{C/14/2}**.

parties agree that there would have been some impact on each Category of business as a whole by this date.[32]

26.8 On 16 March 2020, the UK Government published UK-wide social distancing guidance.[33] This was followed by an announcement on 18 March 2020 to the effect that schools would close to pupils other than children of key workers and vulnerable children from 23 March 2020.[34] This was followed by extra-parliamentary speeches of the Prime Minister on 20 and 23 March 2020, telling certain businesses to close and announcing a 'lockdown', respectively.[35] Further guidance was published on 23 March 2020 telling places of worship and further businesses to close.[36]

26.9 A legal requirement for the closure of businesses selling food or drink for consumption on their premises was first imposed on 21 March 2020.[37] This was followed on 26 March 2020 by further legal prohibitions (including legal restrictions on individuals' movement and ability to gather, and further restrictions on businesses).[38]

26.10 On 31 May 2020, the Secretary of State made further regulations which relaxed aspects of the restrictions on business, movement, and gathering in England as from 1 June 2020.[39]

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32 AF8, paragraph 2 **{C/14/2}**.

33 AF1, row 22 **{C/1/9}**.

34 AF1, row 42 **{C/1/20}**; AF1 supporting bundle **{C/2/225}**.

35 AF1, row 46 **{C/1/21}**; AF1, row 53 **{C/1/26}**.

36 AF1, row 54 **{C/1/27}**.

37 AF1, row 48 **{C/1/24}**. The relevant Regulations applied only in relation to England.

38 See AF1, rows 48 **{C/1/24}** and 59-62 **{C/1/31}**. In Northern Ireland, the relevant Regulations came into force on 28 March 2020 **{J/24/1}**.

39 **{K/21}**

26.11 On 3 July 2020, the Secretary of State made regulations, imposing legal requirements as from 4 July 2020 confined locally to specific areas and addresses in and surrounding Leicester, for the closure of businesses and restrictions on individuals' movement and ability to gather: The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 **{K/22}**.

27. By way of very brief summary of the key Regulations made on 21 March 2020 **{J/15}**, 26 March 2020 **{J/16}**,[40] and 1 June 2020 **{K/21}**:

27.1 The types of business affected appear from their Schedules. Not all businesses were required to close, and many businesses listed within Schedules to the Regulation were able to continue trading.

27.2 Places of worship were first directly subject to legally restrictive Regulations on 26 March 2020;[41] and schools were first directly subject to legally restrictive Regulations on 1 June 2020.[42]

28. The specific terms of the Regulations and their legal significance will be addressed below in relation to the application of the Wordings.

The FCA's case on the factual background: EIO's and MSA's response

29. The FCA's factual account of the UK Government's response to COVID-19 is underpinned by an unpersuasive - and, with respect, somewhat contrived - attempt to conjure an alleged "*prohibition*" out of non-legislative communications.[43] This point is

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40 Save in relation to Northern Ireland, where restrictions were imposed on 28 March 2020 **{J/24}**.

41 **{J/16/4}**

42 **{K/21/5}**

43 Reply, paragraph 13.1 **{A/14/8}**.

important in the context of those clauses (such as MSA1 clause 1) which respond only to government action where access to the insured premises is prevented.[44]

30. As the parties agree, there were no legislative instruments prohibiting business activity before the Regulations of 21 March 2020 and 26 March 2020 came into force.[45]

31. The FCA's attempt to circumvent this difficulty is as follows:

> "*Prohibition does not require legal force, it requires that something is forbidden by someone with authority. The Government, including through its authority to implement enforcement measures through laws or to direct other action, is able to and did prohibit through guidance and announcements (sometimes described as 'instructions' and 'rules') and would have been so understood by the reasonable citizen. They were mandatory and compulsory.*"[46]

32. In relation to this plea, the FCA's argument appears to be along the following lines:

> "*the statement [of the Prime Minister of 16 March 2020] was not just advisory (although the word 'advice' was used)—it explained repeatedly what the Government was "asking" people to do and telling them what they "should" do and what the Government would "no longer be supporting*".[47]

33. However, the FCA's very attempt to make the argument underlines how flawed it is:

33.1 Even putting to one side the FCA's selective quoting of communications,[48] there is a fundamental problem with its whole approach: it seeks to construe non-

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44 There is the further point that access means nothing less than physical access. This aspect is developed in the context of the specific submissions made about MSA1 clause 1.

45 See, e.g., the Reply, paragraph 13.1 **{A/14/8}**, where the FCA accepts that the UK Government did not legislate closure earlier than the 21 March and 26 March Regulations.

46 Reply, paragraph 13.1 **{A/14/9}**.

47 Reply, paragraph 11 **{A/14/7}**.

48 See further Appendix 1 hereto.

legislative communications as though they were legislative instruments when it is obvious that they were not, did not purport to be, and cannot be so equated.

33.2 This is clear from the very fact that the Regulations had to be made. It is entirely trite that the UK Government requires legal authority in order to direct the conduct of citizens with any mandatory or compulsory effect: that is why a statutory instrument which is *ultra vires* is a nullity.[49] The case of a non-legislative communication is *a fortiori*.

33.3 The FCA's erroneous invocation of a 'reasonable citizen' test does not make any difference to this conclusion.[50] There is no evidence of what a reasonable citizen of the UK would or would not have understood. What if one reasonable citizen correctly recognised the government's advice to be just that? Does that automatically mean that what the government said was not a prohibition? What if another reasonable person misunderstood what the government said to carry the weight of the law? Does that misunderstanding magically transform something which was not a prohibition into precisely what it was not? Is what the government said a prohibition for those who mistakenly so understood it but not a prohibition for those who correctly understood it for what it actually was? In any event, even on a practical level, without the (legal) power to enforce any governmental advice or suggestion as though it were a prohibition, no amount of governmental advice can be taken to be a prohibition.

33.4 The FCA's argument is also erroneous in that it strikes at the heart of the rule of law on which the UK constitution is based. The quality of the FCA's argument makes one wonder about how much detail one should be compelled to devote to it. The following points are briefly made:

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49 See, e.g., *UNISON, R (on the application of) v Lord Chancellor* [2017] UKSC 51; [2017] 3 WLR 409 **{K/171}**.

50 See the specific submissions above on the issue of the correct approach to interpretation.

(a) In our democracy, citizens are entitled to listen (or not to listen) to what the Prime Minister says and, if they so choose, dismiss it – in some instances with contumely, or in other instances simply as a point of view not in accord with their own, or in other instances for reasons along a range somewhere in between.

(b) Or they can take to heart what the PM says and follow the advice scrupulously and to the letter.

(c) Which approach they adopt is, in a democracy, entirely a matter of personal choice.

(d) The position changes when the UK Government or the UK Parliament legislates, whether by primary or secondary legislation, or (in the case of the government) otherwise exercises some legal power, including (where such exists) prerogative power, by which members of the public can be compelled to act in a certain way or not to act in a certain way.

(e) In *The Zamora* [1916] 2 AC 77 at 90 **{K/44}**, Lord Parker said:

> "The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity."

(f) This passage was approved in *R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union* [2017] UKSC 5; [2018] AC 61 at 138, [45] – [46] **{K/172}**:

> "45. The Crown's administrative powers are now exercised by the executive, ie by ministers who are answerable to the UK Parliament. However, consistently with the principles established in the 17th century, the exercise of those powers must be compatible with legislation and the common law. Otherwise, ministers would be changing (or infringing) the law, which, as just explained, they cannot do. A classic statement of the position was given by Lord Parker of Waddington in *The Zamora* [1916] 2 AC 77, 90:
>
> [quotation as above]
>
> 46. It is true that ministers can make laws by issuing regulations and the like, often known as secondary or delegated legislation, but (save in limited areas where a prerogative power survives domestically, as exemplified by the cases mentioned in paras 52 and 53 below) they can do so only if authorised by statute."

(g) To quote Lord Bingham of Cornhill, writing as Tom Bingham in The Rule of Law (2010), ch 6 (page 60) **{K/190}**:

> "… the citizens of a democracy empower their representative institutions to make laws which, duly made, bind all to whom they apply, and it falls to the executive, the government of the day and its servants, to carry these laws into effect, …"

(h) Unless and until the government legislates (or exercises some other power conferred on it by Parliament), liberty remains – liberty being the residue of freedoms belonging to all citizens after all powers of interference are taken into account.

(i) No government statement, instruction, guidance or advice can impinge upon the liberty of the subject unless and until it is embodied in legislation

or is duly authorised to be made and to bind/compel pursuant to legislation.[51]

(j) If the FCA's argument is correct, then it is (to use the FCA's own words) "*mandatory and compulsory*" to eat 5 portions of fruit and vegetables a day – because the Government has issued guidance to that effect:

> "The Government recommends that we eat at least 5 portions of a variety of fruit and vegetables a day. This advice is based on epidemiological evidence that shows an association between the consumption of more than 400g a day of fruit and vegetables and a reduced risk of certain diet related chronic diseases…"[52]

(i) The FCA would presumably contend that the Government's guidance on healthy eating, in the form of "Government Dietary Recommendations" promulgated by Public Health Evidence, after input from the Scientific Advisory Committee (no less), would be "understood by the reasonable citizen" as prohibiting non-compliant daily diets and as "mandatory and compulsory".

(ii) The Government guidance may be very sensible and very important. But it is only guidance. Unless and until the Government legislates as to what any citizen must and must not eat, its guidance is just that: it lacks any force of law and can be freely ignored as a matter of individual choice.

(k) The FCA's argument would be risible, were its implications not so serious. It seems the FCA seeks to contend, with all seriousness, that the government can "*prohibit*" personal freedom through "*guidance*", without legislating,

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51 The FCA appears to recognise this in certain places in its Opening Submissions – e.g. paragraph 118 (page 47 **{I/1/47}**) penultimate sentence.

52 https://www.gov.uk/government/publications/government-5-a-day-logo (accessed, 4 July 2020).

without exercising any legal power and without any sanction or enforcement.

(l) The constitutional implications would be considerable.

33.5 The FCA's argument was anticipated in the House of Lords and House of Commons Joint Committee on Human Rights Chair's Briefing Paper dated 8 April 2020 in relation to the 26 March 2020 Regulations **{K/210}**. The paper included the following passage, at paragraph 6:

> "The Regulations put the new measures announced by the Prime Minister on 23 March on a statutory footing, making them legally enforceable from 1pm on Thursday 26 March. It is important to note that prior to this, there was no legal basis for the announced restrictions on movement and gatherings. We have more general concerns about the recent disconnect between laws that are in force and therefore binding, and "announcements", "directions" or "instructions"[5] from Government which have no legal force, but which are communicated in such a way as to appear binding. It is crucial that enforcement authorities are clear on the law. Otherwise there are real risks in respect of the rule of law and potentially also Article 7 ECHR (no punishment without law)."

Footnote 5 read as follows:

> "[5] For example, on 10 April the Health Secretary Matt Hancock said at the daily Government press conference: "This advice is not a request – it is an instruction. Stay at home, protect lives and then you will be doing your part."

33.6 The foregoing points are reinforced by the article written by Lord Sumption in The Times on 26 March 2020, entitled "*There is a difference between the law and official instructions*" **{K/214}**. Referring to the prime minister's "*orders"* on Monday 23 March 2020, he wrote:

> "… in his press conference Boris Johnson purported to place most citizens under virtual house arrest through the terms of a press conference and a statement on the government website said to have "immediate effect". These pronouncements are no doubt valuable as "advice", even "strong advice". But under our constitution neither has the slightest legal effect without statutory authority.

> At the time of writing (Wednesday morning), it is unclear what power the prime minister thought that he was exercising. The relevant powers of the government are contained in the Public Health (Control of Disease) Act 1984 and the Civil Contingencies Act 2004. But it is doubtful whether either authorise the prime minister's orders, which is presumably why the Coronavirus Bill has been introduced.
>
> The ordinary rule is that a person may not be detained or deprived of his liberty without specific statutory authority.[53] The 1984 act contains powers to restrict movement, but they are exercised by magistrates and apply only to particular people or groups who have been infected or whom they may have infected. The Civil Contingencies Act confers a temporary power of legislation on ministers that is exercised in a national emergency, but no specific power to detain people at home.
>
> In the present national mood the prime minister's orders will probably have strong public support and people will be inclined to comply whether they are binding or not. Yet we are entitled to wonder what kind of society we have become when an official can give orders and expect to be obeyed without any apparent legal basis, simply because it is necessary.
>
> …
>
> … There is a difference between law and official instructions. It is the difference between a democracy and a police state. Liberty and the rule of law are surely worth something even in the face of a pandemic."

33.7 The fact that Lord Sumption was writing extra-judicially does not stop him from being self-evidently right. The FCA's assertion that the government could and did prohibit private action "*through guidance and announcements*" so as to remove individual liberties in ways which were "*mandatory and compulsory*" (Reply paragraph 13.1 **{A/14/9}**) is, frankly, chilling.

33.8 It is no better (in fact, possibly, worse) if the FCA is contending, not that the Prime Minister's or government's guidance and announcements were truly mandatory and compulsory, but that reasonable citizens were led to believe they were by the terms in which they were cast. Any such suggestion would amount to an argument that the government could hoodwink the public into thinking it was

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[53] Schedule 1 Article 5 to the Human Rights Act 1998 **{J/7}**.

doing something it wasn't and couldn't – and that such conduct amounted to a prohibition when it was not, simply because of the way the public[54] was taken in.

33.9 The legal principle which the FCA's position ignores is no less fundamental than *Entick v. Carrington* (1765) 2 Wils. KB 275; 95 ER 807.[55]

33.10 An analogy may be drawn with 'quasi-legislation' in the form of guidance or policy statements or directions which the government issues to public bodies but which are not themselves set down in a statute (see Megarry "Administrative and Quasi Legislation" (1944) 60 LQR 125 and C Ganz, *Quasi Legislation: Recent Developments in Secondary Legislation* (1987) **{K/196}**).

(a) Some forms of quasi-legislation may be enforceable *because* of statute – statutory directions being an example (as in the Coronavirus Act 2020 section 52 and Schedule 22 **{J/13}**). Such directions can be made because there is a specific statutory power to make them.

(b) By contrast, quasi-legislation which takes the form of guidance etc. made without specific statutory power is not binding. It only ever amounts to guidance in the ordinary sense of the word. The local authorities to whom such guidance is directed do not have to follow it; they may simply take it into account in choosing how to exercise their own discretion – *R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295 at 345, [143] **{K/98}**:

> "The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of an administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course, there are limits to be

[54] Except, of course, for readers of The Times.

[55] "*… we can safely say there is no law in this country to justify the [King's messengers] in what they have done; if there was, it would destroy all the comforts of society…*" – 817 (bottom) **{K/23}**

> observed in the way policies are applied. Blanket decisions which leave no room for particular circumstances may be unreasonable. What is crucial is that the policy must not fetter the exercise of the discretion. The particular circumstances always require to be considered. Provided that the policy is not regarded as binding and the authority still retains a free exercise of discretion the policy may serve the useful purpose of giving a reasonable guidance both to applicants and decision-makers."

(c) If formal government guidance or non-statutory directions cannot bind local authorities, they cannot bind the public at large unless and until the guidance is given the force of law.

33.11 The factual matrix in terms of the legal powers available to the government in relation to public health and the control of disease is set out below, in the context of the EIO wording. The Public Health (Control of Disease) Act 1984 **{J/5}** empowered the government to take action by making regulations; it did not empower the government to mandate and compel the conduct of citizens through guidance, advice, instructions, encouragement etc. The Civil Contingencies Act 2004 **{J/8}** contains significant safeguards before specified action can be taken. It was never invoked. It does not give a power to the government to put binding emergency measures in place by way of government statement or prime ministerial press conference.

33.12 There is no other statute which gives the government the power to issue either mandatory guidance or compulsory directions to the public at large, save to the limited extent provided for by the Coronavirus Act 2020 **{J/13}** (the relevant powers in which, such as school closure powers, have never been exercised). There is certainly no power in any statute for the government to bind the people in relation to their freedoms of movement simply by way of a public statement, whether at a press conference or in any other setting.

34. Thus: if and to the extent that the Wordings are to be interpreted as requiring a prohibition on access to premises, it cannot conceivably be said that the parties would

have had in mind a non-legislative prohibition said to emerge from Prime Ministerial communications.

35. To put this another way: the FCA either has to win the argument on the meaning of the words in the prevention of access clauses alone, or it must accept defeat. The FCA has no arguable fallback position whereby it can say that non-legislative communications constitute prohibitions. The pleaded argument is a nonsense.

36. More will be said about the facts in the course of the submissions which follow. These submissions now turn to the first major issue, namely coverage.

COVERAGE – PRELIMINARY POINTS

37. The first issue concerns the true construction of the selected coverage provisions in each of EIO's and MSA's sample policy wordings.

38. The FCA's approach to the construction of the coverage provisions is wrong in principle. The FCA seeks to (i) dissect each clause of each insurer, (ii) group supposedly equivalent terms or phrases together and (iii) then construe them across the board. Yet terms and phrases from a contract cannot be isolated from their context and construed in the abstract.

39. The right approach is to consider each policy and its provisions on their own terms. The relevant clauses and the language used within the relevant clauses are to be read together as a whole, and in their immediate and relevant broader contexts.

40. For this reason, the wordings of EIO and MSA must each be considered separately from each other, and separately from the wordings of other insurers (unless they are materially the same and also share the same contextual matrix). The wordings of other insurers are not part of the matrix against which EIO's and MSA's wordings fall to be construed, any more than the wordings of other insurers again who are not before the Court.

41. It is also no answer to suggest that a wording by wording approach makes the FCA's task in this case unwieldy or difficult: the FCA is responsible for the scope and the shape of these proceedings, has taken it upon itself with all its resources to manage these proceedings, and cannot now presume to say that it should be relieved of having to do so properly.

Legal principles of construction of contracts

42. What is common to all the relevant policies are the legal principles by which all contracts must be construed. These principles are set out in Insurers' joint skeleton on the principles of construction of contracts **{I/5}**.

43. The sole purpose of the following brief summary of those principles is to emphasise points of particular relevance to EIO and MSA's submissions:

43.1 The aim of the exercise of contractual interpretation is to ascertain the objective meaning of the language by which the parties have chosen to express their agreement.[56] Only facts or circumstances in existence at the time of contracting and known or reasonably available to both parties are to be taken into account.[57]

43.2 It is, however, a recognised principle that a contract should be construed on the basis that the law (at least established law, and the statutory background) is known or reasonably available to the parties.[58] This principle applies whether or not the law is actually known.[59]

43.3 So far as commercial common sense is concerned:

> "what is impermissible is to start by identifying that there are consequences of one construction which would be unfavourable, perhaps very

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56 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173 at [10] *per* Lord Hodge **{J/134/7}**. See Insurers' joint skeleton on the principles of construction, paragraphs 1-8 **{I/5/2-4}**.

57 *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 at [15] and [21] *per* Lord Neuberger **{J/127/9-10 and 11}**. See Insurers' joint skeleton on the principles of construction, paragraphs 9-10 **{I/5/5-6}**.

58 *Spencer v Secretary of State for Defence* [2012] EWHC 120 (Ch); [2012] 2 All ER (Comm) 480 at [74] *per* Vos J **{K/149}**; *First Abu Dhabi Bank PJSC v BP Oil International Ltd* [2018] EWCA Civ 14 at [37(iii)] *per* Gloster LJ **{K/175}** (citing Lewison, The Interpretation of Contracts (6th ed.), paragraph 4.06 **{K/202}**). See Insurers' joint skeleton on the principles of construction, paragraph 9 **{I/5/5}**.

59 *Spencer v Secretary of State for Defence* at [73] *per* Vos J **{K/149}**.

> unfavourable to one of the parties, and to conclude from that, that the language cannot have been intended to have had such consequences."[60]

43.4 These principles apply equally to insurance policies, where the starting point is the "*ordinary meaning of the language used, unless some customary meaning is pleaded and proved*."[61]

43.5 Dictionary definitions may therefore assist;[62] but not all words or phrases will be capable of any precise definition: some must simply be taken in their "*ordinary sense*" and applied to the facts.[63]

43.6 There is moreover no scope for principles concerning the interpretation of exemption clauses to apply to a provision delineating the scope of cover.[64] The courts interpret insurance exclusions according to the ordinary principles.[65]

43.7 Where the same words are used in different places in a contract, they are to be read so as to bring rational sense and consistency to the whole contract:

> "There is a general principle of construction that a document which falls to be construed should be read as a whole and its separate parts should be so

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60 *National Bank of Kazakhstan v Bank of New York Mellon* [2017] EWHC 3512 (Comm); [2018] 1 CLC 15 at [85] *per* Popplewell J **{K/169}**. See Insurers' joint skeleton on the principles of construction, paragraphs 13-14 **{I/5/7}**.

61 *New Hampshire Insurance Co Ltd v MGN Ltd* [1997] LRLR 24, 52, *per* Staughton LJ **{K/85}**.

62 *King v Brandywine Reinsurance Co (UK) Ltd* [2004] 2 Lloyd's Rep 670 at [86] *per* Colman J **{K/117}**.

63 *Milton Furniture Ltd v Brit Insurance Ltd* [2015] EWCA Civ 671; [2016] Lloyd's Rep IR 192 at [46] *per* Gloster LJ **{K/159}**.

64 *Impact Funding Solutions v AIG Europe* [2016] UKSC 57; [2017] AC 73 at [6]-[7] per Lord Hodge **{J/132/7}**; *Crowden v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (Comm); [2018] Lloyd's Rep IR 83 at [56]-[65] *per* Peter MacDonald Eggers QC **{J/135/12-13}**. See Insurers' joint skeleton on the principles of construction, paragraphs 19-23 **{I/5/9-11}**.

65 *Impact Funding Solutions v AIG Europe* at [6] *per* Lord Hodge **{J/132/7}** and at [35] *per* Lord Toulson **{J/132/13}**.

construed, if that is possible, as to bring rational sense and consistency to that whole."[66]

Response to the FCA's case on the principles of construction

44. The FCA cites many of the same cases as Insurers, the import of which is correctly summarised by Insurers' joint skeleton on the principles of construction **{I/5}**. EIO and MSA have three overarching points in response to the FCA's case on the principles of contractual construction:

44.1 First, the FCA's logic on construction is internally suspect.

(a) The FCA's Trial Skeleton contains much assertion to the effect that the Insureds "*are generally not sophisticated or well-resourced insurance buyers*".[67]

(b) The FCA seeks also, however, to rely upon the fact that the Wordings were "*offered in standard form to multiple policyholders*".[68]

(c) The correct analysis is that the Wordings bear the same meaning irrespective of the identity of the Insured who agreed to them.[69] The parties' intention comes from the "*ordinary meaning of the language used, unless some customary meaning is pleaded and proved*."[70] The FCA's assertions

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66 *C v D* [2011] EWCA Civ 646; [2012] 1 WLR 1962 at [49] per Rix LJ **{K/141}**.

67 FCA Trial Skeleton, paragraph 1 **{I/1/3}** (underlining added). The FCA occasionally overstates the position when suggesting that all Insureds in question are SMEs: see, e.g., paragraph 80 of its Trial Skeleton ("*The "class of persons" to whom these policies are addressed are SME businesses of limited expertise when it comes to matters of insurance*" **{I/1/35}**).

68 FCA Trial Skeleton, paragraph 1 **{I/1/5}**. This argument is advanced in the context of lengthy submissions about *contra proferentem.*

69 See the principles set out in *The State of the Netherlands v Deutsche Bank AG* [2019] EWCA Civ 771 at [49] *per* Vos C: "*a standard form is not context-specific and evidence of the particular factual background or matrix has a much more limited, if any, part to play*" **{K/180}**.

70 *New Hampshire Insurance Co Ltd v MGN Ltd* [1997] LRLR 24, 52, *per* Staughton LJ **{K/85}**.

about the identity and characteristics of the Insureds[71] do not amount to pleading, let alone proof, of a special meaning.[72]

44.2 Secondly, despite the FCA's attempts to suggest otherwise, the parties' contractual language is to be interpreted in the light of established law even where it is not in fact known to a contracting party.[73] That reality cannot be undermined by the FCA's unpleaded and general remarks about what facts might have been in the parties' contemplation.[74]

45. Finally, the FCA is incorrect to attempt to shoehorn principles of *contra proferentem* into the exercise of interpreting an insurance exclusion.

45.1 The FCA correctly recognises the problem created for it by the Supreme Court's decision in *Impact Funding Solutions v AIG Europe* [2016] UKSC 57; [2017] AC 73[75]; but there is an attempt in a footnote to bring *contra proferentem* in via the backdoor, by reference to considerations of ambiguity and the purpose of the contract.[76]

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71 About which there is no evidence.

72 Similarly, the FCA's invocation of Insurers' regulatory obligations (FCA Trial Skeleton, paragraph 8 **{I/1/8}**) fails to particularise any reason why it is not fair or in accordance with law for the Wordings to be given their ordinary meaning in their context (which includes the common law and statutory background).

73 See the remarks of Vos J in *Spencer v Secretary of State for Defence* at [73]: "*The fact that the parties and their lawyers were unaware of this [principle] is unfortunate, but cannot mean that the reasonable person, with whom the construing court is concerned, should be assumed to be labouring under the same misapprehension*" **{K/149}**. Cf. the FCA's Trial Skeleton at paragraph 83 ("*these policies were not negotiated terms and it is unreal to suggest that knowledge of the* Orient-Express *was within the contemplation of these policyholders*" **{I/1/36}**).

74 Cf. the FCA's Trial Skeleton at paragraph 31, where there is assertion about knowledge of epidemic and pandemics, culminating in the circular argument that "*the insurers (who would clearly have been aware of the risk of pandemics and associated governmental action as a result of the above), could have expressly excluded cover for those risks had they wished to do so*" **{I/1/18}**.

75 See the FCA Trial Skeleton, paragraph 89 **{I/1/38}**. In paragraph 94, there is an incorrect attribution of a remark about *contra proferentem* to Lord Hodge **{I/1/40}**. That quotation is in fact from an earlier authority and has been selectively quoted by the FCA.

76 See footnote 72 of the FCA's Trial Skeleton **{I/1/39}**.

45.2 That attempt is misguided, and the FCA's extensive reliance upon the principle in general underlines the difficulties which it faces on the construction of the Wordings (as interpreted in the light of the established law).

EIO'S SAMPLE WORDINGS

46. The Court is concerned with two sample wordings, distinguished by the designations, "**Ecclesiastical Type 1.1 wording**" and the "**Ecclesiastical Type 1.2 wording**".

47. The difference between the two types of wording is slight.[77] The difference comes in the introductory words to the business interruption coverage extensions. It can most easily be seen in the following way:

Type 1.1	Type 1.2
"… is extended to cover loss resulting from interruption of or interference with the ***business*** carried on by ***you*** at the ***premises*** [your usual activities][78] as a result of the following…"	"… is extended to cover loss as insured hereunder directly resulting from interruption of or interference with the ***business*** carried on by ***you*** at the ***premises*** in consequence of the following…"

48. Within each of Type 1.1 and Type 1.2, the above introductory words are then followed by a coverage provision, **Prevention of Access – Non-damage**, which is materially

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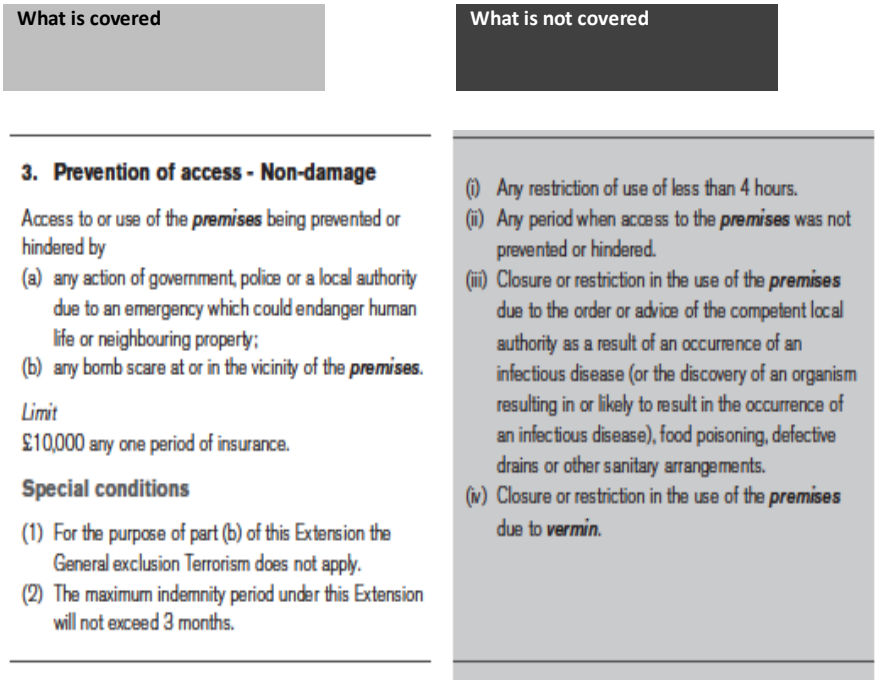
77 There are differences when it comes to so-called trends clauses and basis of settlement provisions. These differences are separately addressed in the context of submissions about the so-called trends clauses and basis of settlement provisions.

78 These alternative words are used in the parish churches [and charities] policies.

identical as between the two types. The coverage provision, taken from the FCA's chosen lead wording for Type 1.1 (i.e. ME857 Parish Plus), is in the following terms:



What is covered	What is not covered
3. Prevention of access - Non-damage Access to or use of the ***premises*** being prevented or hindered by (a) any action of government, police or a local authority due to an emergency which could endanger human life or neighbouring property; (b) any bomb scare at or in the vicinity of the ***premises***. *Limit* £10,000 any one period of insurance. **Special conditions** (1) For the purpose of part (b) of this Extension the General exclusion Terrorism does not apply. (2) The maximum indemnity period under this Extension will not exceed 3 months.	(i) Any restriction of use of less than 4 hours. (ii) Any period when access to the ***premises*** was not prevented or hindered. (iii) Closure or restriction in the use of the ***premises*** due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease), food poisoning, defective drains or other sanitary arrangements. (iv) Closure or restriction in the use of the ***premises*** due to ***vermin***.

49. There are two further linguistic differences to be noted, although EIO submits they make no difference to the meaning or effect of the clause:

49.1 In some versions of the wordings, the phrase "*government, police or a local authority*" in clause 3(a) is capitalised as "*Government, Police or Local Authority*" (and without the indefinite article before Local Authority").[79]

49.2 In most versions of the wordings, the content of the column headed "*What is not covered*" appears after clause 3(b), introduced by the word "*excluding*".[80]

[79] The wordings with this variant are: Type 1.1 – ME869 (Care); and ME858 (Parishguard); Type 1.2 – ME886 (Nurseries); and MGM602 (Marsh School and College).

[80] The wordings with this variant are: Type 1.1 – all except ME857 (Parish Plus) and ME858 (Parishguard); Type 1.2 – all.

50. These variations are evident in the extension clause set out below, taken from the lead wording for Type 1.2, namely ME886 (Nurseries):

Extensions

The insurance by this section is extended to cover loss as insured hereunder directly resulting from interruption of or interference with the ***business*** carried on by ***you*** at the ***premises*** in consequence of the following

Unless specifically stated otherwise these extensions do not increase ***our*** liability as stated under the 'Cover' paragraph in this section

1 Prevention of access

Access to or use of the ***premises*** being prevented or hindered by

(a) ***damage*** to neighbouring property by any of the ***insured events***

(b) any action of Government Police or Local Authority due to an emergency which could endanger human life or neighbouring property

Excluding

(i) any restriction of use of less than four hours

(ii) any period when access to the ***premises*** was not prevented or hindered

(iii) closure or restriction in the use of the ***premises*** due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease) food poisoning defective drains or other sanitary arrangements or vermin or pests

Provided that

our liability in respect of any one occurrence shall not exceed the sum insured by the items or any limit of liability shown in the schedule

51. It should make no difference to the true construction of the wording whether limb (iii) is introduced by the word "*excluding*" or appears under the heading "*What is not covered.*"

51.1 The exclusion provision is simply used as part of the definition of the cover: *Impact Funding Solutions Ltd v. AIG Europe Insurance Ltd* [2016] UKSC 57, [2017] AC 73 at [5]-[7] and [35] (Lords Hodge and Toulson respectively) **{K/166}**. This is a common method of underwriting and policy drafting, where the scope of the

cover is defined in part by the coverage provision and in further part by those exclusions, carve-outs or clarifications of what is not covered, where the two operate in tandem to define precisely the scope of the cover being provided.

51.2 Put another way, the definition of the coverage under the policy is not merely to be found in the initial coverage provision. While the initial coverage provision indicates the coverage which is included, the following words of exclusion or of what is not covered identify expressly what is not included within the coverage. Drafted in that way, the cover the insured has purchased is the net balance after both parts of the same clause are read together – the initial category of cover, together with the qualifications by which the initial category is trimmed back and refined. It is not the initial provision alone which defines the scope of the cover; it is the combination of both provisions which, together, define the scope of the cover.

51.3 It follows that there is generally no room for any rule of construction such as *contra proferentem*, the starting point for which (as well as ambiguity) is that the insurer is, by the so-called exclusion, seeking to exclude the liability which it would otherwise be under. Rather, the term in question is defining the scope of the principal engagement under the policy, nothing more and nothing less. The law is more nuanced than to default to a separate set of rules in cases where limb (iii) is introduced by the magic word "*excluding*", given the context in which, and purpose for which, that word is used. The law is perfectly capable of recognising the function which the word "*excluding*" performs, in the context in which it appears, within a coverage provision of a policy of insurance.

52. Whether appearing in a column headed "*What is not covered*" or after the introductory word "*excluding*", the words in limb (iii) of the provision form a key part of the argument. Those words are described without distinction hereafter as the "**Infectious Disease Carve-Out**".

53. Before addressing the coverage language, including the Infectious Disease Carve-Out, it is first necessary to introduce extension of cover clause 6 – **Specified diseases**. This clause, almost immediately following the **Prevention of Access – Non-damage** clause, and containing a list of the Specified diseases (which is not set out in these submissions), is in the following terms – **{B/4/47}**:

What is covered	What is not covered
(a) any occurrence of a ***specified disease*** being contracted by a person at the ***premises*** or within a radius of 25 miles of the ***premises***; (b) any discovery of an organism at the ***premises*** likely to result in the occurrence of a ***specified disease*** being contracted by a person at the ***premises***; (c) any injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided at the ***premises***; (d) any accident causing defects in drains or other sanitary arrangements at the ***premises***; which causes restrictions in the use of the ***premises*** on the order or advice of the competent local authority. (e) any discovery of ***vermin*** at the ***premises***; (f) murder, rape or suicide at the ***premises***. **Special conditions** (i) ***We*** shall only be liable for the loss arising at those ***premises*** which are directly affected by the occurrence, discovery or accident. In the event that the policy includes an extension which deems ***damage*** at other locations to be ***damage*** at the ***premises*** such extension shall not apply to this Extension. (ii) ***Indemnity period*** shall mean the period during which ***your*** results shall be affected in consequence of the occurrence, discovery or accident beginning with the date from which the restrictions on the ***premises*** are applied (or in the case of (f) above with the date of occurrence) and ending not later than three months thereafter. (iii) In respect of (e) ***you*** must obtain ***our*** consent before ***you*** restrict the use of the ***premises***.	Costs incurred in the cleaning, repair, replacement, recall or checking of property.

54. Lastly, it is necessary to introduce the factual matrix against which the policy wording falls to be construed.

The factual matrix – legal principles

55. The general principles of contractual interpretation have already been addressed.

56. In the context of the EIO Type 1.1 and EIO Type 1.2, the following specific principles bear emphasis:

56.1 First, the general principle is that all contractual parties "*must be taken, objectively, to know the legal context*".[81]

56.2 Secondly, the relevant "*legal context*" includes previous decisions of the courts[82] and the statutory background: "*words used must be read in the context of the common law and statutory background*".[83]

56.3 Thirdly, "*[i]f the parties have been content to leave a matter to the general law, they must be taken to have agreed that their agreement should be interpreted in the light of the general law from time to time*": Lymington Marina Ltd v MacNamara [2007] EWCA Civ 151; [2007] Bus. LR D2969 at [33], *per* Arden LJ **{J/99}**.

56.4 Fourthly, in interpreting the policies, the Court can take into account facts which were not just actually known to the contracting parties, but which were reasonably available to be known by them.[84] Further, "[w]*here the legal background in question is English law, it is considered that the principles of English law, if not actually known to the parties, would at least have been reasonably available to them.*"[85] Therefore, it is not correct for the FCA to suggest at paragraph 535.3 of its Trial Skeleton that the legislative background set out in the section that follows is inadmissible because "*there is no evidence to show that the average insured Parish Church or school or charity was aware that national bodies may have such powers.*" Such legislative background was reasonably available to the parties.

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81 *C v D* at [45] *per* Rix LJ **{K/141}** (in the analogous context of a Part 36 offer). See further paragraphs 43-44 above in relation to the legal background.

82 *Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd's Rep 516, 520, *per* Hobhouse LJ **{K/80}**; Lewison, The Interpretation of Contracts, 6th ed. (2015), paragraph 4.06 **{K/202}**.

83 *Doleman v Shaw* [2009] EWCA Civ 279; [2009] Bus LR 1175 at [56] *per* Elias LJ **{K/137**}.

84 *Arnold v Britton* [2015] AC 1619 at [21] **{J/172/11}**.

85 Lewison, The Interpretation of Contracts, 6th ed. (2015), paragraph 4.06, p. 209 **{K/202}**.

The factual matrix – legislative background

57. The purpose of this brief section is to summarise the legislative framework against the background of which the relevant policy wording was concluded. The legal powers set out above are admitted by the FCA and may therefore be taken as common ground – Reply paragraph 55 **{A/14/28}**.

58. EIO submits that

58.1 The legislative framework was reasonably available to be known to both insurer and insured at the time when each policy was concluded and issued; and/or

58.2 Even if and insofar as the detail of the legislative framework was not known, it was known or reasonably available to be known to both insurer and insured that legislative powers existed whereby central government authorities, local government authorities, courts and others could act, or be empowered to act, in situations of public health emergency.

The Civil Contingencies Act 2004

59. The key statute which confers powers on the government for handling serious civil contingencies is the Civil Contingencies Act 2004 **{J/8}**. It provides a framework for contingency planning and for civil protection for the purpose of (a) preventing the occurrence of an emergency, (b) reducing, controlling or mitigating the effects of an emergency, or (c) taking other action in connection with an emergency.

60. The concept and language of "emergency" is fundamental to the Act and is defined in (amongst other sections) section 19 of Part 2 (Emergency Powers) as meaning (in relevant part) "*an event or situation which threatens serious damage to human welfare in a place in the United Kingdom*", where (i) section 19(2) defines such an event or situation as existing "*only if it involves, causes or may cause (a) loss of human life, (b)*

human illness or injury, …"; and (ii) section 19(6) clarifies that the event or situation may occur or be inside or outside the UK.

61. Section 20 provides that emergency regulations may be made by a senior Minister of the Crown (as defined) and by Her Majesty by Order in Council, if the conditions of section 21 and (in the case of a senior Minister) a further requirement of urgency are satisfied.

62. The section 21 conditions include that an emergency has occurred, is occurring or is about to occur; and that it is necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency.

63. Section 22 provides for the scope of the emergency regulations which may be made.

63.1 By section 22(1), emergency regulations may make any provision which the person making them is satisfied is appropriate for the purpose of "*preventing, controlling or mitigating an aspect or effect of the emergency*" in respect of which the regulations are made.

63.2 By section 22(2), emergency regulations may make any provision which is appropriate for the purpose of (amongst other things) (a) protecting human life, health or safety, (b) treating human illness or injury, and (g) protecting or restoring the provision of services relating to health.

63.3 Section 22(3) makes clear that regulations may, amongst other things, (d) prohibit, or enable the prohibition of, movement to or from a specified place, (f) prohibit, or enable the prohibition of, assemblies of specified kinds, at specified places or at specified times, (g) prohibit, or enable the prohibition of, travel at specified times, (h) prohibit, or enable the prohibition of, other specified activities, (p) make provision which applies generally or only in specified circumstances or for specified purpose, and (q) make different provisions for different circumstances or purposes.

63.4 Section 26 imposes a 30 day time limit on the period of validity of any emergency regulations, although the time limit does not prevent the making of new regulations if the requirements for doing so are again satisfied.

64. The Civil Contingencies Act 2004 **{J/8}** is plainly capable of being used in cases of serious public health emergency, although it is designed to cater for all forms of emergency.

65. In addition to the government's powers under the Civil Contingencies Act 2004, there are separate powers provided by the Public Health (Control of Disease) Act 1984 **{J/5}**, which specifically applies to public health and public health protection.

The Public Health (Control of Disease) Act 1984

66. The key legislative framework in relation to public health in England and Wales is contained in the Public Health (Control of Disease) Act 1984 ("**the 1984 Act**") **{J/5}**, as substantially amended by the Health and Social Care Act 2008 **{K/15}**.

67. For present purposes, the key components of the regime established by the 1984 Act (as amended) are these:

67.1 The administration of the public health functions and responsibilities established by the Act is largely in the hands of those defined as a "*local authority*" under section 1 (*viz*. district councils, county councils, London borough councils, the Common Council of the City of London, the Sub-Treasurer of the Inner Temple and the Under Treasurer of the Middle Temple).

67.2 Public health protection is catered for by **Part 2A**, which was added by the Health and Social Care Act 2008 (replacing the original Part 2, which was regarded as out of date).

67.3 By **section 45C(1)**, the appropriate Minister (*i.e.* central government minister – see below) may by regulations make provisions for the purpose of preventing,

protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere).

(a) By section 45C(2), the power may be exercised by the Minister (a) in relation to infection or contamination generally or in relation to particular forms of infection or contamination, and (b) so as to make general provision, contingent provision or specific provision in response to a particular set of circumstances.

(b) By section 45C(3), the regulations may include provision (amongst other things)

(i) Conferring on local authorities or other persons functions in relation to the monitoring of public health risks;

(ii) Imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health.

(c) By section 45C(4), the restrictions or requirements which the Minister may make or impose may include (a) a requirement that a child is to be kept away from school, (b) a prohibition or restriction relating to the holding of an event or gathering, and (d) a special restriction or requirement.[86]

(d) By section 45C(5), the power in section 45C(1) is made subject to section 45D.

[86] Defined in section 45C(6)(a) as a restriction or requirement which can be imposed by a justice of the peace pursuant to section 45G(2), H(2) or I(2).

(e) The powers, and specifically ministerial powers, may therefore be exercised nationally, regionally or locally.

(f) Section 45C(4) clearly contemplates central government action having local effect in only one locality, just as section 45C(3) contemplates central government action having local effect in all or any localities everywhere.

67.4 **Section 45D** imposes restrictions on the power to make regulations under section 45C. For present purposes, it is significant to note the following:

(a) Section 45D(2) provides that regulations under section 45C may not include provision "*enabling the imposition of a restriction or requirement*" under section 45C(3)(c) unless the person taking the decision to impose a restriction or requirement considers, when taking the decision, that the restriction or requirement is proportionate to what is sought to be achieved.

(b) Section 45D(5)(a) clarifies that regulations "*enable the imposition of a restriction or requirement*" if the restriction or requirement is imposed by virtue of a decision taken under the regulations by "*the appropriate Minister, a local authority or other person*".

(c) The architecture of the legislation therefore contemplates the possibility of action being taken by central government, by a local authority or by some other authorised person.

(d) Section 45D(3) provides that regulations under section 45C may not include provision imposing a special restriction or requirement mentioned in section 45G(2)(a), (b), (c) or (d); and

(e) Section 45D(4) provides that regulations may not include provision enabling the imposition of a special restriction or requirement unless (as well as one

other possibility) the regulations are made in response to a serious and imminent threat to public health.

67.5 By **section 45F(2)(a)**, health protection regulations under section 45C may (amongst other things) confer functions on local authorities and other persons.

67.6 By **section 45G**, a justice of the peace may make an order in relation to someone who may be infected or contaminated in such a way as does or could present significant harm to human health. The form of orders is set out in sub-section (2). Similar powers exist in relation to things in section 45H.

67.7 By **section 45I**, a justice of the peace may make an order in relation to premises if satisfied that the premises are or may be contaminated in such a way as does or could present significant harm to human health. By sub-section (2), the order may impose in relation to the premises one or more of the following restrictions or requirements:

(a) That the premises be closed.

(b) That the premises be disinfected or decontaminated.

(c) That, in the case of a building or structure, the premises be destroyed.

67.8 By **section 45J**, the powers of justices of the peace in sections 45G, H and I include power to make an order in relation to a group of persons, things or premises. It follows that magistrates can make orders in relation to groups of premises, where the legal requirements for the making of such orders are met.

67.9 **Section 45K** provides that an order under section 45I may include such other restrictions or requirements as the justice of the peace considers necessary for the purpose of reducing or removing the risk in question.

67.10 **Section 45M** provides that the power of a justice of the peace to make a Part 2A order is exercisable on the application of a local authority, and that local authorities must cooperate with each other in deciding which of them should apply for an order in any particular case. It follows that a local authority other than the local authority in whose area premises are situated may, in certain circumstances, apply to magistrates who may make an order affecting the premises and the access to and use of those premises.

67.11 **Section 45R** provides for an emergency procedure by which regulations may be made urgently.

67.12 By **section 45T(6)**, the "appropriate Minister" for the purpose of Part 2A is defined as, in England, the Secretary of State.

67.13 By **section 67**, a right of appeal to the Crown Court is granted to any person aggrieved by any order, determination or other decision of a magistrates' court under any provision of the 1984 Act.

(a) If an appeal against a magistrates' court decision to impose an order under section 45I is brought by the premises owner and is partly successful, in consequence of which the Crown Court imposes or continues a varied version of a Part 2A order,[87] the premises (and their owner) would then be subject to an order of the Crown Court.

(b) The Crown Court, created by the Courts Act 1971 **{K/4}**, is a Senior Court and a superior court of record – section 45(1) Senior Courts Act 1981 **{K/7}**.

[87] The jurisdiction of the Crown Court on an appeal is to confirm, reverse or vary the decision appealed against, or remit the matter, or make such order in the matter as the Crown Court thinks just, and by such order exercise any power which the original authority might have exercised. The Crown Court therefore has the jurisdiction to substitute a section 45I order of its own in place of that originally made by the Magistrates' Court.

(c) Its jurisdiction, as set out in section 45(2) Senior Courts Act 1981 **{K/7}**, is exercisable by any of those judges or categories of judges identified in section 8 of the Senior Courts Act 1981 **{K/7}**.

(d) The Crown Court nationally is regarded as a single court. It sits in many different locations. Although cases will normally be heard at a Crown Court near to the Magistrates' Court which made the order being appealed against, this is not a requirement: a hearing may be allocated to take place at any location of the Crown Court.

(e) Section 28(1) of the Senior Courts Act 1981 **{K/7}** provides that an order or decision of the Crown Court may be questioned by any party on the ground that it is wrong in law or in excess of jurisdiction, by applying to the Crown Court to have a case stated by that court for the opinion of the High Court.

67.14 The 1984 Act therefore establishes mechanisms by which public health protection can occur through regulations made to cater either for recurrent / regular concerns or for one-off situations.

Regulations made under the 1984 Act

68. A number of key regulations were then made under the 1984 Act in 2010 (*i.e.* after the 2008 amendments came into force). These included:

68.1 The Health Protection (Notification) Regulations 2010, SI 2010/659 **{J/11}**, which imposed the duty on registered medical practitioners to notify the proper officer of the relevant local authority where the doctor has reasonable grounds for suspecting that a patient may have a notifiable disease, where notifiable diseases are those listed in Schedule 1 to the Regulation.

68.2 The Health Protection (Local Authority Powers) Regulations 2010, SI 2010/657 **{K/17}**, which (amongst other things) gives a local authority the following powers.

(a) By regulation 2, the power to require a parent to keep a child away from school where the local authority is satisfied of various matters in relation to the child, including that (a) the child is or may be infected or contaminated (b) in a way which presents or could present significant harm to human health and (c) it is necessary to keep the child away from school in order to remove or reduce the risk of infecting or contaminating others.

(b) By regulation 8, the power to serve notice on any person or group of persons requesting that the person or group of persons do, or refrain from doing, anything for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination which presents or could present significant harm to human health. While the local authority can offer compensation or expenses in relation to a request (*i.e.* offer a carrot), the Regulations do not provide for a stick (where other parts of the regulations do so, by making non-compliance with local authority requirements an offence).

68.3 The Health Protection (Part 2A Orders) Regulations, SI 2010/658 **{K/16}**, which make provisions relating to applications by a local authority to Magistrates for orders under Part 2A of the 1984 Act.

Summary

69. Two key points emerge from this statutory and regulatory infrastructure:

69.1 Day-to-day responsibility for a number of aspects of public health protection in rests with the local authorities.

69.2 The power to make the most intrusive and invasive orders lies, not with the local authorities, but with the magistrates' courts.

69.3 Central government has always had the overarching power to take action to prevent, protect against, control or provide a public health response to the incidence or spread of infection or contamination in England and Wales. That power includes powers to make general provisions, contingent provisions, or specific provisions in response to particular sets of circumstances, both nationally and also locally.[88]

69.4 It has never been the case that the only authority competent to act in relation to public health protection is the local authority. Central government has always been an authority with competence to act in relation in relation to local public health matters, local and wider public health matters, and national public health matters.

The coverage provision: what was covered

70. The coverage provision is addressed first with reference to EIO Type 1.1 Clause 3 as it appears within the lead asterisked wording identified in Schedule 3 to the APoC **{A/2/67}**, namely ME857 Parish Plus.

70.1 ME857 Parish Plus is a policy insuring Church of England parish churches.

70.2 Having regard to the legal constitution of the Church of England and its parishes, the usual arrangement is that the Insured under such policies is the Parochial Church Council, which is itself a body corporate under the Parochial Church Councils (Powers) Measure 1956 (as amended) **{K/2}**.

70.3 The interest of the PCC in the subject matter of the insurance derives from its legal rights and responsibilities in relation to the building (albeit the freehold title is normally held by the Vicar or Rector) and in relation to the donated or other

[88] It is central government's power to make specific provisions in respect of local circumstances which gave rise to The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 **{K/22}**.

income necessary for the activities of the parish to be pursued. These legal rights and responsibilities are, for present purposes, sufficiently set out in general terms in the Parochial Church Councils (Powers) Measure 1956 (as amended) **{K/2}**.

71. With reference first to what was covered, EIO Type 1.1 Clause 3 extended the insurance provided by section 3 of the Policy to cover loss resulting from interruption of or interference with the Insured's usual activities as a result of **[1]** access to or use of the **premises** being prevented or hindered by **[2]** any action of government police or a local authority **[3]** due to an emergency which could endanger human life or neighbouring property.

72. The scope of the cover and what triggers the cover (*i.e.* the definition of the insured peril) is to be discerned by a process of construing the insuring clause. This process requires both a unitary process of construction, reading the clause as a whole, and a process which identifies the specific role performed by each phrase within the clause, having regard to its relationship with every other.

73. Having regard to the essential unitary process, the sub-division of the clause into phrases is artificial but useful for ease of reference.

74. As a whole, the clause agrees to cover access to or use of the premises being prevented or hindered (hereafter, for ease, "**access prevention etc.**") by action of government, police or a local authority (hereafter, for ease, "**action of government etc.**"), which is itself due to an emergency of the specified type.

75. The essence of the insured peril is access prevention etc., where that has occurred by the specified reason (*viz*. by reason of action of government etc.) in specified circumstances (*viz.* due to an emergency etc.).

76. The interrelationship and connections between the different phrases of the clause are entirely straightforward.

76.1 Phrase [1] requires access prevention etc. but it is not every access prevention etc. which qualifies for cover.

76.2 Phrase [2] defines and qualifies phrase [1] in that it is only prevention or hindrance of access or use which is by (i.e. by reason of) what follows in phrase [2] that can trigger the clause.

(a) Prevention or hindrance of access of use for any other reason or by reason of any other cause is irrelevant and cannot trigger the coverage.

(b) Equally, if phrase [2] action does not have the phrase [1] effect, the cover cannot be triggered.

76.3 While phrase [2] requires action of government etc. to exist and cause prevention etc., it is not all action of government etc. which counts.

76.4 Phrase [3] has been included to qualify and define the type of phrase [2] action which triggers the cover.

(a) It is not just any action of government, police or local authority which triggers the cover.

(b) It has to be action which satisfies phrase [3]. It has to be action due to an emergency which could endanger human life or neighbouring property. If the action is due to something other than an emergency which could endanger human life or neighbouring property, it does not qualify.

(i) For example, if the Police close a church while they investigate the vicar's extracurricular activity as a smuggler of contraband goods[89]

[89] Heaven forfend.

and search for his or her stash, in consequence of which parishioners cannot attend and income is lost, the police action does not trigger the clause[90]: it is not action due to an emergency which could endanger human life or neighbouring property, and so is not of such a character as to satisfy phrase [3].

(ii) It is, moreover, not action due to an emergency at all, but action in the investigation of crime.

(c) Phrases [2] and [3], therefore, go together. The latter stipulates the necessary reason for the former.

77. Having conducted that exercise, the scheme of the clause is tolerably clear. The essence of the insured peril is stated at the outset of the clause (*viz.* access prevention etc. – consistent with the clause heading), but the remainder of the clause serves to define, refine, qualify and restrict the type of access prevention etc. which qualifies, having regard to its cause as stated in phrases [2] and [3].

78. Moreover, the direction of travel within the clause is clear. It starts with the broadest category, namely access prevention etc; it then restricts that category by the requirement that it be caused by action of government etc.; and then restricts the category further by the requirement that the action of government etc itself be due to a specified type of emergency.

79. The upshot of the clause as a whole is that it covers a limited sub-category of access prevention etc – namely, only where the access prevention etc. is caused by action of government etc. and then only where the action of government etc is in response to a specified type of emergency.

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90 Even though the phrase [1] consequence may have occurred.

80. The purpose of phrases [2] and [3] is in each case to narrow what goes before. It is therefore a fallacy to describe each of the phrases as providing a separate trigger.

80.1 It is more accurate to say that there is one trigger, which is defined fully in three phrases. It is only where all three ingredients are satisfied that the single, narrow trigger to cover is made out.

80.2 Phrases [2] and [3] are not on a par with phrase [1]. They are not the trigger to cover. Rather, phrases [2] and [3] are features or characteristics which the single trigger to cover must have (whether in terms of the single trigger's cause or context or otherwise) in order to be the single trigger to cover which the clause requires.

81. A careful understanding of the clause and the relationship between its constituent phrases is therefore essential, both when considering coverage but also when it comes to the issues of causation. These issues are separately addressed, but certain obvious points are worth emphasising at this stage while the phrases of the clause remain laid out on the table for examination.

82. <u>First obvious point</u>: **the insured peril is not the emergency**.

82.1 EIO has not promised to hold the insured harmless against the emergency and all its consequences.

82.2 This ought to be obvious on any reading of the clause.

82.3 The emergency's function within the clause is to identify that to which the action of government must be a response if it is to be qualifying action within phrase [2]. No more and no less. There could be an emergency with no government action etc (not covered), or government action etc with no emergency (not covered).

82.4 It is only where there is government action etc which is due to the emergency, and such action causes access prevention etc. that the cover is triggered.

83. Second obvious point: **the insured peril cannot become the emergency by the back door**.

83.1 First, the insured peril cannot be converted into the emergency just because the emergency is mentioned in the clause – *i.e.* by the back door of promoting its significance within the structure of the clause.

(a) The role performed by each ingredient in the clause must be respected. Not every ingredient plays the lead (or ultimate) role. Some ingredients are merely descriptive of others and are included for no other reason.

(b) If the mere mention of the emergency, regardless of the purpose for its mention (as revealed by the connecting language used and the sentence structure within which it is deployed) is enough to convert it into the insured peril, phrases [1] and [2] are rendered otiose and, in effect, deleted.

(c) A prevention of access coverage extension would then be turned into an emergencies coverage extension.

83.2 Secondly, the insured peril cannot be converted into the emergency by the back door of causation.

(a) If the FCA's causation argument is, in effect, to convert the insured peril into the emergency, the argument must be wrong.

(b) This is the effect of the FCA's argument in relation to the causation counterfactual. The purpose of the causation counterfactual is to identify those losses factually caused by the insured peril, in isolation from those losses which would have been suffered even if the coverage extension had

never been triggered. The causation counterfactual operates by reversing the insured peril and considering what the financial position of the insured would have been if the coverage extension had never been triggered.

(c) The FCA seeks to reverse far more than the insured peril. It seeks to reverse everything which receives any mention in the insuring clause, regardless of the reason for its mention.

(d) Thus the FCA argues that the prevention, the action of government and the entire emergency itself should all be reversed in the causation counterfactual.

(e) The effect of this erroneous and unprincipled approach is to promote the emergency to the insured peril, eclipsing all else in the insuring clause, and to change the insured peril into something it never was.

(i) The scope of the reversal for which the FCA contends is evident in a number of places in the APoC, but paragraph 4.3 (underlining added) will suffice: "*… the correct counterfactual is a world in which there was no COVID-19 and no Government intervention related to COVID-19"* **{A/2/4}**.

(ii) If one seeks to map that statement back onto the coverage provision, it ought immediately to be apparent that "*no Government intervention related to COVID-19*" bears some (only some) relation to the coverage clause as a counterfactual to "*action of government … due to an emergency*".

(iii) But how does "*a world in which there was no COVID-19*" map onto the coverage clause? Where, if anywhere (and it is actually nowhere), in the coverage clause does "*a world in which there was no COVID-19*" appear? What exactly in the coverage clause is the FCA seeking by its

deployment to reverse? The answer is obvious: the FCA is seeking to reverse not just the government action, but the entirety of the world emergency to which the government action was in response.

(iv) It is no answer to suggest that the emergency must be reversed because the words "*due to an emergency*" appear in the coverage clause. That is to ignore the role those words are there to perform – a point made elsewhere above and below.

(v) Put bluntly, the deployment by the FCA of the world emergency as part of the counterfactual seeks to reverse something going way beyond what the coverage clause promises to insure. As a counterfactual, "*a world in which there was no COVID-19*" maps onto a coverage provision a world away from what EIO and its policyholders actually agreed.

(f) The effect of reversing the emergency in the counterfactual is that all the effects of the emergency are reversed, and EIO is made the insurer of all the effects caused by the emergency – because all those effects are then said to have been the consequence of the insured peril, as demonstrated by the application of the 'but for' test.

(g) Such a wide-ranging reversal makes no attempt to isolate and identify the loss caused by the access prevention etc. which was itself by reason of action of government etc. responding to the emergency.

(h) In effect, it makes no attempt to treat the access prevention etc. as the insured peril.

(i) Rather, by identifying all the consequences of the emergency howsoever caused (*viz.* whether caused by the relevant form of action prevention etc. or otherwise caused), the FCA's approach elevates the emergency to the

status of the insured peril – a status it never enjoyed within the coverage clause itself.

83.3 Thirdly, the insured peril cannot be converted into the emergency by the back door of the facts.

(a) This is a back door against which the FCA is beating hard. But it is a robust door and rightly bolted shut, and there is no justification for allowing the FCA to break it down and change the agreed basis of access to the cover.

(b) The characterisation[91] of the facts contended for by the FCA would allow the scope of the agreed cover to be invaded and occupied by matters never intended to be let in through the front door of the coverage language.

(c) According to the FCA, none of the disease, the public authority action responding to the disease or any other strand of the whole can be separated out from any other – paragraph 53.2 APoC **{A/2/35}**. Then the FCA separates out the public authority action and makes the further assertion that "*the public authority actions are part of an indivisible and interlinked strategy and package of national measures which it is impossible, and contrary to the contracting parties' intentions, to divorce for the purposes of calculating the 'but for' counterfactual or for the purposes of proximate causation.*" – paragraph 56 APoC **{A/2/36}**.

(d) On this footing, the FCA's logic appears to be that the entirety of all that has happened must therefore be covered.

(e) The footing is flawed, because the public authority actions are not indivisible amongst themselves, any more than the actions are not indivisible from the

[91] Some might say mischaracterisation, but the more charitable description is sufficient to make this point.

disease. Distinctions can and must be made, where the parties have agreed that those distinctions be made.

(f) It is no answer to say that, if the distinction is made, the Insured cannot prove that it has suffered any loss by reason of the one strand of the whole which was insured.

(g) There cannot be a massive expansion (*i.e.* rewriting) of the insured peril simply in order to enable the Insured to make a recovery, where the narrow agreed peril has not itself caused the loss.

84. Third obvious point: **the insured peril must ultimately be determined by construing the policy wording carefully**.

84.1 The insured peril is not simply an event that causes loss to the insured, but is determined by the specific wording used in the policy. This proposition is well-established and fundamental.

84.2 In *Astrazeneca Insurance Co Ltd* v *XL Insurance (Bermuda) Ltd* [2014] Lloyd's Rep IR 509, Christopher Clarke LJ said (at [32]) **{K/154}**:

> "The liability which is the subject of coverage under Article I must be 'encompassed by an Occurrence'. There has, therefore, to be an 'occurrence'. This may be an actual or alleged personal injury, which is actually or allegedly attributable to an actual or alleged event. But the policy does not provide cover for occurrences. The occurrence is the shell within which the pearl of liability must be found; or, to use the metaphor adopted by the judge, the occurrence is the gateway to coverage. What the occurrence does not do is to identify that which is to be the subject of indemnity. In Yorkshire Water v. Sun Alliance, this court exposed the fallacy of treating an 'event' or an 'occurrence' as the peril insured against'."

84.3 The reference in the penultimate line is to *Yorkshire Water v. Sun Alliance* [1997] 2 Lloyd's Rep. 21 at 28RH **{K/86}** in which Stuart-Smith LJ had referred to the

"*fallacy*" of counsel's argument being "*that it seeks to elevate the 'event' or 'occurrence' into the peril insured against*" where the insured peril was in fact (in the case of one policy) legal liability for damages in respect of accidental loss or damage to material property and (in the case of the other policy) sums which the insured shall become legally liable to pay as damages in respect of loss or damage to property. Stuart-Smith LJ then endorsed an approach whereby four relevant requirements were identified, all of which were essential to be proved before an indemnity could be obtained. Those requirements broke down the insuring clause into its constituent elements, so as to identify precisely the insured peril and to avoid elevating one element which was not the insured peril into the insured peril.

85. Two simple examples from the context of an insured church will suffice to conclude this point.

86. Assume, first, a church which receives 25% of its monthly income from a generous donation made by standing order by the owner of the local restaurant.

86.1 The monthly donation has been regularly received for several years, even during the period of 6 months in the previous year when the church building had to be closed for urgent structural repairs. At the end of March 2020, the generous donor wrote to the vicar, stopping the monthly donation and attributing it to his own loss of income caused by his restaurant being shut down due to Covid-19. In the same letter, the donor reiterated his support for the church and he regularly attended weekly services held via Zoom during the lockdown.

86.2 Was the church's 25% loss of income caused by the insured peril?

86.3 On the FCA's case, Covid-19 and all it caused is (somehow) a single, indivisible whole, and therefore everything must be reversed in the counterfactual, so that the emergency falls to be reversed, as much as the government action which was

due to the emergency and which caused prevention or hindrance of access or use of the church.

86.4 EIO submits that this simply cannot be right. The coverage provision (and therefore the insured peril) is directed to prevention or hindrance of use or access, itself caused by action of government resulting from a specified situation. The 25% loss of income had nothing to do with prevention or hindrance of use or access. The donor said so: he gave a different reason for stopping his donation. It had everything to do with Covid-19 more generally, but nothing to do with the specific insured peril. So that specific loss of income is not covered, and the opposite conclusion can only be reached by rewriting the contract.

87. Assume, secondly, that the same church receives a further 30% of its monthly income from renting the church hall for two days each week to a local group running social activities for elderly people.

87.1 From early March 2020 (before any restrictions are imposed by the government), the local group starts to see a marked downturn in the number of elderly people attending its events – not least after the first UK deaths from Covid-19 are reported. The organisers decide to suspend their meetings before the government regulations in late March.

87.2 The agreement between the local group and the church is informal and rent is paid week by week. No rent is paid (or payable) when the hall is not being used. The vicar sees the local group leader on his daily walk in late April and shouts from a distance that he hopes the OAPs' group can start up again soon. The local group leader shouts back that even if the church were to reopen, he can see no hope of starting again in the foreseeable future, because several of the group have died and the others are shielding strictly.

87.3 Was the church's 30% loss of income caused by the insured peril?

87.4 The loss of income was plainly not caused by the government action preventing or hindering use or access. Based on the facts relating to the regular attendees and what the group leader said, the church would not have received the income even if the government had not required the church to close.

87.5 Yet on the FCA's case, because Covid-19 and all it caused is (somehow) a single, indivisible whole, therefore it is all to be reversed in the counterfactual. Since the loss of income was, in general terms, caused by Covid-19 and the Covid-19 emergency, it would appear to be a loss on a widely drawn counterfactual.

87.6 Again, EIO submits that this simply cannot be right. The coverage provision (and therefore the insured peril) is directed to prevention or hindrance of use or access, itself caused by action of government resulting from a specified situation. On the assumed facts, this was nothing to do with the reason why the group did not meet, in that the group would not have met (and, so, the church would not have received the income) even if the prevention or hindrance caused by government action had not occurred.

88. These examples are not the only examples which could be given of the coverage provision in operation. But it is submitted that they do serve to illustrate its scope and its limitations.

89. But only half the coverage provision has been considered. There is another important side to the coverage coin, to which it is now necessary to turn.

<u>The coverage provision: what was not covered</u>

90. Whether under the heading "*What was not covered*" or introduced by the word "*excluding*", the Insured and EIO explicitly agreed that EIO did not insure loss resulting from interruption of or interference with the Insured's usual activities as a result of (underlining added)

"closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease) food poisoning defective drains or other sanitary arrangements or vermin or pests."

91. The issue is whether an order or advice falls within this provision if it was order or advice of the UK government.

92. The FCA contends that such order or advice does not fall within the provision because the UK government was not "*the competent local authority*" within the meaning of those words.

93. The FCA juxtaposes the phrase "*the competent local authority*" in the statement of what is not covered with the phrase "*action of government, police or a local authority*" in the statement of what is covered and points to the difference between them. The FCA effectively contends that the words "*local authority*" mean the same in both cases, such that action of government or police is (i) always covered and (ii) never not covered or excluded.

94. There are two basic fallacies in the FCA's approach:

94.1 First, the FCA ignores the contextual, unitary deployment and origins (and therefore commercial purpose) of the phrase "*the competent local authority*". With all this ignored, the FCA goes wrong as to the meaning and scope of the phrase.

94.2 Secondly, even within the context of clause 1, the FCA ignores the significance of the additional word "*competent*".

The deployment, origins and purpose of the key phrase: "the competent local authority"

95. The same phrase "*the order or advice of the competent local authority*" also appears in clause 6 – **Specified disease** etc. **{B/4/47}**.

95.1 Clause 6 represents a separate coverage regime for occurrences of specified disease within a radius of 25 miles of the premises which cause restrictions in the use of the premises on the order or advice of the competent local authority.

95.2 It is not every occurrence of a specified disease within the specified area that qualifies for cover under clause 6 (in respect of loss directly resulting from interruption of or interference with the business in consequence of it). The particular occurrence of the specified disease must have caused restrictions in the use of the premises on the order or advice of the competent local authority.[92]

95.3 What does the phrase "*the order or advice of the competent local authority*" mean in the context of the cover under clause 6 for specified disease? This question must be answered in the context of the relevant and admissible background and matrix against which the policy was concluded, including the legal background to the cover being provided. The relevant and admissible parts of the background and matrix are these:

(a) The local authority (i.e. district councils, county councils, LBCs and similar, all as defined in section 1 of the Public Health (Control of Disease) Act 1984) **{J/5}** could serve a notice under regulation 8 of the Health Protection (Local Authority Powers) Regulations 2010 **{K/17}**, requesting (but not requiring)

[92] An occurrence of a specified disease which elicited no order or advice from the competent local authority would not qualify.

a person or group of persons to close the premises, or refrain from accessing or using the premises[93] – see paragraph 68.2(b) above.

(b) A local authority could apply to the Magistrates' Court for an order under section 45I of the 1984 Act – see paragraph 67.7 above. Such an order would be in relation to premises, if satisfied that the premises are or may be contaminated in such a way as does or could present significant harm to human health.

(c) A Crown Court judge could make such an order under section 45I on appeal from a Magistrates' Court in relation to their determination of a local authority application under section 45I.

(d) A High Court judge could make such an order on appeal by way of case stated from the Crown Court.

(e) The Secretary of State could, by regulations made under section 45C of the 1984 Act, make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection, including a particular outbreak of disease in particular premises or a particular location or locality (and nationally) – see paragraph 67.3 above.

(f) Emergency regulations could be made under the Civil Contingencies Act 2004 **{J/8}** by a Senior Minister or by Her Majesty in Council if there is an emergency (i.e. an event or situation threatening serious damage to human

93 In the case of schools only, the local authority could also serve a notice under regulation 2 of the same Regulations on parents of a child or children requiring them to keep their children away from the school – but only if strict requirements for serving such a notice are met. There is no power under the 1984 Act or regulations made under it for the local authority to close the school.

welfare anywhere in a place in the UK) and the statutory requirements are met – see paragraphs 60 to 63 above.

96. EIO submits that any of the action by any of the authorities identified in paragraph 95.3 would be covered under clause 6.

96.1 All of the authorities identified above are competent in the sense that they have a legal jurisdiction which can be exercised, subject to certain requirements being met.

96.2 All of the authorities identified above are competent to act locally to the premises in the sense that, upon the occurrence of a specified disease at the premises or within a radius of 25 miles of the premises, they can and possibly should (in each case, depending on the circumstances) make orders or issue advice that have the effect of restricting the use of those premises.

96.3 It would make a nonsense of the cover if EIO could be heard to say that an order made by the Magistrates' Court, or by the Crown Court, or by the High Court, or by the Secretary of State in response to a specified disease within 25 miles of a premises was (i) not an order by a competent local authority and, therefore, (ii) not sufficient to trigger coverage under the Specified disease clause. If EIO were so to contend, the FCA would be the first to blow its regulatory whistle and cry 'foul'.

97. It is clear, therefore, that the "*competent local authority*" in clause 6 is not confined to the local government authority covering the place where the insured premises are specifically located. The "*competent local authority*" covers any relevant authority competent, upon the occurrence of a specified disease at the premises or within a radius of 25 miles of the premises, to make orders or issue advice that have the effect of restricting the use of those premises.

98. In terms of the meaning of "*competent*" and "*authority*", EIO's case is entirely consistent with paragraphs 108 to 110 of the FCA's own Trial Skeleton. In fact, EIO adopts those paragraphs. Moreover, the interposition of the word "*local*" merely emphasises what would be the case in any event, namely that what competent means, with reference to an authority, is that it exercises jurisdiction in the local area regardless of whether its jurisdiction is confined to that area or is broader. Paragraph 110 of the FCA's Trial Skeleton entirely supports that proposition.

99. Clauses 1 and 6 co-exist in close proximity to each other. They both use the phrase "competent local authority". They both use that phrase in the very same context, viz., "*disease*": clause 1 does so with reference to "*infectious disease*", while clause 6 does so with reference to "*specified disease*". They both do so in the context of the "*occurrence*" of "*disease*". They both do so in the context of the "*use of the premises*" being affected on or due to "*the order or advice of the competent local authority*".

100. The (intended) correlation between them is obvious.

101. Thus:

101.1 Clause 1 carves out of the wider prevention of access cover "*closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of the occurrence of an infectious disease*", while

101.2 Clause 6 writes cover back in but (relevantly to this case) only in respect of "*any occurrence of a specified disease at the premises or within a radius of 25 miles of the premises … which causes restrictions in the use of the premises on the order or advice of the competent local authority*".

102. The idea that the phrase "*competent local authority*" has a different meaning in clause 6 from its meaning in clause 1 is not impossible as a matter of law. In this case, however, there is no good reason to suggest that it does so as a matter of construction.

103. The phrase "*competent local authority*" obviously means the same in both clauses.

104. There are two possibilities for the FCA. The first is that the FCA must argue that, indeed, the phrase "*competent local authority*" means the same in both clauses but that, in both clauses, it means just the local government authority. Thus, coverage under clause 6 would only be triggered if the order or advice comes from the local government authority and from no other authority. The FCA does not, however, make that argument. On the contrary, it seems to eschew it: see paragraph 44 of the FCA's APoC **{A/2/29}**. It seems to say that the phrase "*competent local authority*" in clause 6 includes "*the UK Government*".

105. If, however, the FCA will argue that "*competent local authority*" in clause 6 is, like its counterpart in clause 1, confined to the local government authority, this would be a nonsense.

105.1 However competent and however local its jurisdiction, the FCA would have to argue that an order of the Magistrates' Court is not good enough, nor of the Crown Court, nor of the High Court, nor of the UK government via the relevant Secretary of State. The FCA would have to argue for a dividing line through the middle of clause 6 which would drive a coach and horses through its obvious commercial purpose.

105.2 Why should cover for the Insured under clause 6 turn on the happenstance of the order or advice being that of the local authority itself, rather than of a court on the application of the local authority? Why should it make any difference if the ultimate order was made by the Crown Court rather than more locally? Why would the insured be deprived of cover if it was the Secretary of State, and not the local government authority, who decided to exercise his or her power? Why should that make all the difference?

105.3 Viewed against the legislative background, the FCA's contention cannot be what the phrase "*the order or advice of the competent local authority*" means.

105.4 Moreover, as a matter of plain language, it is neither necessary nor correct to conclude that the FCA's contention must be right. The phrase "*competent local authority*" is plainly apposite to embrace any authority which is legally competent in the locality of the insured premises (even if the authority is legally competent beyond the locality of the insured premises as well). That is obviously what the phrase meant.

105.5 If the FCA were right in arguing that, in every context, the phrase "*competent local authority*" is restricted in scope to a local authority strictly so-called, the operation of clauses 1 and 6 would lead to highly surprising results:

(a) If there were a measles epidemic regionally or nationally to which central government responded, there would be no cover under clause 6 (even though measles is a specified disease),[94] because there would be no order or advice of the "*competent local authority*".

(b) There would, however, be cover under clause 1 because the order or advice of central government in response to the measles outbreak is outside the scope of the Infectious Disease Carve-Out.

(c) It surely cannot be right that a specified disease is not covered under the specified disease clause, but is covered under the prevention of access clause notwithstanding its exclusion of infectious diseases, just because the

[94] It cannot be said that the parties would only have assumed a local outbreak of measles. The possibility (*i.e.* risk) of a wider outbreak cannot be discounted, even if it might have been regarded as less likely than a local outbreak.

government order came from central government rather than local government, where both were competent and either could have acted.

106. The second is that the FCA must argue that the phrase "*competent local authority*" means something different in both clauses: that in clause 6, it includes "*the UK Government*"; but in clause 1 the same *verbatim* phrase (as part of a longer *verbatim* phrase), despite having been self-evidently shared in a related context, was intended to have an entirely different (*i.e.* far narrower) meaning and is to be confined to the local government authority.

107. If, however, and indeed as appears to be the case, the FCA accepts that the phrase "*competent local authority*" in clause 6 includes "*the UK Government*", which is absolutely right, how can it get out of the conclusion that the very same phrase in almost immediate proximity to clause 6 but in clause 1, covering the same subject-matter of disease occurrence, enjoys the same meaning? How can it then say that, in the Infectious Disease Carve-Out, "*competent local authority*" does not include "*the UK Government*" but is confined to the local governmental authority? And if it does say that, is it also saying that, while "*competent local authority*" in clause 6 includes the magistrates' court, the crown court etc. (in fact, any authority which is legally competent, upon the occurrence of a specified disease at the premises or within a radius of 25 miles of the premises, to make orders or issue advice that have the effect of restricting the use of those premises), for some reason the identical phrase in clause 1 means something altogether more confined?

108. The Court should not attribute to the parties a schizophrenic intention of giving a carefully written phrase one meaning in clause 1 and a different meaning in clause 6. This runs counter to basic principles of contract construction: see paragraph 43 above.

109. EIO submits that the entire phrase "*the order or advice of the competent local authority*" means the same in both clauses and includes "*the UK Government*". It was carefully

carried across *verbatim* by the draftsperson between clauses 6 and the Infectious Disease Carve-Out in clause 1.

109.1 The obvious purpose of the *verbatim* repetition of the same phrase in a similar context was that its meaning, scope and effect should also be carried over to the context in which it was repeated.

109.2 Reading the Infectious Disease Carve-Out and clause 6 together, the commercial purpose was to ensure that infectious disease risks which gave rise to formal orders or advice by the competent authority local to the insured were not insured under clause 1 at all, but either were insured under clause 6 (if the disease was a specified disease) or nowhere (if it was not).

109.3 The juxtaposition of the phrase "*action of government, police or a local authority*" in clause 1 with *"the order or advice of the competent local authority*" in the Infectious Disease Carve-Out in the same clause is stark.

(a) The stark juxtaposition and observable difference invite the question: why did the parties use such different phrases in the same immediate context?

(b) To which the obvious answer is: because the second phrase was being shared *verbatim* with a different coverage clause, intentionally, with a view to meaning the same thing (*i.e.* having the same scope) in both contexts.

110. For these reasons, EIO submits that

110.1 the objective intention of the parties was that the phrase "*the order or advice of the competent local authority*" should bear the same meaning in the Infectious Disease Carve-Out as in clause 6, and

110.2 its meaning in clause 6 was, when read against the matrix of the general law, such as to embrace orders or advice not just of the local authority (as defined in the

1984 Act) but also of other authorities competent to act locally to the insured premises, including Magistrates, the Crown Court, the Secretary of State, other government ministers and even Her Majesty in Council.

The significance of "competent"

111. As for the FCA's juxtaposition of the phrase "*the competent local authority*" in the statement of what is not covered in clause 1, with the phrase "*action of government, police or a local authority*" in the statement of what is covered in clause 1, the reasons for the difference in wording and why the Infectious Disease Carve-Out did not simply replicate the coverage wording are clear. There are two reasons: the first is already discussed above in connection with clause 6. The second is because the draftsperson was signposting that the closures or restrictions in connection with an occurrence of an infectious disease that were not to be covered included those mandated by government, police or a local (governmental) authority but were not even to be so confined.

112. Simply within the confines of clause 1 itself, and comparing the two phrases against each other, if the intention had been only to carve-out orders or advice of the local governmental authority in response to infectious diseases, why did the parties add the extra word "*competent*" within the Infectious Disease Carve-Out? The answer is reasonably apparent. The phrase "*the competent local authority*" in the Infectious Disease Carve-Out is a comprehensive phrase encompassing any authority that is competent to act in the locality of the premises and may include (and not even be limited to) "*Government Police or Local Authority*" as the case may be. It may, therefore, include any authority competent to act locally to the insured premises, (whatever it may be) including Magistrates, the Crown Court, the Secretary of State, other government ministers and even Her Majesty in Council.

113. On the FCA's case, the word "*competent*" is unnecessary, bears no meaning and can effectively be ignored or deleted. On EIO's case, it is a deliberate part of the parties'

bargain, must be given meaning and neither ignored nor deleted, but acknowledged and applied. Its inclusion invites a consideration of what authority or authorities were competent in the locality – where competent plainly means legally empowered to act, rather than competent in the sense of non-negligent. Once this is acknowledged as the question, one is driven back to the legislative matrix to identify the authority or authorities that are legally competent in the locality. Those authorities include Magistrates, the Crown Court, the Secretary of State, other government ministers, and Her Majesty in Council.

114. It is again surprising – indeed, arbitrary – then to conclude that the Carve-Out was intended to catch only some authorities who were competent in relation to the locality and not others. The division which is then required to be drawn makes no commercial sense.

115. The inclusion of the additional word "*competent*" is, in fact, changing the emphasis of the phrase altogether. Instead of a phrase (as in clause 1 itself) which draws a clear distinction between government, police and local authority by mentioning all of them, the different phrase in the Carve-Out emphasises the issue of (legal) competence. The word "local" becomes less a description of the nature of the authority and more a qualification of competence in refining the issue as to whether the competence (*i.e.* legal power to order or advise) can be exercised locally in relation to the insured premises.

116. The two separate arguments outlined above complement each other.

117. Both arguments lead

117.1 to the conclusion that the phrase "*the order or advice of the competent local authority*" was consciously and deliberately shared in the Infectious Disease Carve-Out so as consciously and deliberately to mirror the scope and meaning of

the same phrase in clause 6 – which itself cannot sensibly be artificially confined and limited as the FCA must (artificially) otherwise contend; and

117.2 to the conclusion that the phrase was consciously and deliberately different from the phrase "*action of the government, police or a local authority*" in clause 1 – not because the scope of the phrase *"order or advice of the competent local authority*" was intended to be narrower, but because its rationale and shared genesis were different and needed to be capable of clear identification. This was all part and parcel of how the parties ensured that clauses 1 and 6 dovetailed together in an integrated scheme so as to grant infectious disease cover only under clause 6 and only to the extent of clause 6.

118. The final point to make is in relation to the FCA's reliance, at paragraph 534 of its Trial Skeleton, on the wording of EIO 1.1 extension clause 11 and the reference in that extension to the exclusion of "*the order of a competent public authority*". That reliance is misplaced. Extension 11 is cancellation insurance. It is specifically in relation to cancellation or abandonment etc. of church events, not just at the premises but anywhere within the geographical limits. The geographical limits are defined in the General Definitions and include the entirety of the UK. An event could be anywhere within those geographical limits and not just confined to one part of those geographical limits. A church event can involve a charity walk from John O'Groats to Land's End. The reference to a competent public authority in that context is obviously to any public authority anywhere in the UK that has the competence (i.e. jurisdiction) to make a compulsory order for the cancellation or abandonment of the event. The reason why public authority and not local authority is used is because the clause is not confining itself to any particular locality. Moreover, when the FCA says that competent specifies a sub-set of the set 'public authority' or 'local authority', that is entirely consistent with EIO's case: it is that authority which respectively has authority publicly, i.e. everywhere, or that authority which has authority locally to the insured premises.

Coverage under EIO Type 1.1 clause 3 and Type 1.2 clause 1 on the facts

119. The relevant Categories so far as EIO is concerned are Categories 1, 2, 4, 6, and 7.

120. The FCA seems to suggest at paragraphs 491 to 527 that EIO's case on the facts is unclear. That is transparently wrong. Lest it be maintained that there is any unclarity in its position, EIO states simply the following:

120.1 The FCA says that the emergency was in existence from at least 3 March 2020. EIO says that the emergency was in existence as of 12 March 2020. The difference is irrelevant, because the FCA accepts that there was no relevant governmental action until 16 March 2020 (i.e. until after the date when EIO accepts there was an emergency).

120.2 As to the FCA's allegation that there was relevant action of central government (by which access to or use of premises was prevented or hindered) on 16 March 2020, EIO says that the evidence needs to be considered separately with reference to different types of its insureds.

120.3 The evidence shows that relevant action by the government was not taken or did not exist until 23 March 2020. The difference is precisely one week.

120.4 In relation to churches and other places of worship:

(a) The FCA says that access and use were prevented as from 16 March alternatively 23 March 2020 (by action of the government). EIO says that use was hindered as from 23 March 2020 and that any further enquiry regarding access and regarding prevention is irrelevant.

(b) The FCA says that clear instructions were given on 16 March 2020, well before the mandated closure. But it is quite apparent that what the FCA describes as "*clear instructions*" were, in relation to churches, neither clear

nor instructions. Churches were noticeable by their absence from what the Prime Minister said and it is entirely reasonable to suppose that reasonable church goers would not have interpreted what the Prime Minister said as requiring them not to go or discouraging them from going to their places of worship.

(c) Use of the premises was hindered by action of the UK Government as from 23 March 2020 when they were told to close.

120.5 In relation to schools including nursery schools:

(a) The FCA says that access and use were prevented as from 20 March (by action of the government). EIO says that use was hindered as from 23 March 2020 and that any further enquiry regarding access and regarding prevention is irrelevant.

(b) The FCA relies on the government announcement on 18 March that UK schools would be closed from 20 March 2020. In fact, in a press release dated 18 March 2020, the Department of Education announced that schools would close from 23 March 2020, except for children of key workers and vulnerable children.[95] 23 March was the first school day when schools were to be largely closed.

(c) Use of the premises was hindered by action of the UK Government as from 23 March 2020 when they were told to close.

120.6 In relation to care homes, there was no closure or restriction on use. It is the FCA whose case is unclear.

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95 Agreed Facts 1 Chronology bundle, p. 225 **{C/2/225}**; Assumed Facts, Category 7.a. **{E/1/4}**.

120.7 In relation to other types of insureds, the position is fact-sensitive, depending on the precise nature of the charity, organisation or business and its particular activities and characteristics. EIO does not accept any criticism for any alleged lack of clarity, given that this is a test case on construction only.

121. The short issue[96] which then arises is whether any announcements or speeches or musings of any member of the UK Government before 23 March 2020 amount to "*any action of [government] due to an emergency which could endanger human life*", by which "*access to or use of [relevant]* ***premises*** *[was] hindered*."

122. EIO would make two general but important points on the language of its wordings:

122.1 First, the words "*hindered by*" are ordinary words to be read in context and therefore contrasted with the word "*prevented*".

(a) The word 'hindering' has been described as meaning "*interposing obstacles which it would be really difficult to overcome*"[97] (in contrast to the word 'preventing', which has been said to connote impossibility[98]).

(b) Beyond general guidance of this kind about the concept of something being 'hindered by' something else, it is not possible to provide a formula for when access or use will "*hindered by*" government action due to an emergency: the words have to be taken in their ordinary sense and applied to the facts.[99]

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96 List of Issues, paragraph 27.4 **{A/15/9}**. This short issue is addressed here in relation to churches and schools: in relation to other Categories of Insureds, see Appendix 1 hereto.

97 *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495, 510, *per* Earl Loreburn **{J/41/16}**. The issue arose in relation to the words "*preventing or hindering the manufacture or delivery of the article*".

98 *Ibid.*, p. 518, *per* Lord Atkinson **{J/41/24}**.

99 See paragraphs 43-44 above for the principles.

122.2 Secondly, the words "*due to an emergency which could endanger human life*" have a limiting effect. They create a precondition whose requirements are, as a matter of their ordinary meaning and/or the legal background, materially identical to those for an "*emergency*" under s. 1(a) of the Civil Contingencies Act 2004 ("*an event or situation which threatens serious damage to human welfare*").[100]

123. When applying all of these words, it is as well to remember that they raise questions of fact and degree in relation to particular premises. While EIO accepts that action of the UK Government on 23 March 2020 caused access to or use of relevant church and educational premises to be hindered, that was not the case in relation to any prior UK Government action.[101]

124. That this is so is clear from a consideration of the events prior to 23 March 2020:

124.1 In relation to places of worship, the FCA places heavy reliance upon a move away from "*mass gatherings*" on 16 March 2020. It relies upon a speech of the Prime Minister and some UK Government guidance on that date as necessarily establishing that access to or use of places of worship was hindered by action of government due to an emergency.[102]

124.2 However, the text of the relevant announcements makes clear that the UK Government was referring to mass gatherings at which emergency services would have been deployed:

(a) The guidance on mass gatherings of 16 March 2020 said:

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100 See paragraphs 59-65 above.

101 In relation to businesses other than churches and educational establishments, see Appendix 1 hereto.

102 Agreed Facts 1 chronology bundle, p. 138 **{C/2/138}** and p. 145 **{C/2/145}**.

> *"In line with the social distancing guidance it is advised that large gatherings should not take place. While the risks of transmitting the disease at mass gatherings are relatively low, these steps will also allow emergency services that would have been deployed for these events to be prioritised in alleviating pressure on public services."*[103]

(b) Similarly, the Prime Minister's speech of 16 March 2020 referred to "*mass gatherings such as sporting events*" and stated that the UK Government would "*no longer be supporting mass gatherings with emergency workers in the way that we normally do*".[104]

124.3 These statements underline the problems with the FCA's approach: it is not possible to establish a sufficient nexus as a matter of general principle between (a) the availability of access to or use of particular places of worship, and (b) UK Government remarks about mass gatherings.[105] It depends on the facts, which will include significant events unrelated to government action: for example, on 17 March 2020, the Archbishops of Canterbury and York instructed all Church of England clergy that services must be put on hold until further notice.[106] This was six days before the UK Government issued guidance to like effect, and nine days before the binding prohibition came into force on 26 March 2020.

124.4 Therefore, some factual enquiry is necessary in order to establish hindrance in any particular case beyond the hindrance admitted by EIO. The Court cannot do more than acknowledge the ordinary meaning of the phrase in its context and otherwise declare, by consent, that access to or use of the relevant premises was

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103 Agreed Facts 1 chronology bundle, p. 138 **{C/2/138}** (underlining added).

104 Agreed Facts 1 chronology bundle, p. 147 **{C/2/147}** (underlining added).

105 The phrase "*mass gatherings*" as used by the UK Government clearly did not refer to religious gatherings in general, since these are not characterised by the attendance of working emergency services professionals.

106 Assumed Facts, Category 7.a. **{E/1/4}**

hindered by action of government due to an emergency which could endanger human life from 23 March 2020.

125. Precisely the same kinds of points arise in relation to the phrase "*due to an emergency which could endanger human life*":

125.1 The FCA seeks to establish a UK-wide emergency as of 3 March 2020, notwithstanding that:

(a) The first cases in Northern Ireland, Wales, and Scotland were only confirmed on 27 February 2020,[107] 28 February 2020,[108] and 1 March 2020,[109] respectively.

(b) The applicable guidance for employers as at 3 March 2020 said:

> ***"11. What to do if a member of staff or the public with confirmed COVID-19 has recently been in your workplace***
>
> *Closure of the workplace is <u>not</u> recommended"*[110]

125.2 It is very difficult to see how the FCA can establish an "*emergency*" in the relevant sense across the UK as at 3 March 2020 in these circumstances. EIO has admitted the existence of a UK-wide emergency as of 12 March 2020 in recognition of the fact that the UK Government announced plans for UK-wide "*emergency legislation*" on 11 March 2020.[111] There is, however, no basis for the FCA's plea that a UK-wide emergency existed at a date before the UK Government took emergency action in relation to the whole of the UK.

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107 AF1, row 12 **{C/1/6}**.

108 AF1, row 13 **{C/1/6}**.

109 AF1, row 15 **{C/1/6}**.

110 Agreed Facts 1 chronology bundle, p. 35 **{C/2/35}** (underlining added).

111 Agreed Facts 1 chronology bundle, p. 112 **{C/2/112}**.

126. In these circumstances, the FCA is on the Agreed Facts not entitled to declarations in the wide terms sought against EIO:

126.1 In the first place, the Infectious Disease Carve-Out applies.

126.2 Secondly, the declarations could in any event only establish what is already common ground between the parties, namely that (a) access to or use of the relevant premises was hindered by action of government due to an emergency which could endanger human life from 23 March 2020, and (b) there was an emergency which could endanger human life in relation to all relevant premises from 12 March 2020.

Conclusion

127. There is no coverage or entitlement to indemnity because:

127.1 The Infectious Disease Carve-Out applies.

127.2 The insured peril was access prevention etc. by reason of government action, itself due to an emergency that could endanger human life.

(a) The peril was not the emergency or Covid-19 or the epidemic or the pandemic.

(b) The peril was not any action by the government other than such action as caused access prevention etc. of the premises.

127.3 The FCA cannot overcome the 'but for' test of causation.

MSA'S SAMPLE WORDINGS

128. There are three sample MSA policies before the Court. They insure different types of Insureds. For ease, the relevant policies and their relevant wordings are introduced in tabular form as follows:

	Clauses	Ref	Type of Insured
MSA 1	Cl. 1 – action of competent authorities	**{B/10/65}**	Predominantly, not exclusively, businesses never required to close
	Cl. 6 – Notifiable Disease within 25 miles [112]	**{B/10/66}**	Ditto
MSA 2	Cl. 6 – Notifiable Disease within 25 miles	**{B/11/47}**	Retail, leisure, office and surgery (*i.e.* some businesses required to close, others not)
	Cl. 8 – Prevention of Access – non damage	**{B/11/48}**	Ditto
MSA 3	Cl. 1 – Prevention of Access	**{B/12/50}**	Forges (smithies)

129. Each coverage provision is addressed individually.

MSA1

130. MSA1 is a Commercial Combined policy purchased predominantly but not exclusively by types of businesses which were never required to close pursuant to any government regulations.

112 Identical to MSA2 cl. 6.

131. It contains two clauses which the FCA regards as relevant for the purpose of these proceedings:

131.1 Clause 1 – headed "action of competent authorities" **{B/10/65}**; and

131.2 Clause 6 – Notifiable disease (as defined) within a 25 mile radius of the premises **{B/10/66}**.

132. Each clause is considered in turn.

MSA1 clause 1 – Action of competent authorities

133. Additional Cover clause 1 – Action of competent authorities was one of the coverage extensions introduced by the phrase "**We** will pay **you** for:". The full clause 1 was as follows: **{B/10/65}**

We will pay **you** for:

1. Action of competent authorities

loss resulting from interruption or interference with the **business** following action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the **premises** where access will be prevented provided always that there will be no liability under this additional cover for loss resulting from interruption of the business during the first 24 hours of the **indemnity period**.

We will not pay more than **£50,000** under this additional cover for a period not exceeding 12 **weeks**.

134. Additional cover clause 1 insured against interruption of or interference with the business at the premises [1] following action by one or more of the identified entities [2] itself following a danger or disturbance in the vicinity of the premises [3] which action prevented access to the premises.

135. Two introductory points can be cleared away in relation to phrase [1]:

135.1 "*competent local, civil or military authority*" includes each of Her Majesty's Government and Parliament. For ease, reference will be made hereafter to government action.

135.2 The ordinary meaning of "*action*" is an act or acts or things which are done. The government acted when it issued advice or guidance and also when it made Regulations.

136. The essential approach to this clause (and every coverage provision) is the same as that adopted in the context of EIO above. Specifically:

136.1 The scope of the cover and what triggers the cover (*i.e.* the definition of the insured peril) is to be discerned by construing the clause.

136.2 This requires both a unitary process of construction, reading the clause as a whole, and a process which identifies the specific role performed by each phrase within the clause, having regard to its relationship with every other.

136.3 Having regard to the essential unitary process, the sub-division of the clause into phrases is artificial but useful for ease of reference.

137. The essence of the insured peril is government action resulting from a specified situation (*viz*. danger[113] in the vicinity of the premises) resulting in a specified effect (*viz*. prevention of access to the premises).

138. The interrelationship and connections between the different phrases of the clause is entirely straightforward:

138.1 Phrase [1] requires government action. Not all government action qualifies, but only such as results from the specified situation and results in the specified effect.

[113] Disturbance is not relevant to this case. So much is common ground.

138.2 Phrase [2] defines and qualifies phrase [1] with reference to the necessary situation. It is only such action as is caused by ("*following*") danger in the vicinity that can trigger the clause.

(a) Government action for any other reason or by reason of any other cause is irrelevant and cannot trigger the coverage.

(b) Equally, if the danger in the vicinity does not cause the phrase [1] action (*viz.* government action having the specified phrase [3] effect), the cover cannot be triggered.

138.3 While phrase [2] requires government action to exist and cause the specified phrase [3] effect, it is not all government action which counts.

138.4 Phrase [3] then further qualifies and defines the type of phrase [1] government action which triggers the clause: it specifies an essential effect which the government action must cause in order for the clause to be triggered.

(a) It is not just any government action in response to a danger in the vicinity which triggers the cover.

(b) It has to be action which satisfies phrase [3]. It has to be action which causes prevention of access to the insured premises. If there is government action which interrupts or interferes with the business without preventing access to the premises, it does not qualify.

(i) For example, assume the insured is a firm of accountants which conducts audits. Assume further that government action required its audit clients to close their premises. And assume that the government action does <u>not</u> require the accountants' own offices to close or stop conducting business.

(ii) The business of the firm of accountants is interfered with, because it cannot attend at the premises of clients for the purpose of conducting audits. But it is not interfered with by government action preventing access to the insured's premises.

(iii) There is phrase [1] government action, but it does not cause the phrase [3] effect. So the government action does not trigger the coverage.

(c) Phrases [1] and [3] therefore go together. The latter stipulates the necessary effect of the former, without which there is no cover.

139. Having conducted that exercise, the scheme of the clause is tolerably clear. The essence of the insured peril is stated at the outset of the clause (*viz.* action of competent authorities) but the remainder of the clause serves to define, refine, qualify and restrict the type of government action which qualifies, having regard to what the action results from (phrase [2]) and what the action results in (phrase [3]).

140. The direction of travel within the clause is also clear. It starts with the broadest category of government action; restricts that category by the requirement that it result from the specified situation; and then restricts the category further by the requirement that is result in the specified effect.

141. The upshot of the clause as a whole is that it covers a limited sub-sub-category of government action – namely, only where it results from a danger in the vicinity of the premises, and then only where it results in prevention of access to the insured premises.

142. The purpose of phrases [2] and [3] is in each case to narrow what goes before. It is therefore a fallacy to describe each of the phrases as providing a separate trigger.

142.1 It is more accurate to say that there is one trigger, which is defined fully in three phrases. It is only where all three ingredients coincide and are satisfied that the single, narrow trigger to cover is made out.

142.2 Phrases [2] and [3] are essential but are not the trigger to cover. They are features and characteristics which the single trigger to cover must have and they de-limit the relevant scope of the single trigger to cover in terms of its cause and its effect.

142.3 The de-limiting and narrowing aspect of phrases [2] and [3] come to the fore in a different way if there is government action which somehow results from the phrase [2] situation but has far wider effects than the specified phrase [3] effect. In that situation, the clause only looks to the phrase [1] government action <u>insofar as</u> it has the phrase [3] effect. This point is developed further below.

143. A careful understanding of the clause and the relationship between its constituent phrases is therefore essential. Certain further points are worth emphasising at this stage while the phrases of the clause remain under examination.

144. <u>First</u>: **the insured peril is <u>not</u> the danger in the vicinity**.

144.1 MSA has not promised to hold the insured harmless against the danger in the vicinity and all its consequences.

144.2 This ought to be obvious on any reading of the clause.

144.3 The function of the local danger within the clause is to identify that to which the government action must be a response if it is to be qualifying action within phrase [1]. It has no greater function than that. There could be a local danger with no government action (not covered), or government action with no local danger (not covered).

144.4 It is only where there is government action resulting from the danger and such action prevents access that the cover is triggered.

145. Second: **the insured peril cannot become the danger in the vicinity by the back door.**

145.1 This point has been developed above with reference to the EIO wording.

145.2 In the EIO wording, the reference to the "*emergency*" performs a similar function to that of "*danger … in the vicinity*" in MSA1 clause 1.

145.3 Paragraph 83 above is repeated *mutatis mutandis*.

146. Thirdly: **the insured peril is only such government action as prevents access to the insured premises.**

146.1 MSA has not promised to hold harmless against all government actions resulting from a local danger, but only such government action as result in prevention of access to the insured premises.

146.2 Where the government has, over a (short or long) period of time, taken multiple actions, by way of announcements, guidance, advice, encouragement and legislation, it is both possible and necessary to identify which of those prevented access to the insured premises and which did not.

146.3 It is only the government action which prevented access to the insured premises which counts for the purpose of the coverage. All other forms of government action falling short of preventing access do not count.

146.4 Consequently, when it comes to the counterfactual, it is not all government actions resulting from the danger in the vicinity which count, but only such action or actions as prevented access.

146.5 If a different counterfactual is adopted, MSA is made the insurer of all government actions, even those which did not have the specified effect. The peril is thereby expanded and the contract rewritten. This cannot be right.

Summary: the cover is not triggered

147. In light of the foregoing survey of the landscape of the clause, it is possible to summarise MSA's position in a nutshell: MSA1 clause 1 is not triggered for two essential reasons:

147.1 First, because none of the government action prevented physical access to any insured premises, where prevention of access requires nothing less than making physical access to the insured premises physically or legally impossible.

147.2 Secondly, because no danger in the vicinity of the premises (if any such danger can be proved) caused the advice or regulations of the UK government.

148. In order to develop these two points, it is necessary to drill down into the detail of the clause.

149. Before doing so, there are two further preliminary points.

150. Firstly, an important feature of the clause is its repeated use of the word "*following*". The interruption or interference must be following the government action, which action must itself be following a danger in the vicinity. It is common ground on the pleadings that the word "*following*" requires some degree of causal connection.[114] The degree of the required causal connection appears to be in dispute, especially in light of paragraph 325.3 of the FCA's Trial Skeleton (page 125) and paragraph 779 (page 255). As to this:

150.1 The FCA seems now to be saying that the word "*following*" does not even import a 'but for' test. The basis on which the FCA proposes this conclusion is unclear.

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[114] Paragraph 60 APoC **{A/2/40}**; paragraph 68.3 D3+D5 Defence **{A/9/27}**, also paragraph 111.3 **{A/9/40}**.

In any event, it would entail a fundamental and heterodox change to the meaning of causal connection, as explored in Insurers' Joint Skeleton Argument on Causation **{I/6}**.

150.2 The FCA not only fails to provide any basis for its assertion that "*following*" connotes such a weak 'causal' nexus that it is not even required to satisfy the basic 'but for' test of causation; but, remarkably, fails to take account of the contractual context in which the word "*following*" is used in MSA1. The detail of that context is set out in Appendix 2 to these submissions. It suffices at this juncture to say that "*following*" was used interchangeably with "*resulting from*" and, where not used explicitly interchangeably with "*resulting from*", clearly indicates a strong and real causal connection where it is plain that what was followed required much more than the satisfaction of a mere 'but for' test. If any 'authority' were required to support these propositions, one need look no further than paragraph 7.14, footnote 37 in Mance, Goldrein and Merkin (eds.), *Insurance Disputes* (3rd Ed. 2011) **{K/204}** – a passage authored by Christopher Butcher QC.

151. Secondly, MSA1 clause 1 cannot be construed in a vacuum. MSA1 clause 7 provides that "***Consequential Loss*** *as a result of damage to property near the* ***premises*** *which prevents or hinders the use of the* ***premises*** *or access to them will be deemed to be damage.*" The Court will immediately see the implied distinctions being drawn between (i) prevention and hindrance, and (ii) use of premises and access to premises.

Phrase [3]: prevention of access

152. The function of phrase [3] has already been identified. Its content requires that the government action must be such "*where access will be prevented.*"

The meaning of the words

153. The words must be given their ordinary, natural meaning.

154. Prevention

154.1 Prevention of access is to be distinguished from hindrance of access.

154.2 The first (and most commonly used) OED definition of "*prevention*" is "*The action of stopping something from happening or making impossible an anticipated event or intended act.*"

154.3 On its natural and ordinary meaning, prevention of access means that access is made impossible, whether that impossibility arises physically or legally. This will not occur where access is merely made harder, that being hindrance of access.

155. Access

155.1 Access to the premises is not the same as use of the premises.

155.2 Access in phrase [3] is referring to physical access to the premises.

155.3 The relevant OED definition (in relation to buildings or premises) is "*A way or means of approach or entrance.*" On this meaning, the clause is directed to action which makes it physically impossible to approach or enter the premises – for example, because the only access road is blocked, or because a cordon is thrown around the property in response to a danger in the vicinity.

155.4 Access is not prevented where physical access is merely made harder (*i.e.* hindered), nor where use of the premises (as opposed to access) is restricted or becomes not legal.

155.5 The ordinary, natural meaning of the word, and the sense in which the parties have chosen to use it, are matters of context and ordinary usage, not matters of legal authority. However, it is notable that a range of authorities also refer to access in its ordinary and natural sense of physical access to premises. These

authorities are therefore notable, not because they are authorities on the issue of construction (which they are not), but because they are examples of the common usage of the word:

(a) *Lyons, Sons & Co v. Gulliver* [1914] 1 Ch. 631 **{K/41}**: access to adjacent premises being obstructed by a crowd assembling outside the defendant's theatre. This was an example of physical access being hindered (*viz.* obstructed).

(b) *Fritz v. Hobson* (1880) 14 Ch.D. 542 **{K/32}**: a case relating to a house owner's right of physical access from the house to the adjoining highway.

(c) *Colour Quest Ltd v. Total Downstream UK plc* [2009] EWHC 540 (Comm) at [459] **{K/136}**: there is consistent authority for the proposition that a claim for damages lies in public nuisance where physical access to or from premises is obstructed so as to occasion a loss of trade attributable to obstruction of customers' use of the highway and liberty of access. C.f. also *Tate & Lyle v. GLC* [1983] 2 AC 509 **{K/69}**.

Access was never prevented

Never any prevention of physical access

156. In paragraph 46 APoC **{A/2/30}**, the FCA alleges that the advice, instructions and/or announcements as to social distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working given on 16 March 2020 and on many occasions subsequently amounted (see paragraph 46.1) to prevention of access to the premises "*given that owners, employees and/or customers could not access the premises*".

157. Nothing done by any competent authority short of legislation was capable of preventing, or did prevent, physical access. Advice, instructions, guidance and/or

announcements did not need to be complied with. This point is addressed further below.

158. Nothing done by any competent authority, whether on or after 16 March 2020, prevented physical access to the premises of any insured: none of the action taken presented any bar or impediment to accessing any premises. Use may have been rendered legally impossible, both by the Insured and by clients or customers (depending, of course, on the type of business and whether or not it was required to close). Access was never prevented.

159. Let us take some examples:

159.1 The FCA's hardware store at paragraph 750 of its Trial Skeleton. It is quite clear that in relation to the hardware store physical access was possible. The store was expressly permitted by law to remain open. It was a reasonable excuse in some circumstances for customers to leave home and go to the store, to go inside the store and to make purchases from the store. The restrictions imposed in relation to hardware stores and members of the public were restrictions of use. The FCA's idea, at paragraph 750, of a police tape across the entrance door is only apposite if one acknowledges that the police tape could be lifted for anyone wishing to, and permitted to, gain entry.

159.2 Criminal defence solicitors. In relation to their office on the high street, physical access was clearly possible. They were not required by law to close. It was a reasonable excuse in some circumstances for clients to leave home and visit their criminal defence solicitor, to go inside the office and receive advice. The same applies to all category 5 businesses referred to by the FCA at paragraph 151.5 of their Trial Skeleton – e.g. manufacturers, accountants' offices, financial services advisers etc.

160. The FCA's fallacy is to equate access with use and to equate prevention with hindrance. If you can gain access to premises, even if not all parts of the premises are accessible, that is not a prevention of access but it may be a prevention (or hindrance) of use.

161. If one stands back from the clause for a moment, it is quite clear that what the clause is directing itself to is the very simple situation where you can't get to the premises.

162. There is nothing surprising about this conclusion: the clause is an extension of a property damage BI cover which is workable, sensible, understandable and has plenty of scope of application in the real world. It would readily respond to action of any number of authorities resulting from a local danger or disturbance and resulting in the prevention of physical access. Any kind of local emergency involving a cordon or blocked access roads or similar would trigger the cover, and those are precisely the types of situation that the clause was clearly designed to meet.

163. The conclusion that the clause was not designed (and is insufficiently broad) to respond to epidemic or pandemic disease crises is simply the consequence of how the clause is worded and what the parties objectively had in mind (namely, only covering local danger or disturbance whereby physical access is prevented).

<u>The FCA's case as to (legal and non-legal) prevention of access</u>

164. The FCA's case is so extreme that it alleges (in response to EIO/MSA's Defence paragraph 56 **{A/9/22}** that "*Prohibition does not require legal force, it requires that something is forbidden by someone with authority.*" – Reply paragraph 13.1 **{A/14/8}**.

165. The FCA continues: "*The Government, including through its authority to implement enforcement measures through laws or to direct other action, is able to and did prohibit through guidance and announcements (sometimes described as 'instructions' and 'rules') and would have been so understood by the reasonable citizen.*" – Reply paragraph 13.1 **{A/14/9}**.

166. This aspect of the FCA's case has been addressed in the context of the facts at paragraphs 29 to 35 above.

167. As for the legislative action taken by the government, MSA denies that access could be prevented by legal impediment to the use of the premises for the business. That is not prevention of access, but prevention of use. Without prejudice to that, and as regards the legislative action taken by the government, the position sub-divides depending on the type of insured business.

168. The sub-divisions are important, because MSA1 is a policy form predominantly, but not exclusively, insuring businesses of a type which were never required to close. The sub-divisions are also detailed. In circumstances where MSA submits that this stage of the argument will not be reached, MSA's submissions on the sub-divisions are set out in Appendix 2.

Phrase [2]: danger or disturbance in the vicinity of the premises

169. The function of this phrase has already been identified.

170. The phrase "*danger… in the vicinity*" requires an acute risk of harm from something specific happening in the immediate locality of the premises.[115]

171. That is the ordinary sense of the phrase and there is no reason to depart from giving the words their ordinary meaning.

172. The word "*vicinity*" does not admit of precise definition in a way which can be mechanically applied in each and every case. Its essence is one of neighbourhood, albeit not measured mechanically by a precise distance or radius.

[115] Or to life and property, although the latter is not relevant in the present case.

173. The FCA purports to adopt a contractual definition from an RSA wording and to suggest that it applies across the board – APoC paragraph 41.5 **{A/2/27}**.

173.1 On the RSA wording, it might be said that a case of Covid-19 in China was something which would reasonably be expected to have an impact on the Insured and its business, because of the risk of international transmission.

173.2 The FCA contends that the word "*vicinity*" does have such a scope: the FCA argues that an occurrence anywhere in the UK would reasonably be expected to have led to national response and closures everywhere.

174. MSA submits that this is simply not the sense in which the parties were, objectively speaking, using the phrase "*in the vicinity of the premises.*"

175. The phrase was intended to introduce the concept of neighbourhood into the policy, with a proper degree of local connection between the insured premises and the danger or disturbance. The geographical area which is in the vicinity will depend on local circumstances and characteristics. An urban insured location is likely to be within a vicinity measured in a much smaller geographical area than a rural location. Further, it is not the case that one location within a city is in the vicinity of every other location in the same city. For example, although in the same city, Southgate in North London and Croydon in South London are not in the same vicinity. This is not just a matter of distance, but the urban density of the area in between, the division into different areas of London, the physical barrier presented by the Thames and the acknowledged distinctions between North and South London and the division of London into different boroughs.

176. MSA submits that it is both simplistic and unrealistic to conclude that all of Greater London is one vicinity, and all the more so to conclude that every location in the UK is in the same vicinity as every other location in the UK.

177. As to danger in the vicinity:

177.1 There was no acute risk of harm from something specific happening in the immediate locality of any premises prior to 12 March 2020.

177.2 After 12 March 2020, it is a question of fact to be determined in each case, having regard to the location of the relevant insured premises, whether and, if so, when there was first a danger in the vicinity of such premises.

178. The FCA's primary contention, *viz.* that there was a danger in the vicinity of every premises from at least 3 March 2020 (when a UK government action plan was published, quarantining was in place, and there were 176 reported cases across the country) is wrong. At that stage, Covid-19 was not even a notifiable disease and the government risk level was not at high. There was a situation, to which the government was responding with an action plan, but that is different of there being a danger.

179. It was only when the government elevated the risk level to high on 12 March 2020, by which time the government had recently made Covid-19 a notifiable disease, that there could be said to be a danger.

180. Whether such danger was in the vicinity of a given premises after that date is then a question of fact in each case.

181. The FCA's pleaded fall-back case is that a danger exists within the vicinity of the premises whenever it is proved that a person with Covid-19 had been present within the vicinity of the premises, where the term vicinity has the same meaning as defined in RSA4 – APoC paragraph 43 **{A/2/29}**.

182. MSA has already explained why the FCA's case as to the meaning of vicinity is wrong. As to the broader underlying allegation that one proved case of Covid-19 in the vicinity is enough to amount to a danger, the mere presence of someone with a contagious disease is not, on its own, enough for there to be a danger. To an extent, this depends

upon what area 'vicinity' is going to be taken to occupy and the characteristics of that area (e.g. population density). It is for the FCA to prove what, if any, cases of contagious disease existed in the vicinity and the danger that they presented in the vicinity of the premises.

183. In any event, proof of a danger in the vicinity of the premises, on its own, is not sufficient to trigger the coverage provision – it is not even the subject-matter of the coverage provision.

184. The purpose of the requirement of danger is to define the type of government (or other authority) action which is capable (if the other requirements are also met) of triggering the clause.

185. The existence of a danger in the vicinity on any given date is irrelevant unless the danger in the vicinity caused the government action. This proposition has the following implications:

185.1 First, any action pre-dating the existence of a danger in the vicinity of any insured's premises was not caused by (*i.e. "following"*) such danger.

185.2 Secondly, if and insofar as there was any government action post-dating the existence of the danger in the vicinity of the insured premises, it is a question of fact whether such action was caused by such danger.

185.3 Thirdly, the action will not have been caused by (or, if in any way different, will not have followed) any danger in the vicinity if the exact same action would have been taken in any event regardless of any such danger.

185.4 Fourthly, the burden of proof rests on the insured to prove the insured peril and therefore the insured has to prove that a danger in the vicinity caused the government action. While there may be nice points to be taken as to the scope of area that might be occupied by a vicinity, it is blindingly obvious that none of

the relevant government action was taken because there was some specific danger in some specific locality; it was all taken because there was an epidemic everywhere. The government actions that were taken would have been taken irrespective of any local danger. This is not an unrealistic or artificial conclusion. It is a conclusion which the FCA itself accepts – see paragraph 241 of the FCA's Trial Skeleton and paragraph 52 of the FCA's Reply **{A/14/27}**. It simply reinforces an understanding of the clause as being locally focused, rather than responsive to national emergencies or international pandemics, the government response to which was not due to the individual situation in any specific locality, neighbourhood or vicinity.

186. There is no evidence that anything done by any competent authority, whether by way of advice, instructions, announcements, guidance, legislation or otherwise, followed (*i.e.* was caused by) a danger in the vicinity of any insured's premises. All the action taken was in response to Covid-19 generally, not specifically in relation to the vicinity of any particular insured premises.

Conclusion on MSA1 clause 1

187. There is no coverage or entitlement to indemnity because:

187.1 None of the government action in any way prevented physical access to any insured premises.

187.2 No danger in the vicinity of the premises caused the advice or regulations of the UK government.

187.3 The FCA has not proved that the Insureds would have suffered loss but for any qualifying action by the government (*viz*. following a danger in the vicinity of the premises having the effect of preventing access).

187.4 If the qualifying action had not occurred, the Insureds would still have suffered the loss.

MSA1 clause 6 – the so-called disease clause

188. Additional Cover clause 6 – Notifiable Disease etc. was one of the coverage extensions introduced by the phrase "**We** will pay **you** for:". The full clause 6 was as follows **{B/10/66}**:

> **6. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide**
>
> **Consequential loss** as a result of interruption of or interference with the **business** carried on by **you** at the **premises** following:
>
> a) i. any **notifiable disease** at the **premises** or due to food or drink supplied from the **premises**;
>
> ii. any discovery of an organism at the **premises** likely to result in the event of a **notifiable disease**;
>
> iii. any **notifiable disease** within a radius of twenty five miles of the **premises**;
>
> b) the discovery of vermin or pests at the **premises** which causes restrictions on the use of the **premises** on the order of the competent local authority;
>
> c) any accident causing defects in the drains or other sanitary arrangements at the **premises** which causes restrictions on the use of the **premises** on the order of the competent local authority; or
>
> 4. any murder or suicide at the **premises**.
>
> The maximum **we** will pay for any one loss will not exceed **£100,000**.
>
> **Conditions**
>
> 1. For the purpose of this additional cover **premises** will mean only those locations stated in the **premises** definition. If this policy includes an additional cover which deems **damage** at other locations to be insured, the additional cover will not apply to this additional cover.
>
> 2. **We** will not be liable for any costs incurred in the cleaning, repair, replacement, recall or checking of property.
>
> 3. **We** will only be liable for the loss arising at those **premises** which are directly affected by the loss, discovery or accident.

189. In relevant part, MSA1 clause 6 therefore insured against [1] **Consequential loss** (as defined) [2] as a result of interruption of or interference with the **business** [3] following (amongst other things by (a)(iii)) any **notifiable disease** (as defined) within a radius of twenty five miles of the **premises** but [4] subject to the condition that there was only cover for loss arising at those premises directly affected by such **notifiable disease**.

190. Once again, the clause must be read, understood and applied as a unitary whole. The division into numbered phrases is for ease of reference only, where a number of the component parts of the clause require comment or examination.

Phrase [1]: consequential loss (as defined)

191. Clause 6 is a non-damage extension to cover, yet it insures against **Consequential loss**, which is a defined term requiring damage.

191.1 **Consequential loss** was defined as **{B/10/11}**

> "Loss resulting from interruption or interference with the **business** carried on by **you** at the **premises** in consequence of **damage** to property used by **you** at the **premises** for the purpose of the **business**."

191.2 **Damage** was defined as **{B/10/11}**

> "Loss or destruction of or damage to the property insured as stated in the schedule and used by **you** in connection with the **business**."

192. If the definition of Consequential Loss is applied strictly in accordance with its terms, clause 6 could never be triggered because **notifiable disease** (as defined) would never cause damage to property. This cannot have been the parties' intention. MSA submits that the obvious intention was for Consequential Loss to be interpreted and applied sensibly in the specific context in which it was here being used, namely the context of a non-damage cover.

193. This point is addressed in greater detail in the causation of loss section of these submissions, and more particularly in relation to the so-called trends clauses. Self-evidently, sensible verbal manipulation is required and is possible to make the clauses work meaningfully in the non-damage context into which the business interruption cover under the Policy was being extended.

Phrase [2]: interruption or interference

194. Phrase [2] requires, quite simply, that the Consequential loss must be the result of an interruption of or interference with the Business which itself is caused by what is set out in phrase [3].

195. At this stage, phrase [2] requires no further elaboration.

Phrase [3]

196. Phrase [3] does require greater elaboration in relation to each of its three components – *viz*. "*following*"; "*notifiable disease*"; and the 25 mile radius requirement.

"Following"

197. MSA submits that this word is again used in clause 6 in the same sense in which it was used in clause 1.

198. The submissions made at paragraph 150 above are repeated.

Notifiable disease within a radius of 25 miles

199. The policy definition of **Notifiable disease** is as follows (underlining added):

> "illness sustained by any person resulting from:
> …
> b) any human infectious or contagious disease … an outbreak of which the competent local authority has stipulated will be notified to them."

200. The following submissions are made at the outset with reference to this definition:

200.1 MSA accepts that, from 5 March 2020 in England and from 6 March 2020 in Wales, Covid-19 was a human infectious or contagious disease falling within limb b) of the definition.

200.2 Covid-19 was not such a disease anywhere in the UK prior to 5 March 2020.

200.3 The definition requires more than that Covid-19 existed and was a disease within limb b).

200.4 The definition requires also that there be illness sustained by any person resulting from Covid-19.

200.5 It is therefore for the Insured to prove that a person or persons within the 25 mile radius sustained Covid-19 and that the illness sustained by that person or those persons from that disease caused the interruption of or interference with the business.

200.6 The FCA says (paragraph 878 of its Trial Skeleton) that, whenever a person contracts Covid-19 such that it was diagnosable within 25 miles of the premises, whether or not verified and whether or not symptomatic, there was a notifiable disease within the Relevant Area. With respect, this statement is difficult to understand. If a suspected case has never been verified and the person in question (if they are even identified) was asymptomatic, it is hard to see how it could be proved that any such person (if identified) sustained Covid-19. Even, however, putting aside the question of proof, the FCA's statement seems to ignore that the Insured has to establish that the proved cases of illness sustained caused interruption of or interference with the business. Any interruption of or interference with the business would still have occurred even without the proved cases of illness sustained within the Relevant Area, because the government would still have acted in the same way it did – as the FCA all but accepts in paragraph 241 of its Trial Skeleton and also in paragraph 52 of its Reply **{A/14/27}**.

201. As to the words "***within a radius of twenty five miles of the premises***":

201.1 The area within 25 miles of the premises is to be identified by drawing a circle with a radius of 25 miles measured in a straight line, having the premises at the centre of the circle. This area was defined in MSA's Defence as the "**Relevant Area**", and this expression is used in these submissions as well.

201.2 This gives an area of 1963.75 sqm.[116]

201.3 These words were clear words of definition and of restriction as to what MSA was prepared to insure.

201.4 The FCA contends, at paragraphs 895 to 896 of its Trial Skeleton, that a clause such as this directly contemplates a pandemic or wide area disease, being one of the most likely types of disease that could interrupt a business 25 miles away. The issue is not what the parties contemplated, but what effect the language of their contract has. The FCA's case would give no effect to this phrase. The FCA says that the policy must respond to an epidemic or pandemic as if the clause did not contain a 25 mile radius restriction. Whichever way the FCA turns, its analysis is misguided.

(a) If it is right, as the FCA contends, that a pandemic or wide area disease was in contemplation, then it is clear that the agreed intention of the parties was to impose a specific 25 mile radius limitation. In other words, the cover was not intended to respond to losses attributable to epidemic disease beyond the 25 mile radius but was confined to business interruption caused by disease within the 25 mile radius, and only within the 25 mile radius.

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116 $Area = \pi r^2$. $r^2 = 625$. 625 x 3.142 = 1963.75.

(b) If, on the other hand, a pandemic or wide area disease was not in contemplation, then that also fits perfectly with the limitations inherent in the clause. The parties agreed that only diseases confined to that generous 25 mile radius would attract coverage. On that basis as well, coverage for losses attributable to some pandemic or epidemic was simply not intended to be, and was not, provided.

Phrases [2] and [3] together: what the Insured must prove

202. The Insured agreed to terms of cover which require the Insured to prove that there was illness sustained by a person or persons within the Relevant Area and that such illness sustained by that person or persons caused the interruption or of interference with the business at the premises.

203. Proof that there was a person or were people who sustained Covid-19 within the Relevant Area does not, of itself, prove that the illness sustained by that person or those persons caused the insured business to be interfered with.

203.1 If a restaurant was closed down for 2 weeks because of a local measles outbreak, the Insured would prove the reason for the closure. The Insured would have been told by the authorities the reason why the closure was being imposed, and the explanation would have referred to the local measles outbreak.

203.2 It is not difficult in that case either to prove the reason for the closure or to prove that, without the local measles outbreak, the restaurant would not have been closed down.

203.3 That is the archetypal situation for which the clause was designed and to which it was objectively intended to respond.

203.4 But what of the present situation? All the evidence suggests, and the FCA seems almost to concede, that in the absence of any person or persons within the

Relevant Area with illness from Covid-19 the government would have done exactly the same as it actually did.

(a) As the FCA says at paragraph 241 of its Trial Skeleton, had there been fear/risk/danger/emergency/prevalence of Covid-19 all around the country and the incidence of the disease all around the country other than in any one 25 mile radius area, it would probably still have acted as it did. While there is a weak qualification to that acceptation by the FCA in footnote 336 of its Trial Skeleton, that acceptation is almost undoubtedly 100% correct.

(b) As the FCA says at paragraph 52 of its Reply **{A/14/27}**, the FCA does not allege that the advice given and/or restrictions imposed by the UK government were caused by any *particular* local occurrence of Covid-19, but they were caused by the outbreak of Covid-19 which was no more than an aggregate of local occurrences of Covid-19 throughout the UK. In other words, the FCA does not even allege, let alone can it prove, that the absence of any particular local occurrence would have made the slightest difference. Particular local occurrence (*i.e.* the essence of the insured peril) forms no part of the causal sequence on which the FCA relies.

204. There are two further and separate points:

205. The illness sustained by that person or those persons will not have caused the interruption of or interference with the business if and insofar as the business would have been interrupted or interfered with even if the person or persons whose illness with Covid-19 is proved had not sustained Covid-19.

206. Whether (and, if so, to what extent) other people sustained Covid-19 outside the 25 mile radius is irrelevant to proof by the Insured of "*any Notifiable disease within a radius of twenty five miles of the premises*" but potentially relevant to whether the proved

Notifiable disease within the 25 mile radius caused interruption of or interference with the business.

207. Where, as in this case, any interruption of or interference with the business was most immediately caused by action of the government in response to a national epidemic of disease:

207.1 The question of whether the proved Notifiable disease within the Relevant Area caused interruption of or interference with the business has to be answered by assuming that the person or persons within the 25 mile radius whom the Insured proves had the illness did not have the illness.

207.2 Upon that assumption, the question is whether the government would have acted any differently, whether in relation to the premises (or their location) or more generally.

207.3 If the illness sustained within the Relevant Area is proved by reference to LTLA reported cases (as to which, see below), it is to be assumed that the reported cases in that LTLA had not occurred (and were not therefore reported) but all other cases everywhere else had occurred and/or had been reported.

207.4 The question is then whether the absence of the reported cases from the particular LTLA would have made any difference to the relevant government decisions, whether locally (in relation to the insured premises or its immediate locality), regionally (as regards the region where the insured premises are located), or nationally.

208. This assumption is not difficult to make.

208.1 If it is proved (or may be inferred) that

(a) consideration was given, at a relevant time and a relevant level of government, to a master spreadsheet setting out, line by line, the number of reported cases of Covid-19 in different areas of the country (whether LTLAs, UTLAs or other), and

(b) the government decision to take action was based on the totality of what the spreadsheet showed, an apprehension about the national spread of the disease, and a concern to minimise spread for the sake of the public and the NHS,

the question now being asked is this: if a single line entry in the master spreadsheet had not been there (being the entry for the Relevant Area as proved by the Insured), would its absence have made any difference to the action taken by the government?

208.2 If the answer to that question is No, then the illness sustained within the Relevant Area did not cause the government action and/or did not cause any interruption of or interference with the business.

209. The assumption is also not impossible to make. The policy looks at illness proved to have been sustained by individual persons. It is perfectly possible to assume that the individual persons proved to have the disease never had the disease, and then to ask what difference that would have made. There is nothing indivisible. The issue of illness sustained is eminently divisible, because it looks to individual persons contracting the disease.

210. Any other approach to the issue of whether the proved illness within the Relevant Area caused the interruption or interference would not address the issue, but a different issue of whether the interruption or interference was caused by something different.

210.1 For example, if (as the FCA appears to suggest) the issue is approached by assuming there was no Covid-19 anywhere in the world[117], the assumed counterfactual cannot provide the answer to whether the proved illness within the Relevant Area caused the interruption or interference, because the assumed counterfactual is answering the wrong (and dramatically broader) question.

210.2 To pose the question in that way and to take the answer to it as identifying what interruption or interference was caused by the subject matter of clause 6 is fundamentally to rewrite the language of clause 6.

211. If the Insured has difficulty in proving either of these requirements (*viz*. (i) illness sustained within the Relevant Area, and/or (ii) that such illness sustained within the Relevant Area caused the interruption or interference), that is because the cover was objectively intended to respond to a situation which would be local and provable. It did not objectively have in mind cover for epidemic or pandemic disease, where the business would be interrupted or interfered with, regardless of the local situation, because of a national epidemic or an international pandemic.

212. If the Insured cannot prove either of these requirements and therefore cannot make any recovery under clause 6, it does not follow that the analysis is flawed or that Insurers are somehow behaving unfairly.

212.1 It only proves that the scope of the insured peril under clause 6 was too narrow and too confined to be the cause (let alone the proximate cause) of the Insured's business interruption loss.

212.2 If that business interruption loss was not caused by the insured peril but by something bigger in scale and different in nature from that against which MSA

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117 See APoC paragraph 4.3: "*the correct counter-factual is a world in which there was no COVID-19 and no Government intervention related to COVID-19*" **{A/2/4}**.

promised to hold harmless, it would be wrong to saddle MSA with a promise they never made.

212.3 In short, the FCA's approach invites the Court to re-write the policy using hindsight, so as to 'fit the facts' and allow the Insured to recover regardless of the limited scope of the policy as underwritten.

Proof by the Insured of Covid-19 within the Relevant Area

213. Much has been made by the FCA of the factual issue of how cases of Covid-19 may be proved within a given area.

214. The FCA's approach to this issue has more than tested the boundaries of the Framework Agreement **{F/1}**. In reality, the FCA has tried to advance a case outside the boundaries of the agreed scope of these proceedings. In this, the FCA has been rightly rebuffed.

215. This means that the Court will not be troubled by expert evidence or disputed evidence of any kind. The issues for determination are in a narrower compass, as set out in paragraphs 22 to 28 of the APoC **{A/2/17}**; and in the Court's Ruling at the 2nd CMC on 26 June 2020 (Ruling 4) **{A/21/3}**.

216. The issues for determination are addressed in Appendix 3.

Condition 3

217. The cover under clause 6 is also subject to the condition that there was only cover for loss arising at those premises directly affected by such **notifiable disease {B/10/66}**. This forms part of the coverage provision and is set out in phrase [4] at paragraph 189 above. In the clause itself (set out in paragraph 188 above), this restriction on the scope of the cover is contained in condition 3.

218. It is not clear that the FCA disputes the plain meaning and application of condition 3 (or, if it does, on what basis). It is important, however, not to forget condition 3, because it may be of significant effect in some insured situations.

219. Assume, for example, an insured with a warehouse at location A and a factory at location B, more than 50 miles away. If the insured proves illness sustained from Covid-19 within 25 miles of location A as a result of which the warehouse at location A has to close, then location A is the premises directly affected. If, however, the insured suffers significant consequential loss because the factory cannot operate due to lack of raw materials which would normally be supplied by the warehouse, such loss does not arise at the premises at location A but at the factory at location B. It is therefore irrecoverable.

220. This aspect of the clause appears to be common ground in light of paragraph 900 of the FCA's Trial Skeleton.

Summary of MSA's position on clause 6

221. MSA's position is simple, straightforward and entirely faithful to its contractual promise.

222. There is only cover if and to the extent that the insured was caused loss by the illness from Covid-19 which the insured can prove was suffered by individual people within the Relevant Area (defined as being within a 25 mile radius of the insured premises). The issue of what loss, if any, was caused by the illness proved within the Relevant Area is established by assuming that the proved cases of illness within the Relevant Area had not occurred. On that assumption, what if any loss would the insured have avoided? To the extent the insured would not, on that assumption, have avoided the loss but would still have suffered the loss, it was not caused by the insured peril and is not recoverable.

223. The operation of the clause, and the shortcomings of the FCA's case, can be illustrated by the following example:

223.1 Assume an insured which owns 5 country house hotels at different rural locations around the country (in Northumberland, Herefordshire, Norfolk, Sussex and the Scilly Isles). All 5 hotels are insured under a single policy. All 5 hotels are closed completely on the same date (namely, 26 March 2020) because of the government action.[118]

223.2 The insured claims under the policy for all loss in relation to all 5 hotels. The only relevant coverage provision is MSA1 clause 6.

223.3 Does the loss of income in respect of each hotel flow from proved cases of Covid-19 within a 25 mile radius of each hotel? The answer is no. All the loss was caused by government legislation applicable nationwide, which is a different cause altogether from locally proved cases of Covid-19 within the 25 mile radius of each location.

223.4 When the loss in respect of each hotel is tested separately upon a counterfactual assuming that the proved cases of illness sustained within a 25 mile radius of the hotel in, say, Herefordshire did not occur (but everything else remains the same):

(a) MSA submits that the FCA cannot prove that, but for the proved cases of illness within a 25 mile radius of the Herefordshire premises, the government action would not have applied to that location. Plainly it would.

(b) Consequently, the insured would have suffered the loss regardless of the insured peril – because the loss was not caused by the insured peril.

223.5 The only way in which it could be concluded that the total loss was caused by the insured peril is by positing a counterfactual entirely unrelated to the insured peril as agreed in the contract. The counterfactual has to be as wide as assuming no

[118] Ignoring the complexities associated with hotels having been required to stop serving food in communal dining areas a number of days earlier.

disease anywhere, thereby deleting the contractual intention and the contractual effect achieved by the 25 mile radius requirement. Yet that requirement, clearly expressed as part of the coverage provision and clearly intended to be effective, cannot be deleted after the event for the sole purpose of achieving cover where none exists.

Conclusion on MSA1 clause 6

224. There is no coverage or entitlement to indemnity because:

224.1 Any proved local cases of illness sustained did not cause the epidemic or the advice given or the restrictions imposed. Those were responses to the nationwide situation, not to any proved local cases of the illness.

224.2 The cover in respect of the occurrence of any illnesses within the radius of 25 miles of the relevant premises does not insure against loss caused by illnesses outside that area or by the risk of illnesses inside (or outside) that area or any actions of the UK government taken and effective in respect of the nationwide epidemic.

224.3 The FCA cannot overcome the 'but for' test of causation. The FCA accepts that the UK government action would have been the same without any particular local occurrence of Covid-19.

224.4 If the proved local cases of Covid-19 had not occurred, the Insureds would still have suffered the loss.

MSA2

225. MSA2 is a policy form purchased by insureds in retail, leisure, and office and surgery – APoC Schedule 5 **{A/2/105}**. The lead wording is the Retail policy wording.

226. The wording contains two clauses which the FCA regards as relevant to the present proceedings:

226.1 Clause 6 – Notifiable disease within a 25 mile radius.

226.2 Clause 8 – Prevention of access – non damage.

MSA2 clause 6

227. Clause 6 in MSA2 is materially identical to clause 6 in MSA1, subject to one point made by the FCA. The submissions made above in relation to MSA1 are therefore repeated – see paragraphs 188 and following above.

228. The one point taken by the FCA is that MSA2 clause 6 is introduced by the words "***consequential loss*** *following:*". The FCA contends, at paragraphs 883 and 906 of its Trial Skeleton, that the absence of any reference to interruption or interference in this phrase means that the causal chain does not require interruption or interference to occur. In making this argument, the FCA does not ignore the definition of "**consequential loss**", but the FCA dismisses it as inapplicable because it applies (so the FCA says) only to damage to property.

229. This argument is obviously wrong.

230. In using the emboldened and defined term "**consequential loss**" in MSA2 clause 6, the parties were plainly intending that it should apply, with manipulation to the extent required. Otherwise, of course, the FCA must accept that absent physical damage, no insured has any cover in respect of any notifiable disease (which, presumably, is not its case). The reference to interruption or interference is therefore found in the obviously applicable definition of "**consequential loss**".

MSA2 clause 8

231. Clause 8 is in the following terms:

> 8. **Prevention of access – non damage**
>
> **your** financial losses and other items specified in the schedule, resulting solely and directly from an interruption to **your business** caused by an incident within a one mile radius of **your premises** which results in a denial of access or hindrance in access to **your premises** during the **period of insurance**, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 hours.
>
> **We** will not pay under this clause more than 5% of the sum Insured or **£250,000** whichever is the lesser for any one loss

232. Clause 8 insured against financial losses and other items specified in the policy schedule [1] resulting solely and directly from [2] interruption to the **business** caused by [3] an incident within a one mile radius of the insured's premises [4] which results in a denial of or hindrance in access to the premises during the period of insurance, [5] imposed by any civil or statutory authority or by order of the government or any public authority, [6] for more than 24 hours.

233. Clause 8 is materially identical to the Hiscox NDDA clause, the most common version of which is in the following terms:

> "We will insure you for your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to your activities caused by:…
>
> **Non-damage denial of access**
>
> An incident occurring during the **period of the insurance** within a one mile radius of the **insured premises** which results in a denial of access or hindrance in access to the **insured premises**, imposed by any civil or statutory authority or by order of the government or any public authority, for more than 24 consecutive hours."

234. In light of these clauses being materially identical, and in order to avoid unnecessary duplication, MSA adopts the written opening submissions made by Hiscox in relation to each of the equivalent phrases in the Hiscox NDDA clause to phrases [2] to [6] of MSA2

clause 8.[119] Phrase [1] is then separately addressed in Hiscox's submissions on causation.

235. As Hiscox's submissions make clear in relation to their equivalent of phrase [4], this is not a clause where causation arises only after coverage is established. As part and parcel of the insured proving the insured peril, the insured must prove that it was the incident within a one mile radius (if, contrary to MSA's primary case, any such incident can be proved) that resulted in (i.e. caused) the denial or hindrance in access imposed by order of the government.

236. MSA submits that this requires the insured to prove, as part of proving the insured peril, (i) how it was that the order of government which was imposed came to be made, including that it was caused by the incident within a one mile radius, and (ii) that if the incident within a one mile radius had not taken place, the order of government would not have been imposed.

237. In addition to its case that there was no incident within a one mile radius within the meaning of the clause, MSA submits that the FCA cannot prove what it is necessary to prove in order to establish the insured peril. For the reasons set out in Hiscox's submissions, MSA submits that the FCA comes nowhere near.

238. MSA also adopts Hiscox's submissions in relation to the causal connections required by the language used in phrases 1 and 2.

239. MSA submits that, on its true construction, the insured peril under MSA2 clause 8 was an incident within the specified radius of the premises having the specified effect for the specified period.

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[119] The meaning of "interruption" is addressed by Hiscox in the context of its public authority clause. MSA adopts Hiscox's submissions in that context on the meaning of "interruption".

Conclusion on MSA2

240. There is no coverage or entitlement to indemnity because:

240.1 MSA2 clause 6 (Notifiable disease) does not provide coverage or entitlement to indemnity for the same reasons as the identical MSA1 clause 6 – see above.

240.2 MSA2 clause 8 does not respond because the FCA simply cannot prove the insured peril.

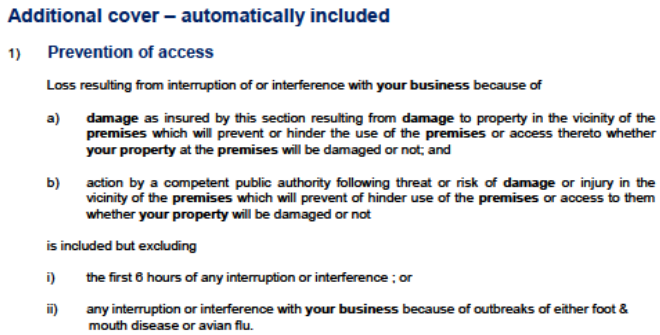
240.3 Even if the FCA can somehow prove the insured peril, the FCA cannot overcome the 'but for' test of causation.

MSA3

241. MSA3 is a policy purchased only by forges (*i.e.* smithies), as the FCA accepts (paragraph 736 of its Trial Skeleton). This was specialist cover for forges. To the best of MSA's knowledge, there have as yet been no claims by any insured under MSA's forge policy. This may not be surprising, given that forges were never required to close pursuant to any government legislation or regulations. Within the categorisations adopted by the FCA, the MSA3 wording was only found in policies insuring businesses within category 5.

242. Section 2 – Business Interruption, Additional Cover clause 1 – Prevention of access ("**MSA3 Clause 1**") insured against loss resulting from interruption or interference with the **business** because of [1] action by a competent public authority following [2] threat of or risk of injury in the vicinity of the premises [3] which action will prevent or hinder use of the premises or access to them.

243. As set out in the policy, the clause is in the following terms **{B/12/50}**:



Additional cover – automatically included

1) **Prevention of access**

Loss resulting from interruption of or interference with **your business** because of

a) **damage** as insured by this section resulting from **damage** to property in the vicinity of the **premises** which will prevent or hinder the use of the **premises** or access thereto whether **your property** at the **premises** will be damaged or not; and

b) action by a competent public authority following threat or risk of **damage** or injury in the vicinity of the **premises** which will prevent of hinder use of the **premises** or access to them whether **your property** will be damaged or not

is included but excluding

i) the first 6 hours of any interruption or interference ; or

ii) any interruption or interference with **your business** because of outbreaks of either foot & mouth disease or avian flu.

244. Although MSA3 Clause 1 did not use the capitalised term "Injury", the word injury in MSA3 Clause 1 was intended to carry the meaning given to the defined term on page 12 of the policy wording, namely "*Bodily injury, death, disease, illness or shock.*" COVID-19 therefore fell within the meaning of the word "injury" in MSA3 Clause 1.

245. On the true construction of the clause, the insured peril is government ("*competent public authority*") action which results from a specified situation and results in a specified effect. This conclusion is reached by the simple exercise of identifying which part of the clause is put first (*viz.* "*action by a competent public authority*"), where what follows are the refinements, restrictions or qualifications on the type of such action which comes within the four corners of the clause.

246. In terms of the specified situation from which the government action must result:

246.1 The threat or risk of injury must be a specific threat or risk of injury referable specifically to the vicinity of the premises, which itself proximately causes or gives rise to specific action by a competent public authority having the specified effect.

246.2 A general countrywide threat or risk of injury attracting indiscriminate central government action which has no specific reference to the vicinity or to anything specifically happening in the vicinity is not covered.

246.3 MSA's submissions in relation to the reference to "vicinity" have been made above in the context of MSA1 clause 1 phrase [2]. The points made are not repeated here.

246.4 There was no threat or risk of injury anywhere in the UK prior to 12 March 2020. After that date, it is a question of fact to be determined in each case having regard to the location of the insured premises whether, and if so, when there was first a specific threat or risk of injury specific to the vicinity of any particular premises.

246.5 The FCA's primary case that there was a threat or risk of injury everywhere in the UK and therefore in the vicinity of every premises ignores the local focus and contemplation of the clause. But if the FCA's primary case is correct, for reasons which will be or will become apparent, that works positively and directly against the FCA's case on causation: for reasons already expressed several times, even if there had been on threat or risk of injury specifically in the vicinity of the premises of the Insured, the government action would have been exactly the same.

247. In terms of the specified effect which the government action proximately caused by the specific threat or risk of injury in the vicinity of the premises must have:

247.1 Self-evidently, this clause covers both prevention and hindrance of access, and prevention and hindrance of use.[120]

247.2 Neither physical access to nor use of the premises is prevented unless it is rendered physically or legally impossible.

247.3 Hindrance of access or use involves something less than full prevention. It occurs where use or access is made more difficult or is inhibited, whether the difficulty or inhibition applies to the insured, its employees and/or its customers.

247.4 It ought to go without saying that the specified effect can occur without the government action resulting in that effect causing any interruption of or interference with the business. The mere proof that use or access is hindered by

[120] Contrast MSA1 which is confined to prevention of access.

the government action is not enough, without more, to prove that any loss was caused by such government action having such effect.

247.5 On the basis of paragraph 46 of the APoC **{A/2/30}**, MSA's understanding is that the FCA does not allege any prevention or hindrance of use or access at any time prior to 16 March 2020.

247.6 MSA's submissions on the facts as to the period after 16 March 2020 are set out in Appendix 1.

248. The ultimate question of whether loss resulted from interruption of or interference with the business because of qualifying action of a competent authority having that effect is a question of fact depending on the location and circumstances of each insured, how they put their claim, for what and on what basis.

248.1 It is not a question of fact which admits of a single answer in respect of all businesses of every type everywhere.

248.2 It is not self-evident that forges will have suffered loss from interruption of or interference with their business because of relevant qualifying action. The following points should be noted in this context:

(a) Forges were never required to close under any relevant legislation.

(b) Even the 26 March Regulations stated that a reasonable excuse for leaving home included the need "*to travel for the purposes of work … where it is not reasonably possible for that person to work … from the place where they are living*" – reg. 6(2)(f) of the 26 March Regulations **{J/16/4}**. This was the case with forges, where the equipment is not available at home and cannot be used remotely.

(c) The same Regulations also stated that a reasonable excuse included the need to obtain supplies for the essential upkeep, maintenance and functioning of the household – reg. 6(2)(a) **{J/16/4}**. This may be relevant in relation to some of the business of forges.

248.3 MSA has been unable to test or explore any of this in the context of any claims, because to date (to the best of MSA's knowledge) there are no claims by any insureds under this wording.

Conclusion on MSA3

249. There is no coverage or entitlement to indemnity because:

249.1 There was no prevention or hindrance of access or use to or of forges.

249.2 No threat or risk of injury in the vicinity of the premises caused the advice or regulations of the UK government.

249.3 The FCA has not proved that the Insureds would have suffered loss but for any qualifying action by the government (*viz*. following a threat or risk of injury in the vicinity of the premises having the specified effect).

249.4 If the qualifying action had not occurred, the Insureds would still have suffered the loss.

CAUSATION

Introduction to causation

250. An insured can only recover for losses caused by the insured peril. This is a fundamental rule of insurance law, reflecting basic contractual principles. Yet it requires restating in this test case in light of the apparently contradictory position adopted by the FCA.

251. The FCA's approach to causation has seemingly been driven by its goal of seeking to maximise coverage for all losses suffered by all relevant insureds under all Wordings, even where the Wordings and/or the law plainly require a different result. This might be because the FCA considers it must be seen to be advancing all conceivable points in favour of insureds even where those points are dubious at best.

252. This approach has infected all aspects of the FCA's causation case, and has forced it to adopt the extreme position which it has. For example:

252.1 All losses are said by the FCA to have been caused by one sole proximate cause, described in the broadest of terms to include anything and everything associated with the COVID-19 pandemic.[121]

252.2 All Wordings are said to respond to losses so caused even though none of the Wordings, including those underwritten by EIO and MSA, insures perils in such broad terms.

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[121] Paragraph 53.1 of the APoC **{A/2/35}**. See also the FCA's Trial Skeleton at paragraph 225.

252.3 The factual "but for" causation test, which is a fundamental threshold causation test (with very limited, and in this case inapplicable, exceptions), is not accepted by the FCA to apply under the Wordings.[122]

252.4 The FCA's purported counterfactual[123] (on its alternative case where it is necessary to consider what would have happened "but for" the insured peril) expands the scope of the insured perils under the Wordings underwritten by EIO and MSA beyond recognition to encompass matters that go well beyond the insured perils.

253. None of this is right. It is contrary to established principles of causation and the proper approach to causation required under the Wordings. The submissions in this section must be read alongside the section on coverage above and the Insurers' Joint Skeleton Argument on Causation **{I/6}**.

The correct approach to causation

254. This has been addressed in the Insurers' Joint Skeleton Argument on Causation **{I/6}**. In so far as relevant to EIO and MSA, the key principles can shortly summarised as follows:

254.1 EIO and MSA are only liable for loss proximately caused by the insured peril under the relevant Policy. This fundamental principle of insurance law derives from section 55 of the Marine Insurance Act 1906 but applies equally outside the marine insurance context (including in business interruption policies).[124]

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122 See paragraphs 4.3 **{A/2/4}**, 59 **{A/2/39}** of the APoC. See also the FCA's Trial Skeleton at paragraph 238.

123 See APoC, paragraphs 4.3 **{A/2/4}**, 56.8 **{A/2/38}** and 7 **{A/2/45}**. See also the FCA's Trial Skeleton at paragraph 275.

124 See, for example, *Lloyds TSB General Insurance Holdings v Lloyds Bank Group* [2002] Lloyd's Rep IR 113 at [42] **{J/87}**; Christopher Butcher QC in Mance, Goldrein and Merkin (eds.), *Insurance Disputes* (3rd Ed. 2011), paragraph 7.14, 7.16-7.17 **{K/204}**; *Riley on Business Interruption Insurance* (10th Ed 2016), paragraphs 15.3, 15.9 **{K/206}**; Hemsworth (formerly Clarke) (ed.), *Law of Insurance Contracts* paragraph

254.2 Clear words are required to alter the proximate causation requirement. With the exception of the phrase "*resulting solely and directly from*" in Amlin Type 2,[125] such words are absent in the relevant Wordings underwritten by EIO and MSA.[126]

254.3 Even where words are included that loosen the ordinary causation requirement, the insured peril must still at least be a "but for" cause of the loss: see *Blackburn Rovers Football v Avon Insurance Plc* [2005] Lloyd's Rep IR 447 at [18] *per* Lord Phillips MR.[127]

254.4 The "but for" causation test is a necessary requirement for establishing causation in fact, although not a sufficient condition for establishing proximate causation.[128] Loss cannot have been proximately caused by an insured peril if such loss was not factually caused by it.

254.5 If the Insured would have suffered the same loss "but for" the operation of the insured peril, the Insured cannot recover for such loss. The insured peril is, in such circumstances, neither the factual nor the proximate cause of the loss.

25-1 **{K/198}**; Birds, Milnes & Lynch, *MacGillivray on Insurance Law* (14th Ed. 2018) at 21-001 **{K/203}**; *Colinvaux and Merkin's Insurance Contract Law* at paragraph B-0425 **{K/195}**.

125 "*resulting solely and directly from*" requires the sole proximate cause of the losses to be the insured peril. The operation of concurrent causes of any kind is excluded.

126 See Christopher Butcher QC in Mance, Goldrein and Merkin (eds.), *Insurance Disputes* (3rd Ed. 2011) at paragraph 7.14 **{K/204}**; *Lloyds TSB General Insurance Holdings v Lloyds Bank Group* [2002] Lloyd's Rep IR 113 at [42] **{J/87}**.

127 See Christopher Butcher QC in Mance, Goldrein and Merkin (eds.), *Insurance Disputes* (3rd Ed. 2011) at paragraph 7.14, footnote 37 **{K/204}**.

128 See *Orient-Express Hotels Ltd v Assicurazioni Generali* SA [2010] Lloyd's Rep IR 531 at [21]-[23] **{J/106}**; *Endurance Corporate Capital Ltd v Sartex Quilts & Textiles Ltd* [2020] EWCA Civ 308 at [35]-[36] **{K/184}**; paragraph 25-1 of Hemsworth (formerly Clarke) (ed.), *Law of Insurance Contracts* **{K/198}**; see Christopher Butcher QC in Mance, Goldrein and Merkin (eds.), *Insurance Disputes* (3rd Ed. 2011) at paragraph 7.14 **{K/204}**: "*it is usually necessary for it to be shown, not only that the loss would not have occurred "but for" the peril(s) insured, but also that that loss was proximately caused by that peril or one of those perils.*"

254.6 Further, in the relevant EIO and MSA Policies, the application of the "but for" causation test is dictated as a matter of contractual agreement by:

(a) The relevant insuring agreements in the policies. These require the application of the proximate cause test, and, therefore, at a minimum, a "but for" test.[129]

(b) The basis of settlement provisions and trends clauses in the policies. Each of the relevant Policies underwritten by EIO and MSA contains applicable basis of settlement provisions and trends clauses that expressly provide for a "but for" test. This is addressed in the following section.

254.7 None of the (very) limited exceptions to the "but for" test is applicable in this case.

254.8 The principle in *Wayne Tank Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57 **{J/58}**, *The Miss Jay Jay* [1987] 1 Lloyd's Rep. 32 **{J/66}** and similar cases is only applicable where there are concurrent interdependent causes and specifically *not* to the situation where there are concurrent independent causes. In the case of the former, the "but for" test is satisfied by each cause.[130] In the case of the latter, where each cause is on its own sufficient to bring about the loss in question, the "but for" test will not be satisfied by the occurrence of just one.[131]

254.9 The FCA appears to premise its argument on causation in this test case almost entirely on the decision in *IF P&C Insurance Ltd v Silversea Cruises Ltd (The Silver*

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129 See, by analogy, the Tribunal and Hamblen J in *Orient-Express Hotels Ltd v Assicurazioni Generali* SA at [17] (see paragraph 17 of the Award), [58] **{J/106}**. As stated above, the only exception to this is the "*resulting solely and directly from*" language in Amlin Type 2 which requires something narrower than a proximate cause, i.e. for the insured peril to be the sole proximate cause.

130 See Christopher Butcher QC in Mance, Goldrein and Merkin (eds.), *Insurance Disputes* (3rd Ed. 2011), at paragraph 7.18 **{K/204}**.

131 See *Orient-Express Hotels Ltd v Assicurazioni Generali SA* at [32] **{J/106}**; Hemsworth (formerly Clarke) (ed.), *Law of Insurance Contracts* at paragraphs 25-6A, 25-6B **{K/198}**; *MacGillivray on Insurance Law* (14th Ed. 2018) at paragraph 21-005 (footnote 27) **{K/203}**.

Cloud) [2004] Lloyd's Rep IR 217 (Tomlinson J), [2004] Lloyd's Rep IR 696 (CA) **{J/90}**. However, that decision provides no support for the FCA's case that the underlying cause is to be regarded as part of the insured peril and is to be reversed in the counterfactual in addition to the insured peril: see Insurers' Joint Skeleton Argument on Causation at paragraph 60 **{I/6/62}**.[132] *The Silver Cloud* **{J/90}** did not establish any binding principles of law in relation to 'but for' causation or the law relating to concurrent independent causes. *The Silver Cloud* **{J/90}** was a decision on its own facts, limited to a construction of the particular clauses at issue in that case.

254.10 Contrary to the heterodox position adopted by the FCA,[133] the burden of establishing that loss was proximately caused by an insured peril rests on the insured (and, therefore, the FCA).[134] This includes establishing that the loss would not have been suffered "but for" the insured peril. This issue, and the FCA's reliance on the decision in *BHP Billiton Petroleum Ltd v Dalmine SpA* [2003] EWCA Civ 170 **{J/89}**, are addressed in detail at paragraph 26 of the Insurers' Joint Skeleton Argument on Causation **{I/6/26}**.

The basis of settlement provisions and the trends clauses

All EIO and MSA policies contain applicable basis of settlement and trends clauses

255. Each of the relevant Policies underwritten by EIO and MSA contains contractual machinery setting out formulae for how the Insured's business interruption losses are to be adjusted. These clauses are most commonly referred to in the Policies as the

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132 See FCA's Trial Skeleton, paragraphs 271, 275, 286.

133 See Reply, paragraph 61 **{A/14/32}**; the FCA's Trial Skeleton at paragraphs 252-258.

134 See Christopher Butcher QC in Mance, Goldrein and Merkin (eds.), *Insurance Disputes* (3rd Ed. 2011), at paragraph 7.24-7.25 **{K/204}**.

"basis of settlement" or "basis of payment" provisions (and, for ease, are referred to using the former phrase, "**basis of settlement**", throughout this written opening).

256. The basis of settlement provisions include a "*a most important provision for… adjustment*",[135] referred to in this litigation as the "**trends clause**".[136]

257. In each of the EIO and MSA policy types, the basis of settlement provisions, including the trends clauses, apply not only to claims under the main insuring provisions which provide cover for business interruption losses caused by damage to property, but also to the extensions to cover (including the non-damage extensions which are the subject of this test case).

258. That this is the case is accepted by the FCA in relation to EIO Type 1.2,[137] the lead policy wording for which is the ME886 Nurseries policy **{B/5/1}**. The same is, however, also true for the remaining EIO and MSA policy types.

259. Each of the EIO and MSA policy types is considered in turn below. To assist the Court, Annexes 1 and 2 to the Defence of EIO and MSA **{A/9/51-54}** have been updated to include references to the trial bundle and are attached as Appendix 4 and Appendix 5 hereto.

260. One point, however, is of general application and bears mentioning at the outset.

260.1 The starting point in considering the applicability of the EIO and MSA basis of settlement provisions must be that, in the absence of wording clearly providing otherwise, the contractually agreed machinery is applicable to all business

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135 *Riley on Business Interruption Insurance* (10th Ed 2016) at paragraph 3.25 **{K/206}**.

136 This clause is also known as the "other circumstances clause", "the special circumstances clause", "the adjustments clause" or "the bracketed provision". See the trends clause considered by Hamblen J in *Orient-Express Hotels Ltd v Assicurazioni Generali SA* at [12] **{J/106}**.

137 APoC, paragraph 75.5 **{A/2/45}**; Reply, paragraph 63 **{A/14/33}**.

interruption claims, including those brought under non-damage extensions to cover, and not just to some of them.

260.2 The policy formula is one of the most significant features of the UK business interruption form.[138] It provides certainty to the calculation of something which is inherently hypothetical and intangible – *i.e.* the business trading results which would have materialised had the insured peril not occurred.[139] It is most unlikely that the parties did not intend insureds to have the benefit of that formula (and, for example, cover for (additional) increased costs of working (or similar)) for all business interruption claims, and instead intended that quantification would simply be "*at large*"[140].

260.3 For the avoidance of doubt, and as explained further below, the reference to "**damage**" in the basis of settlement and trends clauses does not confine the application of those clauses to the material damage BI part of the policy. Sensible and deft verbal manipulation to make the clauses work in the non-damage BI context is what the parties must have intended. Notably, the FCA accepts such verbal manipulation in relation to EIO Type 1.2.[141]

EIO Type 1.1: ME857 Parish Plus and ME858 Parishguard

261. The lead wording for EIO 1.1 is the ME857 Parish Plus policy.[142] While this policy did not contain a trends clause in its traditional form, it contains wording in the "Loss of income" clause in its Basis of settlement section in the following terms **{B/4/43}**:

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138 *Riley on Business Interruption Insurance* (10th Ed 2016), paragraph 15.3 **{K/206}**.

139 *Riley on Business Interruption Insurance* (10th Ed 2016), paragraph 3.1 **{K/206}**.

140 The FCA's Trial Skeleton at paragraphs 555, 801.

141 See Reply, paragraph 63 **{A/14/33}**.

142 See Schedule 3 to the APoC **{A/2/67}**.

"***1. Loss of income***

We *will pay the difference between the* ***income you*** *would have received during the* ***indemnity period*** *if there had been no* ***damage*** *and the* ***income you*** *actually received during that period…*" (Underlining added).

262. Of the other nine policies included within EIO Type 1.1,[143] only one other, ME858 Parishguard **{B/33/37}**, is in similar form to the lead wording (ME857 Parish Plus).[144] The remaining eight policies included in EIO Type 1.1 are similar to one another and contain a trends clause in its traditional form. These are addressed in the following section. It is important to note, therefore, that so far as the basis of settlement provisions and trends clauses are concerned, the policies included in EIO Type 1.1 are not all similar to the lead policy wording.[145]

263. Returning to the "Loss of income" clause in ME857 Parish Plus (and also ME858 Parishguard **{B/33/37}**), the underlined wording identified in paragraph 261 above is in similar terms to that found in a trends clause and clearly requires the court to assess the Insured's loss by reference to the income it would have earned "but for" the **damage**.[146]

264. There can be little doubt that the "Loss of income" provision applies not only to the main insuring provision in the EIO 1.1 policy **{B/4/42}** but also to the "*Extensions*" **{B/4/45}** (including EIO 1.1 Clause 3 ("*Prevention of access – Non-damage*")). Specifically:

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143 See Schedule 3 to the APoC **{A/2/67-68}**.

144 Schedule 3 to the APoC wrongly states that ME869 also contains a similar Loss of Income provision, see **{A/2/71}**. This is not correct.

145 That this was the case has been made clear to HSF (solicitors for the FCA) by DACB (solicitors for Ecclesiastical) on 8 June 2020 (see paragraph 2 of the letter): see **{H/6/1}**. This appears to be accepted by the FCA: see Trial Skeleton, paragraph 19.2.

146 Damage is defined in EIO 1.1 as "*destruction or damage*" **{B/4/42}**.

264.1 There is nothing in the "Loss of Income" section of the policy **{B/4/42}** (including in the basis of settlement provisions themselves) that confines the application of the basis of settlement provisions to the main insuring provision.

264.2 Where an approach to the quantification of the Insured's losses different from that set out in the basis of settlement provisions is required, the "*Extensions*" to cover makes that clear: see Extension 1 ("Archaeological digs"); Extension 7 ("Book debts"); Extension 11 ("Church Event"), Extension 12 ("Reinstatement of data") and Extension 13 ("Computers – Increased Cost of Working") **{B/4/45-50}**.

264.3 The parties cannot have intended the policy to be silent on how business interruption losses claimed under the remaining "*Extensions*" are to be calculated and adjusted. Paragraph 260 above is repeated.

264.4 Significantly, the opening words of the "*Extensions*" to cover in the "Loss of income" section of the policy provide **{B/4/45}**:

> "*The insurance by this section is extended to cover loss resulting from interruption of or interference with **your** usual activities as a result of the following…*" (underlining added).

264.5 The effect of the inclusion of these opening words is that the insurance provided under the "*Extensions*" to cover is provided on the same basis as cover under the rest of the "Loss of income" section of the policy. As a result, the contractual machinery applied not only to the main insuring clause but also, by extension, to the listed "*Extensions*" (unless otherwise specifically provided).

264.6 EIO 1.1 Clause 3 expressly provides as a special condition that the maximum indemnity period under that extension will not exceed 3 months **{B/4/45}**. That special condition is only explicable when read together with the defined term "*indemnity period*" **{B/4/42}** by reference to which losses are adjusted under the basis of settlement provisions **{B/4/43}**. This is yet further indication that the formula set out in the basis of settlement provisions, including that the Insured's

losses are to be assessed by reference to the income it would have received "*during the **indemnity period***", are intended to apply (unless otherwise stated) to the "*Extensions*".

264.7 The word "**damage**" in the basis of settlement provisions does not confine the application of those provisions to cover under the main insuring clause. Properly construed, this is a policy where the parties contemplated that the word "**damage**" would, in order to make clauses work in the non-damage context, have to be read as "**damage or insured peril**". This is well-illustrated by consideration of the definition of "*Indemnity period*":

(a) It is not seriously arguable that the "*Extensions*" to cover were without any applicable indemnity period.

(b) Rather, it must be the case that cover under the "*Extensions*" was, unless otherwise stated, subject to the same definition of "***indemnity period***" as in the "Loss of income" section **{B/4/42}**, and the same maximum indemnity period as set out in the schedule.

(c) "**Indemnity period**" is, however, defined as "*the period beginning with the occurrence of the **damage** and ending not later than the expiry of the maximum indemnity period during which **your** normal activities are affected as a result of the **damage**.*" **{B/4/42}**

(d) For the use of the defined phrase "**indemnity period**" to make sense in the context of additional covers that indemnify against business interruption losses resulting from something other than damage to the insured's property at the premises, the word "**damage**" has to be read as referring to the insured peril and not loss, destruction or damage to the insured property. This can be done by inserting the words "**or insured peril**" after the word "**damage**".

(e) Verbal manipulation to the same extent must be permitted in relation to "**damage**" in the basis of settlement provisions to give effect to the obvious intention of the parties that those provisions apply to the "Loss of income" section as a whole (including the non-damage extensions), and not just to the main insuring clause. In other words, it is clear that something has gone wrong in the framing of the basis of settlement provisions (by only referring to "**damage**") and it is clear what a reasonable person would have understood the parties to have, in fact, meant (i.e. "**damage or insured peril**").[147]

(f) Verbal manipulation to make sense of the basis of settlement provisions, when applied to business interruption losses resulting from something other than damage to the insured's property at the premises, is entirely appropriate if it can be done "*simply and deftly as a matter of language*".[148] That is precisely what can and should be done in this case. It is a part of the construction of the contract.[149]

EIO Type 1.1: policies other than ME857 Parish Plus and ME858 Parishguard

265. The position on the trends clauses for the remaining policies included under EIO Type 1.1 is considered by reference to ME871 Heritage Business and Leisure **{B/26/54}**.

266. ME871 Heritage Business and Leisure contains basis of settlement provisions, including, in the definition of "***Adjusted***", a trends clause:

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147 See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [22]-[25] *per* Lord Hoffmann **{J/103}**. See also paragraphs 26-28 of the Insurers' Submissions on Principles of Construction of Contracts.

148 Cf Rix LJ in *HIH Casualty and General Insurance Ltd. v New Hampshire Insurance Co.* [2000] 2 Lloyd's Rep. 161 at [170] **{K/92}**.

149 See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [22]-[25] *per* Lord Hoffmann **{J/103}**.

266.1 The basis of settlement provision for "*Gross profit Revenue or Rent receivable items*" provides, *inter alia*, as follows **{B/26/55-56}**:

> "*The amount payable is limited to*
>
> *(a) loss of **gross profit** due to a reduction in **turnover** or loss of **revenue** or loss of **rent receivable***
>
> *…*
>
> *occurring during the **indemnity period** and the amount payable as indemnity shall be*
>
> *(i) for loss of **gross profit** the reduction in **turnover** being the sum produced by applying the **rate of gross profit** to the amount by which the **turnover** during the **indemnity period** shall as a result of the **damage** fall short of the **standard turnover***
>
> *(ii) for loss of **revenue** or **rent receivable** the amount by which the **revenue** or **rent receivable** during the **indemnity period** shall as a result of the **damage** fall short of the **standard revenue** or **standard rent receivable**…*"

266.2 "***Standard rent receivable** or **standard revenue** or **standard turnover***" is defined as **{B/26/55}**:

> "*the **rent receivable** or **revenue** or **turnover** during the period corresponding with the **indemnity period** in the 12 months immediately before the date of the **damage** proportionately increased where the maximum indemnity period exceeds 12 months **adjusted***"

266.3 The trends clause is contained in the definition of "***Adjusted***" **{B/26/54}** (underlining added):

> "***Adjusted** means adjusted as necessary to provide <u>for the trend of the **business** and any 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 adjusted figures represent as near as possible the results which would have been obtained during the relative period after the **damage** had the **damage** not occurred</u>.*"

266.4 "***Damage***" is defined as follows **{B/26/54}**:

"*unless stated otherwise in the schedule destruction or damage by any cause not specifically excluded under the Property damage section…*"

267. For essentially the same reasons that apply in relation to the ME857 Parish Plus and ME858 Parishguard wordings, the basis of settlement provisions, including the trends clauses, in the remaining policies in EIO Type 1.1 apply both to the main insuring clause **{B/26/55}** and to the "*Extensions*" **{B/26/57-58}** (including the "*Prevention of access – Non-damage*" extension). Paragraph 264 above is repeated *mutatis mutandis*.[150]

268. In reality, there is no basis for the FCA's different treatment of EIO Type 1.1 and EIO Type 1.2.[151] According to the FCA, the key difference is apparently between the opening words to the "*Extensions*" section of each of the EIO policy types. This is, however, a thoroughly bad point:[152]

268.1 The opening words to the "*Extensions*" section in EIO Type 1.1 is, as set out at paragraph 264.4 above, "*The insurance by this section is extended to cover loss resulting from interruption of or interference with **your** usual activities as a result of the following…*" (underlining added) **{B/4/45}**. The wording in the ME871 Heritage Business and Leisure policy is in similar terms: see **{B/26/57}**.

268.2 It is said by the FCA that the above quoted wording (and in particular the underlined wording) is different in effect from the opening words to the "*Extensions*" section in EIO Type 1.2 which reads, "*The insurance by this section is extended to cover loss as insured hereunder directly resulting from interruption of or interference with the **business** carried on by **you** at the **premises** in consequence of the following…*" (underlining added) **{B/5/42}**.

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150 It should be noted that the submission at paragraph 264.6 above does not apply to the ME869 Care Insurance policy as the "*Prevention of access*" clause in that policy **{B/31/36}** does not contain a condition that the maximum indemnity period under the extension would not exceed 3 months.

151 Compare paragraphs 75.1 and 75.5 of the APoC **{A/2/44-45}**.

152 See the FCA's Trial Skeleton at paragraphs 551, 556.

268.3 The FCA's submission ignores, however, the critical words that are common to both EIO Type 1.1 and EIO Type 1.2, namely "*The insurance by this section is extended to cover…*". Those words make plain that the insurance provided under the "*Extensions*" to cover were provided on the same basis as under the material damage business interruption section of the policies. That would include the basis of settlement provisions and trends clauses.

268.4 There is no difference of any significance between "*loss as insured hereunder directly resulting from*" and "*loss resulting from*", and certainly any difference is not so as to displace the clear import of the words "*The insurance by this section is extended to cover…*".

MSA Type 1

269. There is only one policy included in Amlin Type 1 **{B/10/57}**.[153] This policy contained basis of settlement provisions, including in the definition of "***Standard turnover***" a trends clause:

269.1 Basis of settlement A for "Gross profit" provides, *inter alia*, that the amount payable will be **{B/10/59}**:

> "*for reduction in **turnover**, the sum produced by applying the rate of gross profit to the amount by which the **turnover** during the indemnity period will following the **damage** fall short of the **standard turnover**…*"

269.2 "***Standard turnover***" (i.e. the trends clause) is defined (underlining added) as **{B/10/58}**:

> "*The **turnover** during that period in the 12 months immediately before the date of the **damage** which corresponds with the **indemnity period** to which adjustments will be made as necessary to provide for the trend of the **business** and for variations in or other circumstances affecting the **business** had the **damage** not occurred, so that the figures adjusted represent as nearly as may*

153 See Schedule 5 to the APoC **{A/2/100-103}**.

> *be reasonably practicable the results which but for the **damage** would have been obtained during the relative period after the **damage**.*"

269.3 "**Damage**" is defined as **{B/10/11}**:

> "*Loss or destruction of or damage to the property insured as stated in the schedule and used by **you** in connection with the **business**.*"

270. The basis of settlement provisions, including the trends clause, manifestly apply both to the Insuring clause **{B/10/59}** and to the "Additional cover" **{B/10/65-66}** (including MSA1 Clause 1 ("*Action of competent authorities*") and MSA1 Clause 6 ("*Notifiable disease, vermin, defective sanitary arrangements, murder and suicide*")):

270.1 There is nothing in the "Business interruption" section of the policy **{B/10/57}** (including in the basis of settlement provisions themselves) that confines the application of the basis of settlement provisions to the main Insuring clause.

270.2 Where an approach to the quantification of the Insured's losses different from that set out in the basis of settlement provisions is required, that is made abundantly clear: see Clause 5 ("Lottery win by your employees") and Clause 8 ("Professional accountants") **{B/10/66-67}**.

270.3 The parties cannot have intended the policy to be silent on how business interruption losses claimed under the remaining clauses of the "*Additional cover*" are to be adjusted. Nor can it have been intended that the references in the "*Additional cover*" clauses to "*loss resulting from…*" or "***consequential loss** as a result of…*" give the Insured free rein to calculate its losses howsoever it wishes, having no regard to the calculation methodology specified in the policy. Paragraph 260 above is repeated.

270.4 Indeed, the "Business interruption" section expressly states, "*Claims – basis of settlement – please refer to your schedule for the basis of settlement applicable to your policy.*" **{B/10/59}** (Underlining added). Had it been intended to confine the

application of the basis of settlement provisions to the main insuring clause, it would have been straightforward for this to have been expressly stated. But it was not. The clear purpose and effect of the words actually used is that the basis of settlement provisions apply to the section as a whole.

270.5 The same is apparent from the structure of the section as a whole. The BI extensions to cover (including the non-damage extensions which are the focus of this test case) are enumerated under the heading "*Additional cover*" **{B/10/65}**. The word "Additional" when construed in the context of the section as a whole, coming after, as it does, a list of insured causes of damage headed "*Covers*" **{B/10/61}**, was plainly intended to indicate the supplementary nature of the cover. In other words, cover that was supplemental to the cover provided under the main insuring clause, and subject to the same basis of settlement provisions.

270.6 The "Business interruption" section provides particular definitions of "*Indemnity period*" and "*Maximum indemnity period*" for the notifiable disease additional cover (i.e. MSA1 Clause 6) **{B/10/57-58}**. Those definitions are only relevant when assessing the Insured's losses in accordance with the basis of settlement provisions: it is only those provisions that require, in relation to basis of settlement A ("Gross profit") **{B/10/59}**, that the Insured's claim for reduction in turnover be assessed by reference to "*the amount by which the **turnover** during the **indemnity period** will following the **damage** fall short of the **standard turnover**…*" (underlining added). This further underlines the applicability of the basis of settlement provisions to the additional covers.

270.7 The word "**damage**" in the basis of settlement provisions, including in the trends clause, does not restrict the application of those provisions solely to cover under the main insuring clause. Properly construed, this is a policy where the parties contemplated that the word "**damage**" would be read as "**damage or insured peril**":

(a) A number of the additional covers, including the notifiable disease cover (MSA1 Clause 6) **{B/10/66}** and the prevention of access cover (clause 7) **{B/10/67}** define the indemnity provided by reference to "**Consequential loss**".

(b) "**Consequential loss**" is, however, defined as "*Loss resulting from interruption or interference with the **business** carried on by **you** at the **premises** in consequence of **damage** to property used by **you** at the **premises** for the purpose of the **business**.*" (Underlining added). **{B/10/11}**

(c) For the use of the defined phrase "**consequential loss**" to make sense in the context of additional covers that indemnify against business interruption losses resulting from something other than damage to the insured's property at the premises, the word "**damage**" has to be read as referring to the insured peril and not loss, destruction or damage to the insured property. If not, these additional covers could never be triggered.

(d) Presumably the FCA is still advancing a claim under MSA1 Clause 6. That Clause, however, only entitles the insured to "**consequential loss**". "**Consequential loss**" necessarily requires "**damage**". The FCA has not articulated how the Insureds covered by MSA1 Clause 6 can recover any such "**consequential loss**" if "**damage**" in the definition in that phrase is not transmuted into something that makes sense in the context of the extension for "**notifiable disease**".

(e) The FCA must accept, if not assert, that the reference in the phrase "**consequential loss**" to "**damage**" needs to be changed to "**damage or insured peril**" for the purposes of the application of the phrase to "**notifiable disease**" in MSA1 Clause 6. Indeed, it appears to do so: see the FCA's Trial Skeleton, paragraph 800.

(f) Thus, verbal manipulation to the same extent must be permitted in relation to "**damage**" in the basis of settlement provisions, including the trends clauses, to give effect to the obvious intention of the parties that those provisions apply to the "business interruption" section as a whole, and not just to the main insuring clause. See also paragraphs 264.7(e) and 264.7(f) above.

MSA Type 2

271. The lead wording for Amlin Type 2 is the ADA672-20190601 Retail (Instant Underwriting) policy **{B/11/42}**.[154] This policy contains basis of settlement provisions **{B/11/44}**, including in the definition of "***standard turnover***" **{B/11/43}** a trends clause in the same terms as Amlin Type 1 (see paragraph 269 above). In addition, the Court is also referred to the bases of settlement for reduction in rent receivable (basis of settlement C) and loss of rent payable (basis of settlement D) which are also defined by reference to the trends clauses in the definition of "***standard turnover***", and "**standard rent receivable**" **{B/11/43}**.

272. For largely the same reasons that apply in relation to Amlin Type 1, the basis of settlement provisions, including the trends clauses, in Amlin Type 2 apply both to the main insuring clause ("*What is covered*") **{B/11/44}** and to the "*Additional cover – automatically included*" **{B/11/46-49}** (including MSA2 Clause 6 ("*Notifiable disease, vermin, defective sanitary arrangements, murder and suicide*") and MSA2 Clause 8 ("*Prevention of access – non damage*")). Paragraph 270 above (with the exception of paragraph 270.4) is repeated *mutatis mutandis*.

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[154] See Schedule 5 to the APoC **{A/2/105}**. The Leisure (Instant Underwriting) wording **{B/72/42}** is in similar form to the Retail (Instant Underwriting) wording. The basis of settlement and trends clause provisions for the Office and Surgery (Instant Underwriting) wording **{B/73/42}** are, however, in different form as identified in Appendix 4 hereto. Nonetheless, what is said here in relation to the Amlin Type 2 lead wording applies *mutatis mutandis* to the Office and Surgery policy.

MSA Type 3

273. There is only one policy included in Amlin Type 3 **{B/12/47}**.[155] This policy contains basis of settlement provisions, including in the bracketed provision marked against the definitions of, *inter alia*, "***Rate of gross profit***", "***Standard gross rentals***", "***Standard turnover***", a trends clause:

273.1 The basis of settlement clause for gross profits provides, *inter alia*, that the amount payable will be **{B/12/49}**:

> "*for reduction in **turnover**, the sum produced by applying the **rate of gross profit** to the amount by which the **turnover** during the indemnity period will fall short of the **standard turnover** because of the **damage**…*"

273.2 Similarly, the basis of settlement clause for gross rentals provides, *inter alia*, that the amount payable will be **{B/12/49}**:

> *"for loss of **gross rentals**, the amount by which the **gross rentals** during the **indemnity period** will fall short of the **standard gross rentals** because of the **damage**…*"

273.3 The trends clause in the bracketed provision provides (underlining added) that **{B/12/48}**:

> "*such adjustments* [to, for e.g., "**standard gross rentals**" and "**standard revenue**"] *will be made as may be necessary to provide for the trend of the **business** and for the variations in, or special circumstances affecting, the **business**, either before or after **damage**, or <u>which would have affected the **business** had **damage** not occurred, so that the figures thus adjusted will represent, as nearly as may reasonably be practicable, the results which, but for the **damage**, would have been obtained during the relevant period after **damage**</u>.*"

273.4 "**Damage**" is defined as "*Loss, destruction or damage.*" **{B/12/12}**

[155] See Schedule 5 to the APoC **{A/2/110}**.

274. On a proper construction of the policy, the basis of settlement provisions, including the trends clause, in Amlin Type 3 apply both to the main insuring clause **{B/12/48}** and to the "*Additional cover – automatically included*" **{B/12/50-51}** (including MSA3 Clause 1 ("*Prevention of access*")) for the same reasons set out in relation to Amlin Type 1 at paragraphs 270.1, 270.3 and 270.5 above, which are repeated *mutatis mutandis*.

275. Paragraph 264.7 above as to the permissible verbal manipulation of "**damage**" in the basis of settlement provisions, including in the trends clause, also applies *mutatis mutandis*.

Scope and effect of the applicable basis of settlement provisions and trends clauses

276. The applicable basis of settlement and trends clauses give contractual force to the ordinary principles of causation (and indemnity) which would otherwise in any event be applicable as a matter of law (see paragraph 254 above). Thus:

276.1 The basis of settlement provisions restate the requirement for proximate causation (and, therefore, by implication, the requirement for "but for" causation) contained in the main insuring provisions and the insuring clauses in the BI extensions. For example, in MSA Type 3, the amount payable for reduction in turnover is to be determined by reference to "*the amount by which the **turnover** during the **indemnity period** will fall short of the **standard turnover** because of the **damage***" (underlining added) **{B/12/49}**.

276.2 The trends clauses expressly and clearly reflect the parties' agreement that a "but for" test must be applied when assessing the Insured's losses. The Insured's recoverable loss is to be calculated on the counterfactual of what would have happened "*had the insured peril not occurred*" or *"but for the insured peril*".[156]

[156] See *Orient-Express Hotels Ltd v Assicurazioni Generali* SA at [34] **{J/106}**. See also *Riley on Business Interruption Insurance* (10th Ed 2016) at paragraphs 3.10-3.11 **{K/206}**.

This is no different from the 'but for' test that would otherwise be applicable as a matter of law.

276.3 The same is true for the "Loss of income" provision in two of the EIO 1.1 policies **{B/4/43}**: loss of income is to be assessed by reference to the income the Insured would have received "*if there had been no* ***damage***".

276.4 The purpose of the adjustment under the trends clause is expressly stated to be the fulfilment of the indemnity principle, *i.e.* to establish figures for what the Insured would have earned which "*represent, as nearly as may reasonably be practicable, the results which, but for the* [**damage** or insured peril]*, would have been obtained during the relevant period after* [**damage** or the insured peril]." **{B/12/48}**. Therefore, all events which are independent of the insured peril (whether or not independent of the cause of the insured peril), and therefore would have occurred "but for" the insured peril, must be taken into account.

277. The significance of the contractually agreed "but for" test is two-fold. First, it underscores that that test has to be applied to the assessment of all BI losses under the relevant Policy. It cannot be applied to the adjustment of some losses, and then not applied for others. Secondly, it cannot ever be appropriate to depart from that test, whether as a matter of fairness and reasonableness, or otherwise, <u>when the test is applicable as a matter of agreement between the parties (and when to do so would be in conflict the parties' express agreement that that very test should be applied)</u>.[157]

278. Faced with the formidable hurdle of a contractually agreed "but for" test, the FCA's only retort has been to seek to narrow the ambit of the relevant contractual provisions by assertion alone, and without regard to the actual words of the clauses: see the FCA's

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[157] See what is said by Hamblen J in <u>*Orient-Express Hotels Ltd v Assicurazioni Generali* SA</u> at [34], and by the Tribunal at [20] of the Award (quoted at [17] of Hamblen J's judgment) **{J/106}**.

Trial Skeleton at paragraph 271.[158] On a proper construction of the trends (and other basis of settlement) clauses, this argument has no merit:

278.1 The trends clauses and other relevant provisions identified above are drafted in the widest possible terms to encompass adjustments for anything that affected the business or which would have affected the business in the absence of the insured peril, see, for example, the use of the words "*any other factors*" in the trends clause in the MSA Type 2 Office & Surgeries policy **{B/73/44}**.[159] Similarly, there is nothing narrow about the words 'trend', 'variation' or 'circumstance' which are commonly found in the trends clauses in the EIO and MSA policies.[160]

278.2 No restrictions are placed on the type or nature of "trends", "variations" or "special or other circumstances" that can be taken into account so long as they either affected the business or would have affected the business had the insured peril not occurred.[161] The FCA's construction effectively requires words to be read into the clause or for it to be re-drafted.[162]

278.3 As noted in *Riley* at paragraphs 3.25-3.26, this breadth is necessary to give effect to the indemnity principle.

> "[The "other circumstances"] *clause is also known as the "special circumstances clause", the "trend clause", "the adjustments clause" and is sometimes termed "the bracketed provisions". It is so wide in scope that it will permit adjustments to the turnover and rate of gross profit figures used in calculating a claim to meet almost any actual or potential variation in their amount... Without this*

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158 See also APoC, paragraph 76 **{A/2/45}**.

159 "***our*** *assessment of the* ***income you*** *would have earned but for the* ***damage*** *will be the actual* ***income*** *earned at the* ***premises*** *during the 12 months immediately before the* ***damage*** *that corresponds with the* ***indemnity period*** *and adjusted for trends of* ***your business*** *and any other factors wither* [sic] *before or after the* ***damage*** *that would have affected the* ***business*** *results…*" **{B/73/44}** (emphasis added). Cf. the FCA's Trial Skeleton at paragraph 803.2.

160 Cf the FCA'S Trial Skeleton at paragraphs 558, 803.1.

161 See *Colinvaux and Merkin's Insurance Contract Law* at paragraph B-0780/4 **{K/195}**.

162 See Hamblen J in *Orient-Express* at [58] **{J/106}**.

> *clause the policy cannot be regarded as fulfilling the basic principle of an insurance that is to indemnify... By the use of this clause it is possible to make adjustments in a loss settlement to produce as near as is reasonably possible a true indemnity for an insured's loss, albeit within a restricted period, i.e. the maximum indemnity period and also limited to the sum insured.*"

278.4 There is, therefore, no basis for the FCA's assertion that the trends clauses only permit adjustment for "*something extraneous*" or "*independent*" to the event or state of affairs giving rise to the insured peril.[163] Or that the trends clauses are only intended to adjust for the ordinary vicissitudes of commercial life and nothing else.[164] The FCA's argument echoes that made by the claimant in *Orient-Express*, and despatched without any hesitation by Hamblen J at paragraph 47-48, 52, 57-58 of his judgment **{J/106}**. There is nothing illogical or unintended about adjusting under the trends clauses for the underlying cause or reason giving rise to the insured peril (whether as a trend, variation or special circumstance). This merely gives effect to the "*but for the insured peril*" requirement under the trends clauses, which would in any event be applicable even in the absence of the trends clauses.

278.5 It cannot be ignored, indeed some account should be taken of the fact, that the Policies in issue in this case were all entered into against the legal background of the decision of Hamblen J in *Orient-Express*. That was, of course, a case dealing with business interruption losses in a policy providing for business interruption cover. It is mentioned in all insurance text books of any note. While it might not have found favour with all commentators, it is and at the time when these policies were taken out was established law. The FCA's arguments on construction of the applicable trends clauses have to be evaluated not only on their own terms (which

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163 APoC, paragraph 76 **{A/2/45}**.

164 FCA's Trial Skeleton, paragraphs 271, 558.

demonstrate the fallacy in them) but also against the context of the *Orient-Express* which judicially confirms the fallacy in them.[165]

The application of the "but for" test: the importance of the insured peril

279. Whether looked at from the perspective of the ordinary principles of indemnity and causation, or from what is required as a matter of agreement between the parties, it is evident that a "but for" approach to causation must be adopted in the assessment of the Insured's losses under the EIO and MSA Policies.

280. The critical question, therefore, is this: what losses would the Insured have suffered but for the insured peril (or had the insured peril not occurred). Losses that would have been suffered in any event are not recoverable: they fail the "but for" test.

281. Proper application of this test to the facts requires the proper identification of the insured peril by close reference to the policy language. If the insured peril is given too narrow a reading, the Insured would be kept out of an indemnity for matters which ought to fall within the scope of the relevant policy. Conversely, if the scope of the insured peril is expanded without justification to include matters which are not the insured peril, insurers would be required to provide an indemnity for matters which they did not, in fact, agree to insure.

282. The insured peril in each case is a contractual concept, defined and established by the policy wording entered into when the contract of insurance was made. In each of the relevant non-damage BI extensions in each of the EIO and MSA policy types, the insured perils are specifically defined and carefully delimited: see the discussion of each of the

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165 "*It is also necessary that the Court should have regard to previous decisions of the Courts upon the same or similar wording. Parties to a commercial contract are to be taken to have contracted against a background which includes the previous decisions upon the construction of similar contracts*" (*Toomey v Eagle Star Insurance Co Ltd* [1994] 1 Lloyd's Rep 516, 520, *per* Hobhouse LJ **{K/80}**).

coverage clauses above. Pandemics and their consequences are emphatically *not* insured perils under any of the relevant EIO or MSA policies.

283. Insofar as facts and matters may have occurred in the context of the COVID-19 pandemic which fall outside the parties' contractual definition of the insured peril, those facts and matters cannot be conflated or combined with the insured peril in such a way as to make Insurers liable for facts and matters above and beyond the insured peril and the loss resulting from the insured peril. The conflation or combination of additional facts and matters with the contractually agreed insured peril entails the rewriting of the contract of insurance after the event – and the substitution of a new insured peril (redefined with reference to what actually occurred) for what the parties agreed at the outset of the contract of insurance.

284. The insured peril must not, therefore, be elided with:

284.1 The cause of the insured peril or reasons underlying the insured peril.[166] This is, however, exactly what the FCA is asking the Court to do: "*for the purposes of the but for test the insured peril is taken to include the contemplated underlying causes…*" (see paragraph 244 of the FCA's Trial Skeleton).

(a) Thus, in *Orient-Express Hotels Ltd v Assicurazioni Generali SA* **{J/106}**, the Tribunal, as upheld by Hamblen J, only allowed Orient-Express to recover for loss caused by physical damage to the hotel, and not loss caused by that which caused the physical damage to the hotel (i.e. the hurricanes): see Hamblen J's judgment at paragraphs 52, 56-57, agreeing with what the Tribunal said in its Award at paragraph 20.[167]

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166 Cf. what is said by the FCA at Reply, paragraph 58.3 **{A/14/30}**.

167 Quoted at [17] of Hamblen J's judgment **{J/106}**.

(b) *The Silver Cloud* **{J/90}** provides no support for the FCA's case either: see paragraph 254.9 above and in the Insurers' Joint Skeleton Argument on Causation **{I/6}**. Hamblen J was absolutely right to say in *Orient-Express* **{J/106}** at [32]:

> "*I agree with Generali that no great assistance can be derived from this case, which largely turned on the court's factual conclusions. In particular it does not address the specific issue of two concurrent independent causes, nor the applicability of the "but for" causation test in such a case.*"[168]

(c) In the present context, the insured perils of occurrences of disease within a specified radius of the insured premises and/or defined action by a defined authority having a specified effect must not be conflated or combined with the COVID-19 pandemic which was the underlying cause for the local disease and local action (if proved).

284.2 Other events or matters which are also the result of the same cause that gives rise to the insured peril. Thus, the impact of COVID-19 on public confidence, consumer behaviour and economic activity; and the government measures implemented in consequence of COVID-19 (other than those measures which are expressly included within the defined peril) must be kept separate and distinct from the peril itself. These events or matters may be concurrent independent or interdependent causes of loss, but that provides no justification for conflating them with the insured peril itself.

284.3 Facts and matters which qualify and define the insured peril.

(a) This distinction between the insured peril and matters which qualify and define the insured peril has been addressed in detail in the section on

[168] It is patent from Hamblen J's judgment that he had in the forefront of his mind the critical distinction in relation to causation between interdependent and independent concurrent causes.

coverage above and in "The FCA's mischaracterisation of the trigger" section of the Insurers' Joint Skeleton Argument on Causation **{I/6/68}**.

(b) The significance of the distinction can be illustrated for present purposes by reference to the prevention of access wording in the EIO policies (EIO 1.1 Clause 3 **{B/4/45}** and EIO 1.2 Clause 1 **{B/5/42}**).

(i) The words following "*access to or use of the **premises** being prevented or hindered by*" defined and qualified the only type of prevention or hindrance of access or use which is covered, viz. prevention etc. "*by*" action of government, police or local authority;

(ii) while "*emergency which could endanger human life*" further defined and qualified the type of government etc. action that would trigger coverage under this clause;

(iii) but – and most importantly – these matters which qualified and defined the insured peril were not themselves the insured peril, i.e. prevention or hindrance of access to or use of the insured premises of the qualifying type.

(c) This reflects the approach adopted both by the Tribunal and Hamblen J in *Orient-Express Hotels Ltd v Assicurazioni Generali SA* **{J/106}**. Cover under the main BI insuring clause in that case was for business interruption loss caused by physical damage to the hotel, where such damage had been caused (in the context of an all risks policy) by a fortuitous, non-excluded cause, such as the hurricanes.[169] The relevance of the hurricanes as the cause of damage was in defining and identifying the character of the

[169] See relevant policy provisions at [12].

damage embodied in the insured peril. It was not a free-standing insured peril in its own right.[170]

(d) The phrases referable to the insured perils which qualify and define the insured perils are not, in and of themselves, perils insured against or separate triggers for cover. There is no cover for each defining or qualifying limb of the insured peril on a stand-alone basis as though each was an insured peril. The FCA's case to the contrary is unsustainable (see, for example, its Trial Skeleton paragraphs 215.3, 546-547, 777, 781).

285. None of the policies provides insurance against "*the (nationwide) COVID-19 disease including its local presence or manifestation, and the restrictions due to an emergency, danger or threat to life due to the harm potentially caused by the disease…*"[171] This is what the FCA describes as the "*one proximate, effective, operative or dominant cause of the assumed losses*". Matters are put even more starkly in the FCA's Trial Skeleton: "[t]*he single proximate cause is the disease everywhere and the Government and human responses to it.*"[172] If the FCA is right on this (and EIO and MSA do not dissent from the view that COVID-19 was *a* proximate cause of all losses),[173] there would be no cover for any losses under the relevant Policies underwritten by EIO and MSA: not one of those Policies contains an insured peril which, on its proper construction, was so vastly wide in scope.

286. In reality, the FCA's approach is misconceived: see the section of the Insurers' Joint Skeleton Argument on Causation headed "The FCA's mischaracterisation of the peril". It wrongly seeks to identify a single cause of all losses allegedly suffered by all insureds under all policies and to assert that losses so caused are recoverable under all policies

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170 See Hamblen J's judgment, [52], [56], [57] **{J/106}**.

171 APoC, paragraph 53.1 **{A/2/35}**.

172 See paragraph 225 of the FCA's Trial Skeleton.

173 D3+D5 Defence, paragraph 100.1 **{A/9/36}**.

included in the test case. It does so without reference to the specific insured peril(s) under any relevant policy wording. That is patently wrong-headed. The FCA cannot simply ignore the bargain struck by the parties in the policies, and rewrite the contract by reference to the events which have actually transpired.

287. The FCA's alternative case that the insured peril "*is a proximate cause and there is cover notwithstanding the existence of one or more concurrent uninsured causes*"[174] is also without merit. It assumes the application of the *Miss Jay Jay* **{J/66}** concurrent interdependent causes principle even where there are so-called concurrent independent causes of loss, and the insured peril is not, and cannot be shown to be, a 'but for' cause (let alone a proximate cause) of the loss. This is wrong as a matter of law: see paragraph 254.8 above and the Insurers' Joint Skeleton Argument on Causation **{I/6}**.

The application of the "but for" test: the correct approach to the counterfactual

288. The counterfactual is not an abstract or fluid concept. It is the factual scenario that is necessarily assumed to have existed in order to:

288.1 Identify those losses which have been caused by the insured peril; and

288.2 Isolate them from the losses the Insured would have suffered in any event, *i.e.* but for the insured peril (or had the insured peril not occurred), and which were not, therefore, caused by the insured peril.

174 FCA's Trial Skeleton, paragraph 225 **{I/1/91}**.

289. The ambit of the counterfactual is circumscribed by the ambit of the insured peril. In order to give effect to the indemnity principle, the counterfactual requires the subtraction of the insured peril, nothing else.[175]

290. Yet again the FCA's approach on this issue is misconceived. Its proposed counterfactual ("*a world in which there was no COVID-19 and no Government intervention related to COVID-19*")[176] – for all clauses under all relevant Wordings - does not in any way reflect the insured perils in the policies underwritten by EIO and MSA. It instead smacks of a hindsight driven approach – impermissibly constructing the counterfactual by reversing everything that occurred irrespective of whether or not it was an insured peril. Instead of starting with, and confining the enquiry to, what is required by the policy wording, it ignores it.

291. Thus, the FCA's counterfactual involves reversing not only the insured peril, but also matters which go far beyond what EIO and MSA promised to insure in the relevant coverage clauses, i.e. the matters identified at paragraph 284 above.

292. If facts and matters beyond those embodied in the insured peril are reversed in the counterfactual, this would:

292.1 Ignore the (in the event, limited) ambit of the insured perils in the EIO and MSA policies.

292.2 Wrongly elevate to the status of an insured peril anything which receives any mention in the insuring clause even when, in reality, the purpose of its inclusion is (only) to define and qualify the insured peril.

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175 See the approach of Hamblen J in *Orient-Express Hotels Ltd v Assicurazioni Generali SA* at [45]-[48] **{J/106}**.

176 APoC, paragraph 4.3 **{A/2/4}**. See also paragraphs 56.8 **{A/2/38}**, 77 **{A/2/45}**, and Reply, paragraph 58.4 **{A/14/30}**. See also the FCA's Trial Skeleton, paragraphs 10.3 **{I/1/10}**, 543 **{I/1/188}**, 801 **{I/1/259}**.

292.3 Allow the Insureds to recover for all losses caused by COVID-19, including the consequences of all government measures implemented in relation to COVID-19 thereby impermissibly expanding the scope of cover to something beyond that which was agreed by the parties when the relevant Policy was concluded.[177]

292.4 Convert the EIO and MSA policies into policies providing pandemic cover.

293. In spite of having underwritten policies with specifically defined and carefully delimited perils, EIO and MSA would be in no different position from an insurer who has agreed to cover all the consequences of pandemics in the broadest of terms. This is self-evidently not the basis on which risk was priced or premium was paid under the EIO and MSA policies.

294. The FCA's approach to the counterfactual is, therefore, manifestly flawed. It cannot conceivably be right that the one counterfactual that removes everything associated with COVID-19 is applied to each and every relevant clause under each and every Wording without distinction.

295. The appropriate counterfactual is where the insured peril, properly defined and delimited, is assumed not to have occurred, but all other factors remain unchanged.

296. Thus in any counterfactual to be applied to the relevant EIO and MSA Wordings, it must be assumed that the following factors continued unchanged:

296.1 The COVID-19 pandemic both nationally in the UK and internationally and its impact in causing illness and death and/or the risk of illness and death to people.

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[177] As Hamblen J put in the context of the facts in *Orient-Express Hotels Ltd v Assicurazioni Generali SA* at [58] **{J/106}**, Orient-Express's approach would allow it "*to recover for the loss in gross operating profit suffered as a result of the occurrence of… the hurricanes… as opposed to the loss suffered as a result of the damage to the hotel*" which "*is inconsistent with the causation requirement of the main insuring clause which OEH accepts requires proof that the losses claimed were caused by damage to the hotel.*"

296.2 All government measures in response to COVID-19, other than those specifically encompassed within the insured peril (and which are therefore to be reversed in the counterfactual).

296.3 The adverse (economic) impact on businesses and other organisations of SARS-CoV-2 and/or COVID-19 (i) that in fact occurred in the period prior to the implementation of any government measures (and is likely to occur again in the period after the lifting of government measures);[178] and (ii) that would have continued, and may have increased, for as long as COVID-19 remained or remains in the UK (and/or globally) even if the UK government had not taken the measures that it did.[179]

(a) Such impact was likely (it may be inferred) the result of the response to COVID-19 of individuals (whether consumers, public, employees or business owners) and/or businesses independent of any government intervention, neither of which is an insured peril under the EIO and MSA policies.

(b) Thus, by way of example, none of the following should be reversed in the counterfactual as (i) they are not part of the insured peril and (ii) losses resulting from them are losses that would have been incurred in any event:

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178 See AF8, paragraph 1, underlining added **{C/14/2}**:

> "*By no later than the end of 11 March 2020 and prior to the UK Government issuing any material guidance or imposing restrictions of national application as a result of COVID-19 (other than, if and to the extent relevant, making the Health Protection (Coronavirus) Regulations 2020 quarantining those believed to have the disease, issuing the COVID-19 Action Plan and explanatory guidance entitled "What is Social Distancing?" and making the disease notifiable), there was already a more than de minimis economic impact from COVID-19 within the UK on many of the businesses in each Category of business in the FCA's Assumed Facts document (Annex 2 to the APoC).*"

179 See AF8, paragraph 3, underlining added **{C/14/2}**:

> *"That economic impact would have continued for at least as long as COVID-19 remained a significant threat in the UK (and potentially overseas), and may have increased, even if the UK Government had not issued such guidance or restrictions.*"

(i) the independent[180] decisions of business owners to close their premises / cease or limit business activities (see the example in the Assumed Fact scenarios of a Category 2 business (a nightclub) which decided to open on Fridays and Saturdays only from 6 March 2020 due to a downturn in business) **{E/1/1}**;

(ii) business decisions or circumstances of third parties on whom the Insured is dependent for the conduct of its business (*e.g.* the impact on UK cinemas of the business decision of the producers[181] to delay the release of the new James Bond film, No Time To Die)[182];

(iii) changes in consumer and/or public behaviour due to loss of confidence and/or fear arising out of knowledge, experience or apprehension of COVID-19 generally (see the example in the Assumed Fact scenarios of a Category 1 business (a restaurant and café) which experienced a downturn in business from 1 March 2020 (before any government measures) due to increasing concern about the COVID-19 outbreak **{E/1/1}**);

(iv) global travel restrictions and their consequences (see the examples in the Assumed Fact scenarios of a Category 6 holiday lettings company which had a booking cancelled for Cottage 6 due to an Italian customer who was prohibited from travelling to the UK, and a Category 7 school which lost revenue from facility hire due to Italian

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180 Independent of the insured peril(s).

181 Announced on 4 March 2020.

182 See also the example in the Assumed Fact scenarios of a Category 4 business owning multiple clothing retail outlets that had supply chain issues because of the closure of an overseas factory due to COVID-19. Such supply chain issues must not be reversed in the counterfactual such that any losses resulting from such supply chain issues would have been suffered in any event. **{E/1/2}**

students being unable to travel and therefore cancelling a residential course during the Easter holidays **{E/1/5}**).

297. Against this background, the correct counterfactual to be applied on each of the relevant EIO and MSA Wordings is considered (assuming the insured peril to have been proved in each case).[183]

EIO 1.1 Clause 3 ***{B/4/45}****; EIO 1.2 Clause 1* ***{B/5/42}*** *(Prevention of Access)*

298. The only matter to be reversed on the counterfactual is access to or use of the premises being prevented or hindered where such prevention *etc*. has occurred:

298.1 for the specified reason (*viz*. by reason of action of government etc.);

298.2 in specified circumstances (*viz*. due to an emergency endangering human life etc.).[184]

299. None of the other matters, including those set out in paragraph 296 above, is to be reversed. Specifically, and importantly, the "*emergency endangering human life*" **{B/4/45}** to which the government action which caused prevention *etc*. was a response is not to be reversed. That is not an insured peril in its own right. Rather, its function is (only) to qualify and define the type of action which triggers the cover. Therefore, only the access prevention *etc*. is to be reversed, and it is to be assumed that there continued to be an emergency which could endanger human life from SARS-CoV-2 and/or COVID-19.

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183 Which, to be clear, gives rise to no mutual inconsistency where multiple coverage clauses are engaged or potentially engaged within any one wording (contrary to the implied suggestion at paragraph 803.3 of the FCA's Trial Skeleton).

184 The counterfactual to be applied is identified in the Third and Fifth Defendants' Defence at paragraphs 133-134 **{A/9/47-48}**.

300. If the counterfactual reversed not just the access prevention *etc*. of the qualifying type, but also the emergency itself, EIO would be made insurer of all business interruption losses caused by the emergency (and, therefore, in the present circumstances, all effects of the COVID-19 pandemic). This is not right. It would change and expand the insured peril beyond recognition. There would be no difference between the insured perils actually covered in the relevant EIO policies and a clause in the following terms:

> **The insurance by this section is extended to cover loss resulting from interruption of or interference with your usual activities as a result of the following… (i) An emergency which could endanger human life.**

301. It is transparently wrong to analyse causation in a manner that rewrites the EIO policies with the sole purpose or result of shoehorning all losses caused by the COVID-19 pandemic into the (limited and targeted) indemnity provided under the relevant EIO Wordings without apparently any, or at least sufficient, regard to the language actually used to define and delimit the insured peril.

MSA1 Clause 1 ***{B/10/65}*** *(Action of competent authorities)*

302. The only matter to be reversed on the counterfactual is the action of the identified authorities of the qualifying type, *i.e.* such action:

302.1 which results from a specified situation (*viz*. danger in the vicinity of the premises); and

302.2 which has a specified effect (*viz*. where access will be prevented).[185]

[185] The counterfactual to be applied is identified in the Third and Fifth Defendants' Defence at paragraphs 118-119 **{A/9/43}**.

303. None of the other matters, including those set out in paragraph 296 above, is to be reversed. Specifically, and importantly:

303.1 For essentially the same reasons set out at paragraphs 299 to 301 above, the function of the phrase, "*danger… in the vicinity of the premises*" **{B/10/65}**, to which the competent civil authority action was a response, is to define the type of qualifying action. The peril includes action by the identified authorities having that quality but the "*danger… in the vicinity of the premises*" is not the insured peril or any part of the insured peril. The counterfactual does not reverse any more than the qualifying action. It does not reverse that which gave the action the characteristic which qualified it to be the peril insured against. So it is that the counterfactual assumes the continuation of the danger in the vicinity of the Insured's premises from SARS-CoV-2 and/or COVID-19, to which the insured peril was a response and consequence.

303.2 There is, in any further event, no basis for entertaining in the counterfactual any reversal of the danger outside the vicinity of the premises – that, on any view, falls beyond the scope of the insuring clause. That, however, is the mischief that the FCA seeks to achieve by proposing the counterfactual which it does.[186]

303.3 The only authority action to be reversed is the defined action by the identified authorities having the effect of preventing access to the premises. On MSA's alternative case[187] that access might be prevented by legal impediment, the only action that prevented access was the passing and/or coming into force of the 21 and/or 26 March Regulations and even then only as regards those insured businesses falling within Part 2 of the Schedule. Therefore, even if the Insured can prove that such action was "*following*" danger in the vicinity of the premises,

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[186] See APoC, paragraphs 4.3 **{A/2/4}**, 56.8 **{A/2/38}**, 77 **{A/2/45}**.

[187] MSA's primary case is that none of the action by any competent authority in relation to COVID-19 prevented access to the premises as it presented no physical impediment to accessing the premises. On that basis, the insured peril would not be proved.

it is to be assumed on the counterfactual that all other government action (including the remainder of the 21 and/or 26 March Regulations) continued to take effect.

MSA1 Clause 6 ***{B/10/66}****; MSA2 Clause 6* ***{B/11/47}*** *(notifiable disease)*

304. The only matter to be reversed on the counterfactual is precisely and only the insured peril: illness resulting from notifiable disease that has been proved by the Insured to have been sustained by person or persons within the Relevant Area.[188]

305. None of the other matters, including those set out in paragraph 296 above, is to be reversed.

306. Specifically and importantly, other than excluding the case(s) of COVID-19 proved by the Insured to be present within the Relevant Area:

306.1 SARS-CoV-2 and/or COVID-19 will have continued to be present and to cause illness and death and/or the risk of illness and death to people (as in fact they did), pandemically and epidemically.

306.2 All government action (including advice, guidance, instructions and legislation) in response to the COVID-19 pandemic will have continued (as it did) to take effect.

306.3 All actions of the Insured itself and/or the public will have continued unless the Insured can prove specifically that any such action was taken as a result of (and with knowledge of) the specific proved cases of COVID-19 within the Relevant Area.

[188] The counterfactual to be applied is identified in the Third and Fifth Defendants' Defence at paragraphs 114-115 **{A/9/41}**.

307. The Scilly Isles provides an ideal real-life example of this counterfactual: see AF10 **{C/16/2}**. Notably, in spite of having no confirmed cases of COVID-19 (as at 30 April 2020) and no registered deaths, the Scilly Isles were subject to the same government measures as the rest of the UK, and have suffered and continue to suffer material adverse economic impact as a result of COVID-19. It has made no difference to the Scilly Isles that there have been no illnesses resulting from notifiable disease sustained by any person or persons within a radius of 25 miles. There is, therefore, no basis for assuming that the same losses would not have been, and every basis for assuming that the exact same losses would have been, suffered in the 'disease-free island' scenario.[189] By asserting otherwise, the FCA ignores the consequential effects for the 'disease-free island' of COVID-19 being everywhere other than the island.[190]

MSA2 Clause 8 ***{B/11/48}*** *(Prevention of access – non-damage)*

308. The only matter to be reversed on the counterfactual is the incident of the qualifying type: *viz*., an incident within a one mile radius of the insured's premises which resulted in a denial of or hindrance in access to the premises imposed by or by order of one of the specified authorities for more than 24 hours.[191]

309. In other words, one reverses the insured peril which, at the risk of inexcusable repetition, is an incident within the requisite geographical curtilage having the requisite result of a denial of or hindrance in access to the premises by order of government[192].

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189 See APoC, paragraph 79 **{A/2/46}**. See the FCA's Trial Skeleton, paragraph 10.3.

190 As for the issue of windfall profits raised in the FCA's Trial Skeleton (see, for example, paragraph 10.3 **{I/1/10}**), this is addressed in the Insurers' Joint Skeleton Argument on Causation **{I/6/52-53}**.

191 The counterfactual to be applied is identified in the Third and Fifth Defendants' Defence at paragraphs 124-125 **{A/9/44-45}**.

192 i.e. mandatory government legislation or legally enforceable requirement: those are the only matters that can properly be said to have been imposed by or by order of government.

310. If one reverses that incident,[193] one is left with all other incidents within and without the geographical curtilage, with the epidemic of COVID-19 outside the one mile radius, and with all governmental orders and communications which were not made as a result of that incident and/or, irrespective of that incident, were made as a result of every other incident in the country and as a result of everything else occurring in the country including, of course, the national epidemic.

311. In the light of the FCA's acceptation, even averment, that the proximate cause of everything was or included COVID-19 nationwide, the net result for the Insured in the counterfactual is that it will have suffered from exactly the same results as those that it has in fact experienced even if the insured peril had never occurred.

312. On any view, there is no basis for the reversal of

312.1 Non-binding, non-mandatory government communications whether in the form of guidance, advice, exhortation, encouragement or instruction.

312.2 All government orders and legislation other than as a result of the incident, including all those in the 21 and/or 26 March Regulations that did not deny or hinder access to the Insured's premises.

MSA3 Clause 1 ***{B/12/50}*** *(Prevention of access)*

313. The only matter to be reversed on the counterfactual is action of the competent public authority of the qualifying type, *i.e.* such action which results:

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[193] The idea that one can have an incident "*within*" the one mile radius but which also extends beyond the one mile radius or, from the other perspective, that occurs outside the one mile radius but breaks through the boundaries into that radius, is quite wrong. The whole idea of the preposition "*within*" is that whatever it governs is contained inside and does not extend beyond. The same meaning attaches to the adverb: if a visitor asks whether there is room in the inn and is told to enquire "*within*", he/she is being told to go inside and ask. Shouting from the outside is not the same as enquiring within.

313.1 from a specified situation (*viz*. threat or risk of injury in the vicinity of the premises); and

313.2 in a specified effect (*viz*. whereby use of or access to the premises was prevented or hindered).[194]

314. None of the other matters, including those set out in paragraph 296 above, is to be reversed. Specifically, and importantly:

314.1 For essentially the same reasons set out at paragraphs 299 to 301 above, the "*threat or risk of… injury in the vicinity of the premises*" **{B/12/50}** to which the competent public authority action was a response is not to be reversed. Its purpose is solely to define the type of qualifying action. The counterfactual does not reverse any more than the qualifying action. It does not reverse that which gave the action its required quality for qualification as part of the insured peril. Therefore, the counterfactual assumes the continuation of the threat or risk of injury in the vicinity of the Insured's premises from SARS-CoV-2 and/or COVID-19.

314.2 In any event, there is no basis for reversing in the counterfactual threat or risk of injury from SARS-CoV-2 and/or COVID-19 <u>outside</u> the vicinity of the premises – that, on any view, falls outside the scope of the insuring clause. The FCA's counterfactual where "*there was no COVID-19 in the UK*" can, therefore, have no application to MSA3 Clause 1.[195]

314.3 The only authority action to be reversed is the defined action by the identified authorities having the specified effect. All other government action in response to the COVID-19 pandemic is to be assumed to have continued to take effect.

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194 The counterfactual to be applied is identified in the Third and Fifth Defendants' Defence at paragraphs 128-129 **{A/9/46}**.

195 See APoC, paragraphs 4.3 **{A/2/4}**, 56.8 **{A/2/38}**, 77 **{A/2/45}**.

314.4 Moreover, there is no basis for reversing the adverse (economic) impact on businesses of SARS-CoV-2 and/or COVID-19 as set out at paragraph 296.3 above.

315. When the counterfactuals are properly constructed in the manner set out above they demonstrate the flaw in the FCA's position. On no view do the EIO and MSA Policies provide cover for all losses incurred by all insureds arising out of the COVID-19 pandemic. Although of course the Court cannot make findings on the facts, the likelihood is that a very large part of the Insureds' losses will be irrecoverable for the very simple and obvious reason that "but for" the operation of the (narrowly circumscribed) insured perils, the Insureds' businesses would have been interrupted and/or interfered with to the same or substantially the same extent and the losses resulting from such interruption and/or interference would have been incurred in any event. To the extent that losses would have been suffered in any event, the indemnity under the insuring clauses would not be triggered and the "but for" requirement in the trends clauses (and similar) would not be met.

The FCA's objection to the EIO/MSA counterfactuals

316. The FCA takes issue with the EIO/MSA approach to the "but for" test and counterfactual. It takes the four points set out below, each of which is without merit:

316.1 First, it says that it is incorrect, for the purposes of the counterfactual and causation more generally, to separate out and treat as distinct causes the various facts and matters identified at paragraph 53.2 of the Particulars of Claim **{ A/2/35}** because to do so would be "*contrary to the contracting parties' intentions*".[196] As part of this argument, it also asserts that the government's action in response to COVID-19 was part of an "*indivisible and interlinked strategy and package of*

[196] APoC, paragraphs 53-56 **{A/2/35-39}**. See also Reply, paragraph 58.1 **{A/14/29}**.

national measures" which cannot be divorced for the purposes of the counterfactual.[197]

316.2 Secondly, it says that it is "*absurd*" for the "but for" test to be applied in the way EIO and MSA suggest.[198]

316.3 Thirdly, it says by its correct operation, the "but for" test should address "*realistic counterfactuals*" which require the elimination of all interdependent and interlinked matters, "*not… artificial counterfactuals*" that would not or could not occur in the real world.[199]

316.4 Fourthly, the FCA complains in its Trial Skeleton that the exercise that would be required to give effect to the Insurers' counterfactuals is impractical and would place a disproportionate burden on insureds which cannot have been intended.[200]

317. EIO and MSA also rely on what is said in the section of the Insurers' Joint Skeleton Argument on Causation addressing the "Fundamental problems with the FCA's case on causation" **{I/6/67}**.

The drawing of distinctions

318. Approaching the counterfactual in what EIO and MSA say is the plainly correct manner, *i.e.* by subtracting only the insured peril and nothing else, *may* require distinctions to be drawn between the following conceptually distinct facts and matters namely, (a) local occurrences of disease, and the nationwide/global pandemic; (b) disease, and action by competent authorities; and (d) different types of government action. None

197 APoC, paragraph 56 **{A/2/36}**.

198 APoC, paragraphs 55 **{A/2/36}**, 74 **{A/2/44}**.

199 APoC, paragraph 74 **{A/2/44}**. See also Reply, paragraph 58.5 **{A/14/30}**.

200 See the FCA's Trial Skeleton, paragraphs 244 **{I/1/98}**, 246 **{I/1/99}**, 546.3 **{I/1/190}**, 903 **{I/1/290}**.

of these facts and matters which may be seen to be part of the COVID-19 pandemic are inherently indivisible from the others.

319. The making of these distinctions is not in contradiction of the contracting parties' intentions, as asserted by the FCA.[201] On the contrary, these are distinctions which the relevant Wordings (and therefore the parties, by agreeing such Wordings) require by defining and delimiting the insured perils in the way that they do. There is nothing in the relevant Policies nor is there any rule of law preventing the Court from distinguishing between the various facts and matters identified at paragraph 318 above for the purposes of constructing a counterfactual that reverses the insured peril, and nothing else. To the contrary, the principles of the law of indemnity and the Policies' terms, themselves, require the Court to recognise, acknowledge and apply such distinctions.

320. It is only by making such distinctions (where mandated by the actual definitions and delimitations of the insured perils) that effect can be given to the fundamental principle that the Insured is to be indemnified for the loss caused by the insured peril, not more and not less.[202]

321. The FCA claims the government's action in response to COVID-19 "*are part of an indivisible and interlinked strategy and package of national measures which it is impossible… to divorce for the purposes of calculating the 'but for' counterfactual or for the purposes of proximate causation.*"[203]

322. This assertion has no relevance to the so-called disease clauses, MSA1 Clause 6 and MSA2 Clause 6. In any event, there is no factual basis for it or, for that matter, the assertion that "*the Government's response, in the form of advice, instructions and*

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201 APoC, paragraphs 53-56 **{A/2/35-39}**.

202 *Orient-Express Hotels Ltd v Assicurazioni Generali SA* at [45] **{J/106}**.

203 APoC, paragraph 56 **{A/2/36}**

legislation, was a single body of public authority intervention".[204] As Appendix 1 hereto demonstrates (as does the FCA's Trial Skeleton at paragraphs 34 and following), the government response to COVID-19 included different actions implemented at different times by different means aimed at different persons and having very different effects. (This is quite apart from the fact that, anecdotally at least, the government has been accused of lacking any (let alone, an indivisible and interlinked) strategy or putting together any, or any (let alone a coherent) package of national measures to combat COVID-19.)

323. For example, there are very real distinctions that can be drawn between guidance, advice, instructions and announcements, which are advisory and non-binding, on the one hand; and legislation which is legally enforceable, on the other (a distinction which appears to be drawn by the FCA itself at paragraphs 46 and 47 of the Particulars of Claim **{A/2/30-32})**. Similarly, requirements in legislation for businesses to close or cease operations are not the same as legally enforceable restrictions on free movement of individuals (even when contained in the same statutory instrument). The public authority actions are plainly not indivisible amongst themselves.

324. The fact that different matters – including measures relating to individuals and measures relating to businesses[205] - are addressed in one speech or statement or document by the Prime Minister or other government minister or in one piece of legislation is also irrelevant.[206] It does not make the different government measures having different effects on different people the same or part of the same insured peril. It cannot seriously be suggested that the framing of the counterfactual, and therefore the extent of the indemnity recoverable under the relevant Policies, is dependent on

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204 APoC, paragraph 4.1 **{A/2/3}**. See also FCA's Trial Skeleton, paragraph 10.1 **{I/1/9}**.

205 A (bad) point repeatedly made by the FCA in its Trial Skeleton: see, for example, paragraphs 47.4 **{I/1/22}**, 50 **{I/1/24}**, 54 **{I/1/24}**, 58 **{I/1/26}**, 66 **{I/1/31}**.

206 See APoC, paragraphs 56.1 to 56.7 **{A/2/37-39}**.

the fortuity of how a relevant authority responds to a particular event and the form which its action takes. That would be nonsensical.

325. In any event, the FCA's (mis)characterisation of the government response to the COVID-19 pandemic cannot provide a basis for ignoring the distinctions that the relevant Policies require to be drawn between the different types of government response having a variety of different effects. The FCA cannot be entitled (wrongly) to characterise the government response as an indivisible "*single body of public authority intervention*" and then to rely on that mischaracterisation to rewrite the relevant Policies after the event so as to require Insurers to indemnify for losses not proximately caused by the operation of the more limited peril(s) they agreed to insure.

Absurdity

326. The FCA's assertions that the Insurers' approach to the "but for" test and the counterfactual is absurd assumes what it seeks to prove. It is without basis.[207]

327. There is nothing absurd or unreasonable about:

327.1 The Insured being unable to recover for that part of its loss which would have been suffered in any event "but for" the operation of the insured peril. Such losses are not factually caused by the insured peril.

327.2 Restricting the Insured's recovery to loss proximately caused by the insured peril.

327.3 The application of the "but for" test where there are concurrent, independent causes of loss. It is unsurprising that the Insured is not able to recover where the entirety of the loss in question would, as a matter of fact, have been caused by some condition or circumstance not insured under the relevant Policy, without

[207] APoC, paragraphs 55 **{A/2/36}**, 74 **{A/2/44}**.

the action of the insured peril. In such circumstances, the insured peril is not a cause of loss at all.

Realism and artificiality

328. There is nothing in the assertion that the counterfactual required on the proper application of the "but for" test must be "*realistic*" and requires the "*elimination of all interdependent and interlinked matters, not the construction of artificial counterfactuals that would not or could in the real world have occurred*".[208] The FCA is rehearsing the arguments as to realism and artificiality of the counterfactual that were pedalled by the insureds in *Orient-Express Hotels Ltd v Assicurazioni Generali SA* and roundly rejected by both the Tribunal and Hamblen J.[209] Those arguments are just as unpersuasive now as they were in the context of that case.

329. The relevant Wordings (including the basis of settlement provisions and trends clauses) do not dictate that the counterfactual must be realistic or must not be artificial; nor is there any rule of law or fact that does so. Indeed, it would be most surprising if they did, given that the counterfactual is, by its very nature, concerned with a hypothetical enquiry (*i.e.* the position the Insured would have been in "but for" the insured peril).

330. The scope of the counterfactual is instead dictated solely by the ambit of the insured peril – considerations of realism and artificiality are simply irrelevant. This is because the sole purpose of the counterfactual is to allow an assessment of what losses the Insured would have suffered (if any) "but for" the insured peril.

331. As to the suggestion that the counterfactual requires the "*elimination of all interdependent and interlinked matters*", this is a rehashing of the FCA's bad point that distinctions cannot be drawn between 'local' disease and the pandemic, etc. (see

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208 Paragraph 74 of the APoC **{A/2/44}**. This is a point repeated *ad nauseum* in the FCA's Trial Skeleton, see for example paragraphs 10.3 **{I/1/10}**, 183.2 **{I/1/70}**, 215.2(a) **{I/1/86}**, 302 **{I/1/119}**.

209 See [20] of the Award quoted at [17] of Hamblen J's judgment; and [46]-[48], [52], [57]-[58] **{J/106}**.

paragraphs 318 to 325 above). Under this new guise the FCA appears to say that such matters are all "*interdependent*" and "*interlinked*" and therefore, apparently, cannot be separated and must all be subtracted in the counterfactual. Whether matters are "interdependent" or "interlinked" is, however, irrelevant. Distinctions will need to be drawn and seemingly interlinked matters will need to be separated and treated differently for the purposes of the counterfactual so as to isolate the losses caused by the insured peril.

332. The FCA cannot be permitted to rely on ambiguous concepts of realism and artificiality to exclude from the counterfactual matters unconnected with the insured peril, thereby impermissibly seeking to expand the scope of the insured perils (and thus the scope of the indemnity) to make them something which they are not.

333. In any event, the EIO and MSA counterfactuals are neither unrealistic nor artificial. It is not difficult to envisage situations in which either (i) there was a disease free area but COVID-19, the government measures taken in response to COVID-19 and the impact of COVID-19 on businesses and individuals continued to take effect; or (ii) there was COVID-19 and the impact of COVID-19 on businesses and individuals but with only some but not all (depending on the specific ambit of the insured perils) of the government measures in place. This is addressed at paragraphs 25.12-25.15 of the Insurers' Joint Skeleton Argument on Causation **{I/6/23-26}**.

Alleged impracticality of the EIO/MSA counterfactuals

334. Finally, the FCA also says in its Trial Skeleton that it would be impractical to reverse in the counterfactual only the insured peril and nothing else.[210] This submission is, again, without foundation.

[210] See, for example, paragraphs 246 **{I/1/99}**, 546.4 **{I/1/190}**, 903 **{I/1/290}**.

335. The application of the "but for" test will require from time to time a demanding enquiry in order to isolate covered losses from uncovered losses. This is particularly true in a business interruption context, including when adjusting losses under the trends clauses. For example, even on the FCA's case, an exercise might be required under the trends clause to adjust for the "*ordinary vicissitudes of commercial life*",[211] say for a market downturn that had depressed revenue figures in the year prior to the occurrence of the insured peril. This may be a complex enquiry requiring the input of experts. There is no real difference, at least from the perspective of practicality, in adjusting for such extraneous matters and the impact that COVID-19 would have had on the insured's business quite apart from the occurrence of the insured peril. However, and most importantly, none of this can affect the correct approach to causation. As the Tribunal in *Orient-Express* **{J/106}** put it:

> "*As for the point that this is an artificial enquiry, all claims for Business Interruption raise hypothetical issues and whilst the Tribunal would acknowledge that the evaluation required on the facts of the present dispute is more difficult than most, this cannot affect what is the correct approach in principle.*" (Underlining added).[212]

Conclusion on causation

336. The issue of what, if any, business interruption loss was caused by an insured peril can only be determined on the actual facts of each individual case. However, in light of the targeted ambit of the insured perils under each of the relevant EIO and MSA Wordings, the likelihood is that EIO and MSA did not provide insurance for any or any significant proportion of the Insured's losses arising out of COVID-19.

337. This conclusion is unsurprising. At least a material proportion of the losses suffered by most if not all insureds is likely to have been proximately caused by something other than the focused and circumscribed insured perils:

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211 FCA's Trial Skeleton, paragraph 271 **{I/1/106}**

212 Award paragraph 20 (quoted by Hamblen J at [17]) **{J/106}**.

337.1 COVID-19 nationally and internationally is likely to have been *a* proximate cause of all losses suffered. As COVID-19 *per se* is not an insured peril under any of the EIO and MSA Policies, there would be no cover for losses where COVID-19 itself is the sole proximate cause.

337.2 A further likely proximate cause of at least a material proportion of the losses is the response to COVID-19 of individuals (whether consumers, employees, business owners or members of society) and businesses, regardless of any relevant government action of any kind (see paragraph 296.3 above). If and insofar as such individual (and non-governmental) response was either the sole proximate cause or a concurrent proximate cause with Covid-19 itself, there is no cover for any Insured under any of the relevant Policies because individual response to Covid-19 which would have occurred regardless of any relevant government action is not an insured peril.

338. In the circumstances, the likelihood is that the vast majority of an Insured's losses would have been incurred in any event "but for" the insured perils in the EIO and MSA Policies.

CONCLUSION

339. EIO and MSA end as they began: the present situation is, very sadly, a tragedy for many, if not most, insureds.

340. The issue, however, and whether it is a matter for regret or not, is that EIO's and MSA's policies provided targeted, focused insurance for specific perils.

341. The answer to the issue, again whether it is a matter for regret or not, is that either those perils did not operate or, even if in some part they did, they were not the cause of the insureds' losses.

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APPENDIX 1: Prevention or hindrance of access or use on the facts

A1.1. The FCA's case is that it can establish prevention and/or hindrance of access to or use of all insured premises on and from 16 March 2020.[213] It alleges no earlier prevention or hindrance of access or use.[214]

A1.2. The arguments pursued by the FCA are as follows:

A1.2.1 First, the FCA says that there was hindrance or prevention of access or use in relation to all premises from 16 March 2020, because of "*advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working*".[215]

A1.2.2 Secondly, the FCA pleads alternatively that there was nonetheless hindrance or prevention of access to or use of a range of businesses from 20, 21, 23, 24 and/or 26 March 2020, because of UK Government guidance and Regulations.[216]

A1.3. EIO and MSA's case is as follows:

A1.3.1 First, the FCA cannot establish hindrance or prevention of access to or use of all relevant premises from 16 March 2020.

A1.3.2 Secondly, the UK Government's announcements and Regulations were very far from an "*indivisible and interlinked strategy*"[217] (let alone a strategy which itself

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213 APoC, paragraphs 46-47 **{A/2/30-33}**.

214 List of Issues, paragraphs 28.4 and 28.5 (concerning EIO) **{A/15/9}** and paragraphs 30.6, 30.7, 30.8, and 30.9 (concerning MSA) **{A/15/12-13}**.

215 APoC, paragraph 46 **{A/2/30-32}**, cross-referring to events in paragraph 18 of the APoC.

216 APoC, paragraph 47 **{A/2/32-33}**.

217 APoC, paragraph 56 **{A/2/36}**.

caused hindrance or prevention of access to or use of all premises across the UK), because:

(a) The UK Government response was piecemeal (as is self-evident from the limited scope of the 21 March Regulations as compared with the broader scope of the entirely separate 26 March Regulations: they were separate, and the latter did not follow inevitably from the former).

(b) Apart from the Regulations, the UK Government's measures not create any legal prohibitions: the guidance and announcements were framed so as to allow innumerable different interpretations and responses from businesses or individuals exercising judgement in their own circumstances.[218]

The Agreed Facts upon which the FCA relies to establish prevention or hindrance

A1.4. The relevant period is 16 March 2020 to 28 March 2020. This was the period during which "*advice, instructions and/or announcements*" and Regulations of the type pleaded by the FCA were introduced.

A1.5. There are 33 entries for this period in Agreed Facts 1,[219] but many entries are wholly irrelevant to issues of hindrance or prevention of access or use.

A1.6. For example, it is irrelevant to consider: (a) remarks of the Chancellor of the Exchequer about a meeting with other insurers, and subsequent documents and discussions in

[218] The 26 March Regulations also left considerable scope for individuals to exercise judgement in their individual circumstances.

[219] Agreed Facts 1, rows 31-64 **{C/1/11 - 32}**.

Parliament relating to that meeting;[220] and (b) financial measures for businesses announced by the Chancellor of the Exchequer (including furloughing).[221]

A1.7. Therefore, only relatively few events require analysis. Each underlines the correctness of EIO and MSA's position that the FCA cannot establish a necessary hindrance or prevention of access or use in relation to all insured premises across the UK.

A1.8. The starting point is 16 March 2020, when the Prime Minister made a speech which was accompanied by guidance:

A1.8.1 The speech made clear that the UK Government guidance was advisory and not to have any mandatory effect.

A1.8.2 The Prime Minister said, *"we need to <u>ask</u> you to ensure that if you or anyone in your household has one of those two symptoms, then you should stay at home for fourteen days. That means that <u>if possible</u> you should not go out even to buy food or essentials… And <u>if that is not possible</u>, then you should <u>do what you can</u> to limit your social contact when you leave the house to get supplies*".[222]

A1.8.3 He also made clear that this new advice was prompted by a recent development from the Scientific Advisory Group for Emergencies,[223] and underlined the advisory character of the guidance on home working: "*We need people to start working from home <u>where they possibly can.</u> And you should avoid pubs, clubs, theatres and other such social venues… it's important that Londoners now pay*

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220 Agreed Facts 1, rows 37 **{C/1/17}**, 40 **{C/1/18}**, 41 **{C/1/19}**, 43 **{C/1/20}**, 44 **{C/1/20}**. The Court made clear at the second CMC that EIO and MSA will not have to deal with the allegations in APoC, paragraphs 18.11 to 18.13 **{A/2/9-10}**, relating to the Chancellor of the Exchequer's remarks about meetings with the insurance industry (Second CMC Transcript, page 7/lines 17-24 **{F/29/3}**).

221 E.g. Agreed Facts 1, row 47 **{C/1/22}**.

222 Agreed Facts 1 chronology bundle, p. 146 **{C/2/146}** (underlining added).

223 Agreed Facts 1 chronology bundle, p. 146 **{C/2/146}**.

special attention to what we are saying about avoiding non-essential contact, and to take particularly seriously the advice about working from home, and avoiding confined spaces such as pubs and restaurants" **{C/2/146-47}**.

A1.8.4 The accompanying guidance on social distancing similarly referred to the advisory nature of the UK Government's response: "*This guidance is for everyone. It advises on social distancing measures we should all be taking*".[224]

A1.9. None of this guidance or advice was directed at businesses. Nor were the Prime Minister's advisory remarks on mass gatherings which would normally require support from emergency workers:

> "it is advised that large gatherings should not take place. While the risks of transmitting the disease at mass gatherings are relatively low, these steps will also allow emergency services that would have been deployed for these events to be prioritised in alleviating pressure on public services".[225]

A1.10. Therefore: (a) there was nothing issued on 16 March 2020 which amounted to a prohibition; (b) businesses were not subject to any measures; and (c) it was very much a matter for individuals how they chose to respond.

A1.11. In the light of these considerations, the 16 March 2020 messages do not amount to prevention or hindrance of access anywhere in the UK.

A1.12. The 16 March 2020 messages do not amount to prevention of use anywhere in the UK. Those messages might amount to hindrance of use in certain cases, although there would be factual questions of degree to consider.

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224 Agreed Facts 1 chronology bundle, p. 129 **{C/2/129}** (underlining added).

225 Agreed Facts 1 chronology bundle, p. 138 **{C/2/138}** (underlining added).

A1.13. The Court is not in a position to comment on all individual cases by making a general declaration that the UK Government's messages of and from 16 March 2020 constitute hindrance or prevention of access to or use of premises across the UK.[226]

A1.14. That, in a nutshell, is what EIO and MSA have to say about the FCA's primary case on UK-wide prevention or hindrance of access or use. Materially the same points arise in relation to the other "*advice, instructions and/or announcements*" invoked by the FCA.

A1.15. EIO and MSA must, however, address the events in Agreed Facts 1 further in order to deal with (a) the FCA's attempt to characterise guidance as being indistinguishable from legal prohibition, and (b) the FCA's "*indivisible and interlinked strategy*" allegation.

A1.16. As to 17 March 2020, the only relevant event is a speech in which the Chancellor Exchequer underlined (a) that the UK Government response was piecemeal and based on changing circumstances, (b) that the onus was upon individuals to keep each other safe, and (c) that there would be ongoing support for businesses:

> "I promised to do whatever it takes to support our economy through this crisis – and that <u>if the situation changed, I would not hesitate to take further action</u>. That is what I want to begin doing today. This struggle will not be overcome by a single package of measures, or isolated interventions. It will be won through a collective national effort. <u>Every one of us, doing all we can to protect families, neighbours, friends, jobs</u>.
>
> …
>
> We will support jobs, we will support incomes, <u>we will support businesses</u>, and we will help you protect your loved ones. We will do whatever it takes."[227]

A1.17. Again, if one considers the impact on businesses as at 17 March 2020, it can very easily be seen why the FCA is not entitled to a declaration that there was UK-wide prevention

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226 See the statement of principle in paragraph 43.5 above about the need for words to be taken in their "*ordinary sense*" and applied to the facts.

227 Agreed Facts 1 chronology bundle, p. 169 **{C/2/169}** (underlining added).

or hindrance of access or use by a purported indivisible and interlinked package of UK Government action:

A1.17.1 By way of illustration, the Assumed Facts include an example of a Category 4 business (general retail) simply closing its shop on 17 March 2020[228] and modifying the business to focus on online trading.[229] In a case of this kind, there is no necessary nexus between the closure of the premises and UK Government guidance: there was no direction (legislative or otherwise) that shops must close, and it was entirely a matter for individuals to decide what they ought to do.

A1.17.2 Moreover, in relation to a shop of this kind, the fact that home working was encouraged where people possibly could work from home does not mean that the UK Government required closure of the shop (indeed in such a case working from home would not have been possible for those owning / working at the shop and so the government was expressly not advising work from home for such people). It is not possible to establish in definitive terms that access to all shops was made more difficult by the action of the UK Government.

A1.17.3 Similarly, the Assumed Facts **{E/1/3}** give the example of a Category 5 business which closed its offices on 17 March 2020 in the light of UK Government guidance[230]: the guidance cited above did not say anywhere that offices ought to be closed, and the decision taken in that scenario was one made by the business itself in its particular circumstances.

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228 Assumed Facts, Category 5 **{E/6}**.

229 Obviously, the example of online trading beyond closure demonstrates as a matter of principle how there is a distinction between the performance of the business and whether or not access to or use of its premises is prevented or hindered (assuming prevention or hindrance to be established).

230 Agreed Facts 1 chronology bundle p. 129 **{C/2/129}**.

A1.18. Turning, then, to events on 18 March 2020:

A1.18.1 Schools were told to close to pupils except children of key workers and for vulnerable children. However, this was not done by reference to any legal authority.[231]

A1.18.2 The Department for Education statement simply said: "*Schools will close from Monday, except for children of key workers and vulnerable children*". The Monday to which the UK Government referred was Monday, 23 March 2020.[232]

A1.18.3 EIO accordingly accepts that there was hindrance of use of schools as from 23 March 2020, although many schools remained open for the children of key workers and vulnerable children and/or continued to teach via online lessons (as the Assumed Facts for Category 7.b. show[233]). However, what the FCA cannot establish is a general proposition that the very making of the announcement hindered the use of schools from 18 March 2020.[234]

A1.18.4 The FCA now also appears to rely upon the Prime Minister's speech of 18 March 2020,[235] but this takes the FCA's case no further. The word "*advice*" has been omitted from the extract quoted by the FCA:

> "I want to repeat that everyone - everyone - must follow the advice to protect themselves and their families, but also - more importantly - to protect the wider public. So stay at home for seven days if you think you have the symptoms.

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231 The Coronavirus Act 2020 only came into force on 25 March 2020, but was not used to close schools when it did come into force. Paragraph 56.7 of the APoC mentions the fact of the powers but does not mention that they were not used in relation to school closures **{A/2/38}**.

232 Agreed Facts 1 chronology bundle p. 225 **{C/2/225}** (underlining added).

233 Assumed Facts, Category 7.b. **{E/9}**.

234 In view of the terms of the announcement of 18 March 2020, the FCA is also wrong to assert that the guidance took effect from 20 March 2020.

235 FCA Trial Skeleton, paragraph 54 **{I/1/24-25}**. This was not one of the matters pleaded in paragraph 18 of the APoC **{A/2/7-13}**.

> Remember the two key symptoms are high temperature, a continuous new cough."[236]

A1.19. The only event of 19 March 2020 referred to in the FCA's Trial Skeleton is the introduction of the Coronavirus Bill to Parliament. As to this:

A1.19.1 The FCA alleges that the Bill "*included measures for containing and slowing the virus, including (again interlinking impacts on individuals and businesses) provisions as to events and gatherings, premises, elections and police powers*".[237]

A1.19.2 This appears to be asserted as part of a general narrative about a purported interlinked strategy; but it is rightly not relied upon by the FCA as establishing any prevention or hindrance of access or use of premises.[238]

A1.20. As to events on 20 March 2020:

A1.20.1 In the Prime Minister's speech of 20 March 2020, he said "*I want to thank everyone for following the guidance we issued on Monday*", underlining the fact that his guidance was not mandatory.[239]

A1.20.2 The Prime Minister told cafes, pubs, bars, and restaurants to close save for providing take-away.[240] This was a different approach from that set out previously. Nightclubs, theatres, cinemas, gyms and leisure centres were also asked to close; and he asked people "*as far as possible… to stay at home…*" (again expressing guidance in non-mandatory terms).

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236 Agreed Facts 1 chronology bundle p. 222 **{C/2/222}** (underlining added).

237 FCA Trial Skeleton, paragraph 55 **{I/1/25}**.

238 The APoC, paragraph 47, concerns events "*on 20, 21, 23, 24 and/or 26 March*" **{A/2/32}**. The FCA did not plead the announcement of the Coronavirus Bill in paragraph 18 of the APoC **{A/2/7-13}**.

239 Agreed Facts 1 chronology bundle p. 241 **{C/2/241}**.

240 However, he did not have any authority to force this to happen.

A1.20.3 EIO and MSA accept that this announcement constituted hindrance of use from 21 March 2020;[241] but it did not constitute prevention of access or use.[242]

A1.21. From 21 March 2020, there was, as EIO and MSA accept, prevention or hindrance of use in relation to some Insureds; but there remained no prohibition on many modes of trading even when the 21 March Regulations came into force.

A1.22. The events which follow the 21 March Regulations in the Agreed Facts 1 chronology raise materially the same points. There was non-binding and piecemeal guidance issued in relation to businesses on 23 March 2020[243] and on 24 March 2020,[244] but no further legal restrictions were enacted until the 26 March Regulations came into force.[245]

A1.23. EIO and MSA accept that businesses of the types named in the guidance will have suffered hindrance of use from 23 March 2020. The effect of the Regulations has been addressed as a matter of principle in relation to coverage in Appendix 2 below.

A1.24. In summary, therefore:

A1.24.1 The FCA cannot establish that all Insureds suffered hindrance or prevention of access to or use of premises without more on and from 16 March 2020.

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241 However, they should not be taken to abandon any coverage points made above. For example, the word "*imposed*" in MSA2 Clause 8 must still be given full effect.

242 The 21 March Regulations came into force in relation to Category 1 businesses from 2 pm on 21 March 2020; but even Category 1 businesses were able to continue in business from their premises by providing takeaway services (see Assumed Facts, Category 1 **{E/1/1}**). In relation to Category 2 businesses, some were caught by the prohibitions in the 21 March Regulations while others first caught by those in the 26 March Regulations.

243 The 23 March 2020 guidance (Agreed Facts 1 chronology bundle p. 294 **{C/2/294}**) affected Category 4 businesses (being non-essential retail businesses) and Category 7.a. businesses (being places of worship).

244 The 24 March 2020 guidance was specifically directed at Category 6 businesses (being hotel and holiday accommodation providers: Agreed Facts 1 chronology bundle p. 300 **{C/2/300}**).

245 The entry into force of the Coronavirus Act 2020 on 25 March 2020 is not relied upon by the FCA as establishing prevention or hindrance on its alternative case. It is not pleaded in paragraph 47 of the APoC **{A/2/32-33}**.

A1.24.2 Further, apart from the 21 March and 26 March Regulations, the government measures were all non-mandatory and non-binding; they were entirely advisory in nature.

A1.24.3 The notion of an indivisible and interlinked UK Government strategy and/or package of measures is in the circumstances not sustainable.

APPENDIX 2: MSA1 clause 1

A2.1. This Appendix contains MSA's detailed submissions on two matters relevant to MSA1 Clause 1 as follows:

A2.1.1 First, the meaning of "*following*".

A2.1.2 Secondly, and only if (contrary to MSA's primary case) the clause covers non-physical prevention of non-physical access, there was no prevention of such access for businesses which were never required to close (where MSA1 was predominantly used in respect of such businesses).

The meaning of "following"

A2.2. "*Following*" is not freighted with any well-known legal meaning. In that sense, it is not like "*caused by*" or "*resulting from*" or "*arising out of*" or any of the other causal connectors which have been judicially considered as to the strength of the causal connection involved.

Dictionary meaning

A2.3. The dictionary meaning of "*follow*" or "*following*" connotes something coming after something else in sequence or time, or something happening or occurring after something else.[246] There is clearly a chronological connotation to the word, but the

[246] OED for "*follow*" (verb), meaning 4 **{K/222.1}**.

chronological sense does not exhaust its ordinary scope of meaning. The semantic range of the word also extends to something being consequent upon something else.[247]

A2.3.1 This is consistent with Roget's Thesaurus which, under the heading "effect"[248], groups together as adjectives: "*resultant, resulting, following, ensuing; consequent…*" – Roget's International Thesaurus (4th Ed.) at 154.7 **{K/224}**.

A2.3.2 Fowler's Dictionary of Modern English Usage (4th Ed., 2015) **{K/217}** is also instructive: there are usages where the connection between the two events is merely temporal (i.e. where the preposition "after" would serve), but there is also a usage where "*there is a strong element of consequence*".

A2.4. The semantic range as revealed by different dictionaries is all very well, but the semantic range then needs to be taken back to the context in which the parties have deployed the word in order to determine the precise sense of their agreed use of it.

Contextual use: "following" in MSA1

A2.5. In MSA1 the word "*following*" was used interchangeably with the phrase "*resulting from*". It was objectively intended, on a true construction of the wording, to connote proximate cause or something very close to the proximate cause.

A2.6. The word was used in or in relation to the business interruption coverage on a number of occasions. Specifically:

A2.6.1 On page 4, the "welcome" page, the coverage was summarised as follows:

> "In return for payment of the premium shown in the schedule, **we** agree to insure **you** against:

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247 *Ibid*. at meaning 3.

248 Where "effect", obviously, can mean the outcome of a cause, in the sense that "effect" is a word used to denote the causal relationship with that which brought it about.

…

- loss resulting from interruption or interference with the **business** following **damage**;

…"

A2.6.2 By contrast, the business interruption insuring clause at the start of section 6 promised to pay for "*any interruption or interference with the **business** resulting from **damage** to property…*".

A2.6.3 The insuring clause said "*resulting from"* where the summary of it used "*following*". The two were plainly intended to be interchangeable.

A2.6.4 The same sense of the word "*following*" can be seen in the Claims – basis of Settlement A – Gross profit provision.

A2.6.5 The same sense of the word can be seen in additional coverage clause 1 (as to which, see separately above) and clause 4.

A2.7. In addition, the word was used in other sections of the policy wording as well. These are briefly summarised below.

A2.8. In Section 1 – Material Damage:

A2.8.1 In additional cover clause 1 – Additional costs "**following**" theft **{B/10/33}**, there is cover under limb (b) for the expenses incurred in necessarily replacing locks to buildings, safes or strongrooms at the premises following theft of keys from the building. Plainly, the additional costs in question resulted from the theft of keys in that the cause of the replacement of the locks was the theft of the keys.

A2.8.2 In additional cover clause 10 **{B/10/36}**, there is cover under limb (a) for the expenses incurred in refilling fire-extinguishing appliances and replacing used sprinkler heads "solely **following**" insured **damage**. Again, the costs in question

resulted from, and were caused by, the occurrence of the insured damage and the depletion of the appliances and the use of the sprinkler heads.

A2.8.3 In additional cover clause 14 **{B/10/37}**, there is cover for rent of buildings which suffer damage – for rent receivable, the reduction in rent "solely following damage"; and for rent payable, the rent payable by the insured for the building "*whilst unfit for occupation following damage*". These are financial losses in way of reduced or unpaid rent caused by the damage.

A2.8.4 Additional cover clause 20 uses "*following*" in a similar way **{B/10/38}**.

A2.9. In Section 2 – Money and Personal Accident (Assault), insuring clauses 2 and 3 **{B/10/43}** provide cover for certain types of loss "*following robbery or attempted robbery*", where the word "*following*" is plainly introducing losses caused by the robbery or attempted robbery.

A2.10. In Section 3 – Goods in transit, additional cover clauses 1, 4 and 5 **{B/10/48}** used "*following*" in a causative sense when describing the additional covers being provided.

A2.11. In Section 9 – Legal Expenses,

A2.11.1 Clause 4 provides tax protection cover where there is a dispute about compliance with regulations relating to any of what follows (the word "*following*" being obviously used there in a different sense) "*following a compliance check*" by HMRC {B/10/90}. The causal sense is again obvious, where the HMRC compliance check causes the dispute about compliance to arise.

A2.11.2 Clause 5 again uses the same word in the same way **{B/10/91}**.

Contextual use: "following" in MSA2

A2.12. In MSA2 the word "*following*" was also used interchangeably with the phrase "*resulting from*". It was objectively intended, on a true construction of the wording, to connote proximate cause or something very close to the proximate cause.

A2.13. The word was used in or in relation to coverage on a number of occasions. These usages are set out in table form below.

Reference in MSA2 {B/11/1}	**What is said:**
Contrast page 4 of the policy, definition of "Consequential loss" on page 42 and basis of settlement A where "following" is used, with the BI insuring provision "*What is covered*" on page 44 where "resulting from" is used	Page 4: "In return for payment of the premium shown in the schedule, **we** agree to insure **you** against… loss resulting from interruption or interference with the **business** following[249] **damage**" Page 42: Definitions - "**Consequential loss** Loss resulting from interruption of or interference with the **business** carried on by **you** at the **premises** following **damage** to property used by **you** at the **premises** for the purpose of the **business**." Page 44: Basis of settlement A – Gross profit "the amount payable will be… 1. for reduction in **turnover**, the sum produced by applying the rate of **gross profit** to the amount by which the **turnover** during the **indemnity period** will following the **damage** fall short of the **standard turnover** 2. for increase in cost of working, the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in **turnover** which but for that expenditure would have taken

[249] All underlining in this table has been added for emphasis.

	place during the **indemnity period** following the **damage**" Page 44: BI insuring provision "For each item in the schedule, **we** will pay **you** for any interruption or interference with the **business** resulting from **damage** to property used by **you** at the **premises** for the purpose of the **business** occurring during the **period of insurance** caused by an **insured event** and provided that **damage** is not excluded under sub-section 1."
Section A, Sub-section 1 – Contents and stock, Additional cover – automatically included, clause 7	**"7. Fire brigade damage to gardens** **We** will pay for costs necessarily incurred in reinstating or repairing landscaped gardens and grounds following **damage** caused by fire brigade equipment or personnel attending the **premises** to combat fire."
Section A, Sub-section 1 – Contents and stock, Additional cover – automatically included, clause 20	"**20. Theft of keys** **We** will pay the reasonable costs necessarily incurred in replacing external door locks at the **premises** following the loss of keys by: a) theft from the **premises** or registered office or from the home of; or b) theft following hold-up whilst the keys are in the personal custody of, **you** or any principal, director, partner or **employee** authorised to hold keys provided that the maximum amount payable in any one **period of insurance** doesn't exceed **£2,500**."
Section A, Sub-section 1 – Contents and stock, Additional cover – automatically included, clause 26	"**26. Value added tax (VAT) cover** **We** will pay for VAT, paid by **you**, which is not subsequently recoverable. Provided that: a) **your** responsibility for VAT arises solely as a result of the **reinstatement** or repair of the **property insured** following **damage**"
Section A, Sub-section 2 – Business interruption, Additional cover – automatically included, clause 2	"**2. Boilers**

	consequential loss following **damage** to boilers or other equipment in which internal pressure is due to steam only on the **premises**."
Section A, Sub-section 2 – Business interruption, Additional cover – automatically included, clause 3	"**3. Failure of utilities** **consequential loss** following any **damage** arising at any: a) generating station or sub-station of the electricity supply undertaking; b) land based premises of the gas supply undertaking or of any natural gas producer linked directly with it; c) water works or pumping station of the water supply undertaking; or d) land based premises of the telecommunications undertaking, from which **you** obtain electricity, gas, water or telecommunications services, all in the **territorial limits.**"
Section A, Sub-section 5 – Breakage of plain, plate or sheet glass and sanitaryware, Additional cover – automatically included	"**We** will also pay for: a) **damage** to window frames or framework, shutters or blinds following breakage of **glass**"
Section A, Sub-section 10 – Book debts, What is covered	"**We** will cover interruption of or interference with the **business** following **damage** to **your** records of **outstanding debit balances** contained within the **premises**"
Section B, Buildings cover – optional, Additional cover – automatically included, clause 13	"**13. Sprinkler installation upgrading costs** **We** will pay you for the additional costs incurred following **damage** to the **buildings**, to upgrade an automatic sprinkler installation in order to meet current Loss Prevention Council Rules, provided that at the time of the **damage** the installation conformed with the rules current at the date of installation."
Section B, Buildings cover – optional, Additional cover – automatically included, clause 16	"**16. Value added tax (VAT) cover** **We** will pay for VAT, paid by **you**, which is not subsequently recoverable. Provided that: a. **your** responsibility for VAT arises solely as a result of the **reinstatement** or repair of the **buildings** following **damage**"

Section B, Buildings cover – optional, Additional cover – automatically included, clause 17	"**17. Fire brigade damage to gardens** **We** will pay for costs necessarily incurred in reinstating or repairing landscaped gardens and grounds following **damage** caused by fire brigade equipment or personnel attending the **premises** to combat fire."

Summary

A2.14. Having regard both to the word's meaning and its usage in the context of MSA1, it is submitted that

A2.14.1 Its use was plainly intended to connote a causal connection between the two matters either side of the word;

A2.14.2 The parties used the word as interchangeable with "*resulting from*"; and therefore

A2.14.3 A strong connection equivalent to proximate causation is in view.

A2.15. If this is wrong, it remains common ground that a causal connection is required.

A2.16. MSA submits that, whatever the precise strength of the causal connection, the word cannot denote that the 'but for' test does not apply. If the 'but for' test does not apply, the word is not being used in any causal sense at all, because there is no sense in which something which does not satisfy the 'but for' test is "following" something else, if "following" has any causal connotation.

Legal prevention of access

A2.17. Without prejudice to MSA's primary case, this section of Appendix 2 addresses the extent (if any) to which there was ever any legal prevention of access in respect of different types of business. This is on the footing (which MSA does not accept) that

access could be prevented by legal impediment to the use of the premises for the business. In approaching this section of MSA's submissions, it must be borne in mind that MSA1 was predominantly, but not exclusively, purchased by insureds whose businesses were never required to close.

A2.18. In the case of insured businesses falling within Part 1 or Part 2 of the Schedule to the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 ("**the 21 March Regulations**") **{J/15}**:

A2.18.1 No action taken by the government before the 21 March Regulations came into force was action which prevented the access of anyone to any premises of any kind anywhere.

A2.18.2 When the 21 March Regulations came into force:

(a) Those regulations were not action preventing access to the premises of insured businesses falling within Part 1 of the Schedule, because access to the premises continued to be permitted save to the limited extent of the requirements set out in paragraph 2(1) of those Regulations. Those requirements may have amounted to a hindrance of use, but they did not amount to any prevention of access.

(b) Those regulations were action preventing access to the premises of insured businesses falling within Part 2 of the Schedule.

A2.19. In the case of insured businesses falling within any part of Schedule 2 to the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ("**the 26 March Regulations**") **{J/16}** but to which the 21 March Regulations did not already apply:

A2.19.1 No action taken by the government before the 26 March Regulations came into force was action preventing access to any insured premises anywhere.

A2.19.2 When the 26 March Regulations came into force:

(a) Those Regulations did prevent access to the premises of any insured businesses newly falling within Part 2 of the Schedule;

(b) But those Regulations were not action preventing access as regards:

(i) insured businesses (if any) newly falling within Part 1 of the Schedule, because access to the premises continued to be permitted save to the limited extent of the requirements set out in paragraph 2(1) of those Regulations. In other words, there was hindrance of use, but not prevention of non-physical access;

(ii) insured businesses falling within Part 3 of the Schedule, because access to the premises continued to be expressly permitted for the purpose of carrying on the business;

(iii) insured businesses to which paragraph 5(1) of the Regulations applied, because access to the premises continued to be expressly permitted for the purpose of carrying on the business to the extent permitted by the exception to paragraph 5(1)(a).

A2.20. In the case of insured businesses which did not fall within any part of the Schedule to any of the Regulations, none of the action taken by the government at any time was action preventing access.

A2.21. Further, and specifically as regards the period after the coming into force of the 26 March Regulations, the restrictions on movement contained in paragraph 6 of the 26 March Regulations did not prevent access to the premises of any business of a type not listed in Part 2 of Schedule 2, for the following reasons:

A2.21.1 Paragraph 6(2)(f) expressly provided that a reasonable excuse for a person to leave the place where they are living included the need to travel for the purposes of work, where it was not reasonably possible for that person to work from the place where they were living.

A2.21.2 If working from home caused or would cause loss to the insured from not being able to undertake the business to the full extent permitted by law, then it was not reasonably possible for the work to be done from the place where the business owner and/or his, her or its employees were living.

A2.21.3 In those circumstances, paragraph 6(2)(f) permitted the business owner and/or his, her or its employees to travel and gain access to the premises for the purpose of conducting the work which it was not reasonably possible to do from home. Consequently, in any case where loss was or would be suffered from working at home (i.e. in any case where the insured seeks to claim under the policy), access to the premises was not prevented.

A2.21.4 It is no answer to say that the government made other public statements drawing public attention away from the legal right to leave home and go to work in circumstances where it was not reasonably possible to work from home. No such public statements could prevent access, even where the phrase is somehow expanded to refer to non-physical prevention of non-physical access.

A2.21.5 This point is one of significant importance in the real world, especially where the insured was not required to close. An example will illustrate the point:

(a) Assume the insured is a small firm of high street accountants, 10% of whose income came from running payroll services for clients using special IT equipment/software at the insured's office, which could not be used from home.

(b) Since the relevant work could not be done from home, it was always legal for staff to attend the insured's offices in order to use the special IT equipment and provide the monthly payroll services.

(c) The insured did not run payroll services during lockdown because the relevant staff were shielding and/or furloughed. The clients were left to do their own payrolls during lockdown.

(d) The 10% income was therefore lost, but not because the insured's access to its own premises was prevented. The reason this was not done was nothing to do with access being prevented (which it never was). Yet on the FCA's case, this loss would be covered under MSA1 clause 1. This cannot be right, even on the broadest interpretation of MSA1 clause 1 (which is itself wrong).

A2.22. If necessary and relevant (which it is not), in the case of businesses whose customers or clients would ordinarily attend the premises, they could still do so to the full extent permitted by (i) the general language of "reasonable excuse", and/or (ii) the specific language of paragraph 6(2)(a) of the Regulations.

APPENDIX 3: PROOF OF DISEASE IN A PARTICULAR LOCALITY

Introduction

1. This question arises if there is potential coverage under either the so-called disease clauses or the public authority clauses, and such clauses are held to require proof by the Insured of the presence of COVID-19 within a defined area. This section deals with how the insured shows the necessary presence of the disease within the relevant area. It should be read alongside AF3 on "Prevalence of COVID-19" **{C/5}**. At the time of filing these Opening Submissions, AF3 is yet to be fully agreed (though the document is close to finalisation). References to AF3 in this document will need to be updated in due course.

2. In light of indications by other Insurers of their intention to adopt these submissions, the remainder of this document refers to "Insurers" (rather than to MSA alone). However, as this issue is not relevant to Arch or EIO, references to "Insurers" in this section should be understood accordingly.

3. The FCA has gone to elaborate lengths in the APoC, paragraphs 23-28 **{A/2/17-21}**, to detail various methods of proof, some involving statistical modelling and epidemiology, which it says can be used to show the occurrence of COVID 19 in a Relevant Policy Area,[250] i.e. the area within which the disease must occur to fall within the relevant policy terms.

4. Contrary to the impression created by paragraph 189 of the FCA's Trial Skeleton, it is the FCA, and not the Insurers, which is relying on "*technical and scientific*" matters to establish the presence of COVID-19 in the Relevant Policy Area. Where the presence of COVID-19 can be proved on the basis of "*clear and transparent publicly available information*", that has been accepted by the Insurers – as reflected in AF3.

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[250] See definition at APoC, paragraph 22 **[A/2/17}**.

Unfortunately, the FCA seeks to go well beyond what can sensibly be agreed in the confines of these test case proceedings.

5. In reality, the fact that the FCA has had to resort to such complex methods is a clear sign that the Wordings were not intended to provide cover in circumstances like these. The occurrence of a notifiable disease, for example, should be a straightforward matter of accessible public record.

6. In the light of the expert evidence debates that have taken place at prior CMCs, the prevalence issues that can be determined at this trial are necessarily limited in scope.[251]

7. What can be debated, to the extent possible without the benefit of expert evidence is limited to:

   7.1 the type of proof which could be sufficient to discharge the burden on insureds (and which has been referred to as the "methodology issue" at the CMCs); and

   7.2 if one assumes that what the FCA has pleaded at paragraphs 23-28 of the APoC **{A/2/17-21}** is the best available evidence, whether that is sufficient as a matter of principle to discharge the burden of proof on insureds.

8. These were the only two issues identified by Flaux LJ for determination at this July trial.[252]

9. In spite of the Court's clear ruling, and Flaux LJ's reiteration that the Court was of "*the very firm view… that the issues for hearing in July are the ones I have identified as*

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[251] See ruling of Butcher J at first CMC **{A/19/2-3}** and ruling 4 of Flaux LJ and Butcher J at the second CMC **{A/21/3-4}**.

[252] See ruling 4 of Flaux LJ and Butcher J at the second CMC at paragraph 1 **{A/21/3-4}**.

opposed to anything wider than that",[253] the FCA appears to be ignoring the Court's rulings at both CMCs. The FCA makes no reference to those rulings in its Trial Skeleton.

10. In relation to two issues – namely the undercounting ratio and the averaging methodology - the FCA appears to be inviting the Court to reach findings of fact that (a) its evidence is the best evidence available; and (b) its evidence can discharge the insureds' (and, therefore, in this action the FCA's) burden of proof. Remarkably, the FCA even asserts at paragraph 210 of its Trial Skeleton that, while it apparently relies on "*sophisticated analyses from Imperial College London and Cambridge University…*", the Insurers "*have put forward nothing*". It does so without any mention of Butcher J's ruling at the first CMC (or the reasons for that ruling), the narrow scope of the prevalence issues to be determined at this trial and the absence of permission for expert evidence, all of which entirely explain Insurers' position.

11. Neither (a) nor (b) set out in the above paragraph can be determined in this test case and at this trial, and the Court cannot make findings in relation to them. It is almost too obvious to have to state that whether the FCA's evidence is, in fact, the best evidence, and whether it is sufficient to discharge the FCA's burden of proof are matters that cannot be determined without testing the FCA's evidence. The FCA's evidence might be the best or it might be the worst evidence. That is not something that can be decided at this trial where expert evidence has not been permitted. This is why the issues that arise in relation to prevalence have been narrowly confined by the Court to matters that can be determined without the benefit of expert evidence.

What can and cannot be agreed on methodology

12. Beginning with what the Insurers accept can be shown or relied upon on the basis of publicly available data as to the number of confirmed cases of COVID-19 and the

[253] Paragraph 7 of ruling 4 at the second CMC: **{A/21/3-4}**.

number of deaths relating to COVID-19, the following points can be made at this stage.[254]

13. It is not in dispute that an insured *might* be able to prove a case of COVID-19 at a particular location by specific evidence in a particular case. Whether it can do so is a question of fact to be determined on the evidence adduced in that case. Nothing further, therefore, needs to be said about what the FCA calls "Specific Evidence" in its Trial Skeleton, paragraph 197.

14. The Reported Cases data[255] released by the UK Government showing lab-confirmed cases of COVID-19 can be used to show the number of cases in a regional, UTLA[256] or LTLA[257] zone. There is a caution, however, that the Reported Cases data record both daily and cumulative totals. Only the former can be used to show the presence of COVID-19 on any given date, however, because the cumulative cases will include people who have recovered. This is an important distinction – i.e. between daily tallies and cumulative totals – to bear in mind as it is often unclear exactly to which of the two the FCA is referring.[258]

15. NHS England has also published, on a daily and cumulative basis, hospital death data for the number of individuals who have died in each NHS Hospital Trust having previously tested positive for COVID-19 ("**the Daily Death Trust Data**").[259] These data are compiled

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254 These points are made bearing in mind that some Wordings have a specified radius limit or refer to vicinity or similar and the insured would thus have to prove disease within such an area.

255 Referred to in the APoC at paragraph 24 **{A/2/18}**. See detailed description of this data at AF3 at paragraphs 3-9 **{C/5/2-3}**.

256 Upper Tier Local Authority: see paragraph 7 of AF3 **{C/5/3}**.

257 Local Tier Local Authority: see paragraphs 7, 20 of AF3 **{C/5/3}, {C/5/7}**.

258 See, for example, paragraph 24 of the APoC which introduces the Reported Cases but appears to only refer to "*the accumulated total number of Reported Cases in each… Zone… on each date since records began…*" **{A/2/18}**. See also paragraphs 28.1 and 28.2 **{A/2/19}**.

259 Referred to in the APoC, paragraphs 23 **{A/2/17}** and 28.4 **{A/2/21}**. See also AF3 at paragraph 36 **{C/5/13-14}**.

on a per NHS trust, not per hospital, basis and so do not provide information as to the number of deaths at each NHS hospital where the relevant trust has more than one hospital.[260]

16. There are also death data published by the Office of National Statistics, on a weekly basis, for the number of deaths that have occurred in England and Wales in the year to date, including deaths involving COVID-19,[261] identified by local authority and health board ("**the ONS COVID Death Data**").[262]

17. The regional, UTLA and LTLA Reported Cases data and certain of the death data referred to above can be used to show the presence of COVID-19 within a Relevant Policy Area, but logically only in the following circumstances:

17.1 The Insured can prove the presence of at least one case of COVID-19 within the Relevant Policy Area on a particular date if, on that date, the daily lab-confirmed cases in the Reported Cases data[263] ("**the Daily Count**") for the relevant LTLA is at least one, and that LTLA is entirely within the Relevant Policy Area (whether or not the insured premises is located inside or outside the relevant LTLA).[264]

17.2 If a Relevant Policy Area incorporates more than one LTLA, the Insured can prove the presence of at least one case of COVID-19 within the Relevant Policy Area on a particular date if the Daily Count for one of the LTLAs in the Relevant Policy Area is at least one, and that LTLA is entirely within the Relevant Policy Area.[265]

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260 See RSA's Defence at paragraph 21(b) **{A/12/11}**.

261 I.e. where the cause of death recorded on the death certificate includes COVID-19.

262 See paragraph 28.4(a) of the APoC **{A/2/20}**. See also AF3 at paragraph 38 **{C/5/14}**.

263 Also referred to in AF3 as "the Underlying Data".

264 See AF3, paragraph 23 **{C/5/8}**.

265 See AF3, paragraph 27**{C/5/9-10}**.

17.3 Subject to paragraph 17.4 below, the Insured can prove the presence of at least one case of COVID-19 within the Relevant Policy Area in a particular week of the year (albeit not on a particular day in that week) if the ONS COVID Death Data show that deaths involving COVID-19 for the relevant local authority or health board for that week is at least one, and the local authority or health board is entirely within the Relevant Policy Area.[266]

17.4 It is not possible, on the basis of the ONS COVID-19 Death Data alone, to prove that there had been at least one case of COVID-19 within the Relevant Policy Area on a particular date of that week. However, it is agreed in principle that by proving the presence of at least one case of COVID-19 within the Relevant Policy Area in a particular week of the year using the ONS COVID-19 Death Data, the Insured can also prove the presence of at least one case of COVID-19 during the period immediately prior to that week (although the extent of the 'immediately prior period' to which the weekly figures from the ONS COVID-19 Death Data may be extrapolated is a matter of expert evidence, and not for determination at the July trial).[267]

18. However, there are also limitations to what can be agreed on the basis of the publicly available data as to lab-confirmed COVID-19 cases and the number of deaths. In particular:

18.1 If the LTLA is only partly within the Relevant Policy Area (including, for example, where the Relevant Policy Area falls within the LTLA and therefore the LTLA extends beyond the Relevant Policy Area), the Insured cannot prove the presence of at least one case of COVID-19 within the Relevant Policy Area on a particular

266 See AF3, paragraph 39 **{C/5/14}**.

267 See AF3, paragraph 40 **{C/5/14-15}**.

date just on the Reported Cases data alone (even if the Daily Count for the relevant LTLA is at least one).

18.2 If the local authority or health board is only partly within the Relevant Policy Area, the Insured cannot prove the presence of at least one case of COVID-19 within the Relevant Policy Area just on the ONS COVID-19 Death Data alone (even if the ONS COVID-19 Death Data for the relevant health board or local authority for the relevant week record at least one).

18.3 Even if, on a particular date, the Daily Death Trust Data record at least one, and the NHS Hospital Trust is entirely within the Relevant Policy Area (i.e. all hospitals within that Trust are within the Relevant Policy Area), the Insured cannot prove on the basis of the Daily Death Trust Data alone the presence of at least one case of COVID-19 within the Relevant Policy Area on that particular date. The Insurers do not, therefore, agree with what is said at paragraphs 199-200 of the FCA's Trial Skeleton.

18.4 This is because such data do not reflect whether the individual whose death has been recorded in fact died from and/or with COVID-19; it only reflects that the person who died had at some point previously tested positive for COVID-19. As stated on the Government website "*deaths of people who have tested positively for COVID-19 could in some cases be due to a different cause*."[268] It will not be known, therefore, on the Daily Death Trust Data alone whether on the date of death there was in fact a case of COVID-19 in the relevant NHS Hospital Trust. A person could have tested positive for COVID-19 and recovered although they subsequently died for reasons unconnected with COVID-19.

[268] See https://coronavirus.data.gov.uk/about and AF3, paragraph 36 **{C/5/13-14}**.

18.5 The FCA's reliance on regional data[269] is also problematic. The Insured cannot prove the presence of at least one case of COVID-19 within the Relevant Policy Area on regional data alone. The regional data will not be specific to a hospital or LTLA or local authority. Therefore only part of the region will be within the Relevant Policy Area. It is noted that the FCA's Trial Skeleton does not seek to rely on regional data. It is not known, therefore, whether the declaration at paragraph 28.4(e) **{A/2/21}** is persisted in.

18.6 Finally, Insurers cannot at this stage agree the unpleaded suggestion at paragraph 205.1 of the FCA's Trial Skeleton that, in order to establish the presence of COVID-19 in the Relevant Policy Area on a particular date, an Insured can rely on the Daily Count on the days surrounding that date on the basis of infectious periods for the disease. The Reported Cases data alone do not show when a person is being tested relative to the infectious period.

19. In light of certain of the limitations identified above, particularly at paragraphs 18.1, 18.2 and 18.5, the FCA has sought to rely on additional methodologies to discharge the insured's burden of proof, namely:

19.1 An alleged undercounting ratio: see APoC, paragraph 26-27, 28.3-28.4 **{A/2/18-21}**; and

19.2 Application of an evenly distributed average: see APoC, paragraph 28.4 **{A/2/20-21}**.

[269] See APoC, paragraphs 28.4(b), (c), (e) **{A/2/21}**. See also the regional data referred to in AF3, i.e.: (a) the number of "hospital admissions for COVID-19" (whatever that may mean) for the period 17-29 March published by the Government by region (paragraph 35 **{C/5/13}**); and (b) the daily and cumulative numbers published by NHS England by region for persons who have died in hospitals in England where COVID-19 is mentioned on their death certificates (footnote 35 **{C/5/14}**).

The alleged undercounting ratio

20. The alleged undercounting ratio is described at paragraphs 26-27 of the APoC **{A/2/18-19}**, and is then referred to in the declarations sought at paragraphs 28.3, 28.4(c) **{A/2/20-21}**. In summary, the FCA seeks to extrapolate from certain analyses – referred to in paragraph 26 of the APoC as the Imperial Analysis and the Cambridge Analysis – a mathematical formula for calculating the relationship between the Reported Cases and the actual incidence of COVID-19 in the UK and/or particular regions/areas of the UK.

21. There is no dispute that the number of actual COVID-19 cases in the UK is much higher than the number of Reported Cases.[270]

22. How one derives a reliable figure for actual cases is, however, much more difficult.

23. The use of an undercounting ratio to attempt to ascertain the likely number of actual cases of COVID-19 is acceptable in principle, but only if an undercounting ratio can be identified that can produce a reliable (not just reasonable, see below)[271] estimate. This depends on the methodology which includes both the data used and the analysis applied to them. The methodology adopted by the FCA, namely the Imperial and particularly the Cambridge Analyses, is not uncontroversial and there has been no opportunity to investigate it or verify it. Indeed, the full methodology of the Cambridge Analysis is not available publicly. The allegations in paragraph 30.2 of the Reply **{A/14/15}** in particular make points which could only be made good by expert evidence which will not be permitted at this trial.

24. The same is true of the facts and matters set out at paragraphs 212 of the FCA's Trial Skeleton (see for example the assertions that the Imperial Analysis was "*based on sophisticated modelling*"(paragraph 212.1) or that the Cambridge Analysis "*is real time*

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270 See paragraph 23(c) of RSA's Defence **{A/12/9}** adopted by all the Insurers save for QBE. As for QBE's position: see paragraph 37 of its Defence **{A/11/9}**.

271 As per the APoC, paragraphs 26 **{A/2/18}**, 28.3 **{A/2/20}**.

genuine expert analysis aimed at getting as close to the true position as practicable" (paragraph 212.2)). How can the Court evaluate the correctness of these matters without expert evidence? These are exactly the type of facts and matters that cannot be tested without the Insurers having the benefit of expert assistance and the Court having the benefit of expert evidence.

25. The change in the FCA's case from pleading that the undercounting ratio can "*reliably be estimated*" to pleading that it can "*reasonably be estimated… by applying an appropriate Undercounting Ratio*"[272] does not assist it either. Without the assistance of expert evidence, the Court is in no position to reach any conclusions at this trial as to whether the true incidence of COVID-19 can "*reasonably be estimated*" on the basis of an "*appropriate Undercounting Ratio*". Nor can it conclude that an appropriate undercounting ratio can "*properly be inferred*" from the Imperial Analysis, the Cambridge Analysis or any other analysis. In any event, an insured cannot discharge the legal burden on it by merely proving, on a balance of probabilities, that the undercounting ratio can reasonably (rather than reliably) be estimated.

26. The APoC now refer to a rebuttable presumption in relation to the "*methodologies*" set out in the APoC, paragraph 28.4 **{A/2/20}**. It appears from paragraph 196 of the FCA's Trial Skeleton that that rebuttable presumption is said to arise where a policyholder merely relies on particular types of evidence "*as prima facie discharging the burden of proof*", i.e. where the policyholder merely asserts that such evidence is capable of discharging its burden of proof. The burden of proof would then apparently shift to the insurer to demonstrate that the policyholder's methodology was unreliable or that some other methodology would be appropriate.

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[272] See APoC, paragraphs 26 **{A/2/18}** and 28.3 **{A/2/20}**. See also the FCA's Trial Skeleton at paragraph 212.4.

27. That plea has no basis in law, and is unsupported by *Equitas v R&Q Reinsurance* [2010] Lloyd's Rep IR 600 that the FCA prays in aid.

27.1 *Equitas* does not provide any support for the shifting of the legal burden of proof.[273] The legal burden of proof to establish liability is and remains on the insured throughout.

27.2 *Equitas* is not authority for the case the FCA is making, namely that evidence is best evidence by means of the claimant's assertion alone and without actually being tested by the defendant or the Court; and that the best evidence necessarily discharges the burden of proof.

27.3 As set out in *Equitas*, a "*rebuttable presumption*" could only arguably arise in any sense if there was *prima facie* evidence to the effect that the methodologies referred to in paragraph 28.4 of the APoC were sound; such evidence would not shift the legal burden, but if left unanswered, could discharge that burden.[274] In fact, however, "*rebuttable presumption*" is not an accurate description in such a situation; there is merely evidence which might discharge the legal burden of proof, if not contradicted.

27.4 Insurers do not dispute that the insured *can* rely on the best evidence available, whether that is statistical evidence, epidemiological evidence or something else, to prove the presence or cases of COVID-19 within the Relevant Policy Area: the

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273 *Equitas v R&Q Reinsurance* [2010] Lloyd's Rep IR 600 at [70]-[71] **{K/139}**. See also *Rhesa Shipping SA v Edmunds ("the Popi-M")* [1985] 1 WLR 948 at 951 B-D **{K/71}**. See also the statement by Eder J in *Ted Baker plc v Axa Insurance UK plc (No. 2)* [2014] EWHC 3548 (Comm) **{J/125}**, quoted at paragraph 261 of the FCA's Trial Skeleton **{I/1/103}**, that the burden in an insurance claim to establish on a balance of probabilities that a relevant event was caused by one or more insured perils "*always remains on a claimant… Notwithstanding… the difficulty which a claimant may face…*"

274 Ibid at [70].

Insurers do not, therefore, make the same arguments that R&Q did in the *Equitas* case **{K/139}**.[275]

27.5 However, what is, in fact, the best available evidence (and whether the insured's evidence is the best evidence) is a question of fact and (expert) evidence which is not for determination at this trial where no evidence has been admitted on this topic: see paragraphs 6 - 11 above. As the FCA itself notes in paragraph 194.5 of its Trial Skeleton **{I/1/74}**, Gross J in *Equitas* only reached the conclusions he did "*after considering the detail of the models employed…*" Contrary to the suggestion in the last sentence of that paragraph (and paragraph 194.6 **{I/1/74}**), the Court here cannot engage in a similar enquiry to that of Gross J because it does not have the necessary expert evidence before it.

27.6 Further, and contrary to what is said at paragraph 211 of the FCA's Trial Skeleton **{I/1/82}**, it is not enough simply to show that the methodologies alleged are the best evidence (if that was even possible) or to assume that they are the best evidence. As recognised in the *Equitas* case **{K/139}**, even the best evidence may simply not be sufficient to discharge the burden of proof. As Gross J said in *Equitas* at 71(iv) (which is also quoted at paragraph 194.4 of the FCA's Trial Skeleton **{I/1/74}**), "*A claimant is left to take decisions on the manner of proving its claims, using the best evidence available and upon which the claim may or may not succeed.*" (Underlining added).

27.7 This is also clear from paragraph 70 of Gross J's judgment (set out in full below), the key part of which (indicated in **bold and underlining**) is excluded from the quote at paragraph 194.2 of the FCA's Trial Skeleton **{I/1/73}**:

> "*70. There is a danger of over-complicating the analysis or the terminology by straying into "legal", "evidential", "shifting" and "provisional" burdens of proof (see, Phipson on Evidence, 16th Edition, at paras 6-02 and 6-03; Cross and*

[275] The suggestions to the contrary at paragraph 194 of the FCA's Trial Skeleton **{I/1/73}** are not, therefore, correct.

> *Tapper on Evidence, (9th Edition, at pages 106 to 115, especially at page 113). That said, a consideration of and the distinction between, the nature of the burdens involved may be helpful in shedding light on this issue. Adopting the phraseology of Evans J (as he then was) in Wurttembergische AG Versicherungs Beteiligungsgesellschaft v Home Insurance Co [1993] 2 Re LR 253, at page 261, it can be suggested that the concern here lies with the "evidential and therefore a shifting burden of proof". If this be right, then Equitas is entitled to seek to discharge the legal burden resting upon it (of satisfying Lord Mustill's first rule) by the use of the best evidence it has available; should such evidence prima facie suffice to discharge that legal burden, Equitas does not need to undertake a process of regression; it would be for R&Q to mount a sufficient response which necessitates Equitas doing so.* ***Of course, should the evidence relied upon by Equitas be incapable of satisfying the burden resting upon it (if say, actuarial modelling is incapable of sufficing for the purpose at hand) or if such evidence in fact falls short of doing so (if, for example, the models do not sufficiently approximate reality), then the Equitas claim/s must fail.*** *The risk that Equitas runs, however, is one of fact or evidence; it does not fall foul of any rule of law.*"

27.8 Whether the FCA's material is or is not the best evidence, and whether it is or is not adequate to discharge the insured's burden of proof cannot be the subject of findings at this trial. These are matters that have to be tested. Findings cannot be made simply on the basis of the FCA's assertions of quality, or because some analysis apparently has the imprimatur of Government: see paragraph 212.3 of the FCA's Trial Skeleton **{I/1/83}**.

27.9 There can, in the circumstances, be no finding of a rebuttable presumption in any sense.

28. The FCA also complains that, if the Court does not adopt its undercounting ratio which is said to be based on the Cambridge and Imperial Analyses, "*policyholders would be considerably disadvantaged*" (see paragraph 212.5(c) of the FCA's Trial Skeleton **{I/1/84}**). To be very clear, the Insurers are not saying that policyholders cannot seek to rely on an undercounting ratio and/or the Cambridge and Imperial Analyses in trying to prove their claim. What the Insurers are saying is that whether or not that evidence is any good, and whether it is sufficient to discharge the burden of proof which rests on policyholders cannot be determined in the forum of this expedited test case trial that has been selected by the FCA, without any expert evidence.

29. Indeed, the Insurers were willing to have a second, highly expedited, trial to determine this very issue, with the Court having the benefit of expert evidence, but the FCA has now expressly eschewed this.[276]

The averaging methodology

30. The second methodology referred to in the APoC paragraph 28.4 **{A/2/20-21}**, which is also said to be subject to the rebuttable presumption (see FCA's Trial Skeleton, paragraph 208.1 **{I/1/81}**), is the concept of averaging across the area: see paragraphs 28.4 (a), (b), (c) and (e).

31. There is no conceivable basis for simply geographically averaging COVID-19 data across a region to show that there was a case of COVID-19 in any particular part of that region.

32. It is inherently unlikely that cases of COVID-19 (or COVID-19 deaths) would be evenly distributed across the relevant region, LTLA or UTLA. Thus using a simple average is unlikely to be a reliable or accurate basis from which to infer the presence of COVID-19 within the Relevant Policy Area.[277] The degree of unlikelihood may differ depending on the size and characteristics of the relevant region, LTLA or UTLA – for example, if a UTLA includes part of a town on one side and open countryside on the other side, an evenly distributed average is highly unlikely to reflect the true position.

33. Manifestly, such averaging would have to take into account many factors if there were to be any hope of it being remotely reliable. It would be a complex task.

34. The same is true for the suggestion, in the Reply[278] and at paragraph 208.2 of the FCA's Trial Skeleton **{I/1/81}**, of averaging by population size. This still considers only one

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276 **{H/38/1}**.

277 See the points made in RSA's Defence at paragraph 28(a) **{A/12/11}** (including by reference to the position of the Scilly Isles, Agreed Facts 10, paragraph 2) **{C/16/1}**); and the sero-prevalence material at paragraph 18 of AF3 **{C/5/6}**.

278 See paragraph 35.3 **{A/14/19}**.

potential variant that *might* affect the distribution of cases of COVID-19 across any relevant area and ignores all others (e.g. age, ethnicity, socio-economic differences, concentrations of hospitals or care homes). It thus does not solve the difficulties with averaging; it still assumes an even spread of COVID-19 among the population.

35. The averaging across the area – whether by size of area or population – is, therefore, very unlikely to be regarded as the best evidence. In any event, the Court cannot decide that it is the best evidence available without expert evidence.

36. Moreover, a conclusion that the result of simple averaging is the best evidence available (or an assumption that it is the best evidence) would not satisfy the burden of proof as *per* *Equitas* **{K/139}**: the insured would still need to show that the best evidence was capable of satisfying the legal burden of proof and did in fact do so. These are not issues with which the Court can become involved at this trial.

37. There is thus no basis for the rebuttable presumption contended for by the FCA, i.e. that the insured should be entitled to adopt the evenly distributed average methodology unless the insurer can show that that methodology would be unreliable and/or inappropriate (see paragraph 208.1 of its Trial Skeleton **{I/1/81}**).

38. As regards the two questions posed at the outset, firstly as regards the type of proof which may be used, and secondly, as to the sufficiency of the FCA's evidence in discharging the burden of proof on the assumption that it is the best evidence (see paragraph 7 above):

38.1 The Insurers accept that certain publicly available data may be used to show the matters in paragraph 17 above.

38.2 When one comes to methodologies, in principle, a reliable undercounting ratio could be used, and in principle some reliable method of calculating the distribution of cases across an area could be used.

38.3 But the Court cannot regard the methodologies put forward by the FCA as the best evidence. That would need to be tested.

38.4 Moreover, even if the Court were to make that assumption, it cannot decide at this trial that the FCA's proposed methodologies are sufficient to discharge the burden of proof. The best evidence is not necessarily sufficient as a matter of principle to discharge the burden of proof on insureds.

The declarations sought

39. Where this leads to as regards the declarations sought in APoC, paragraph 28 **{A/2/19-21}** is as follows:

39.1 Paragraph 28.1: that the actual number of individuals infected with COVID-19 on a particular date in a regional area, UTLA or LTLA, is as great as the number of Reported Cases, is only correct if "Reported Cases" is taken to be a reference to daily not cumulative totals in the data referred to at paragraph 24 of the APoC **{A/2/18}**.

39.2 Paragraph 28.2: what is said in this sub-paragraph as to the presence of COVID-19 within LTLAs in England cannot be accepted as correct as the facts relied on to make these assertions are based on the cumulative totals for Reported Cases and make no allowance for those who had recovered from COVID-19.

39.3 Paragraph 28.3: the declaration sought in this paragraph which relates to the undercounting ratio, falls outside of the scope of the (only) two issues identified by Flaux LJ (see paragraph 7 above) as arising for determination at this hearing. Further, the issue(s) raised by paragraph 28.3 cannot be decided at this trial without expert evidence. The declaration is, in any event, denied.

39.4 Paragraphs 28.4(a) to (c), (e): these rely on a supposed rebuttable presumption and also on the averaging methodology and undercounting ratio, and are denied for the reasons set out at paragraphs 20 to 35 above.

39.5 Paragraph 28.4(d): The declaration sought is denied for the reasons set out at paragraphs 18.3 and 18.4 above.

APPENDIX 4: MSA WORDINGS – BASIS OF SETTLEMENT PROVISIONS

Policy wording (lead wording asterisked)	Basis of settlement provision	Relevant definitions
Type 1		
***ADA628-20190601 Commercial Combined (Instant Underwriting)**	Policy Section 6 (Business interruption – Optional), Insuring clause, basis of settlement provisions (pp. 60-61) **{B/10/59-60}**	General Definitions, including definition of "*Damage*" (p. 12) **{B/10/11}** Policy Section 6 (Business interruption – Optional), Additional definitions on pp. 58-59, including definition of "*Standard turnover*" (i.e. the trends clause) **{B/10/57-58}**
Type 2		
***ADA672-20190601 Retail (Instant Underwriting)**	Policy Section A – Automatic cover, Sub-section 2 – Business interruption, What is covered, basis of settlement provisions (pp. 44-45) **{B/11/44-45}**	General Definitions, including definition of "*Damage*" (p. 12) **{B/11/12}** Policy Section A – Automatic cover, Sub-section 2 – Business interruption, Additional definitions on pp. 42-44, including definition of "*Standard turnover*" (i.e. the trends clause) **{B/11/42-44}**
ADA626-20190601 Leisure (Instant Underwriting)	Policy Section A – Automatic cover, Sub-section 2 – Business interruption, What is covered, basis of settlement provisions (pp. 44-45) **{B/72/44-45}**	General Definitions, including definition of "*Damage*" (p. 12) **{B/72/12}** Policy Section A – Automatic cover, Sub-section 2 – Business interruption, Additional definitions on pp. 42-44, including definition of "*Standard turnover*" (i.e. the trends clause) **{B/72/42-44}**
ADA627-20191024 Office and Surgery (Instant Underwriting)	Policy Section A – Automatic cover, Sub-section 2 – Business interruption, What is covered, basis of settlement provisions (including the trends clause) (pp. 42-43) **{B/73/44-45}**	General Definitions, including definition of "*Damage*" (p. 8) **{B/73/10}** Policy Section A – Automatic cover, Sub-section 2 – Business interruption, Additional definitions on pp. 40-41, including the words "*We will adjust the figures as necessary to provide for trends or special circumstances affecting the business before or after the damage or which*

		would have affected the business had the damage not occurred" (i.e. the trends clause) **{B/73/38-39}**
Type 3		
***ADA555-20191101 Forge Commercial Combined (with Eastlake & Beachell)**	Policy Section 2 – Business Interruption, Sub section A – Estimated gross profit, basis of payment provisions (p. 48) **{B/12/49}**	General Definitions, definition of "*Damage*" (p. 11) **{B/12/12}** Policy Section 2 – Business Interruption, Sub section A – Estimated gross profit, Additional definitions on pp. 46-47, including definitions of "*Annual gross rentals*", "*Annual gross turnover*", "*Rate of gross profit*", "*Standard gross rentals*", "*Standard turnover*" and the bracketed provision included alongside (i.e. the trends clause) **{B/12/47-48}**

APPENDIX 5: EIO WORDINGS – BASIS OF SETTLEMENT AND LOSS OF INCOME PROVISIONS

Policy wording (lead wording asterisked)	Basis of settlement or loss of income provision	Relevant definitions
Type 1.1		
PD3258 (ME871) Heritage Business and Leisure	Policy Section 4 (Business interruption), Basis of Settlement Clause (pp. 55-56) **{B/26/42-43}**	Policy Section 4 (Business Interruption), Definitions on pp. 54-55, including definitions of "*Adjusted*" (i.e. the trends clause) and "*Damage*" **{B/26/55-56}**
Education (ME794)	Policy Section 4 (Business interruption), Basis of Settlement Clause (pp. 51-52) **{B/27/51-52}**	Policy Section 4 (Business Interruption), Definition on pp. 50-51, including definitions of "*Adjusted*" (i.e. the trends clause) and "*Damage*" **{B/27/50-51}**
Education (ME868)	Policy Section 4 (Business interruption), Basis of Settlement Clause (pp. 53-54) **{B/28/53-54}**	Policy Section 4 (Business Interruption), Definitions on pp. 52-53, including definitions of "*Adjusted*" (i.e. the trends clause) and "*Damage*" **{B/28/52-53}**
ME866 Charity and Community	Policy Section 4 (Business interruption), Basis of Settlement Clause (pp. 54-55) **{B/29/54-55}**	Policy Section 4 (Business Interruption), Definitions on pp. 53-54, including definitions of "*Adjusted*" (i.e. the trends clause) and "*Damage*" **{B/29/53-54}**
ME867 Faith and Community	Policy Section 4 (Business interruption), Basis of Settlement Clause (pp. 54-55) **{B/30/54-55}**	Policy Section 4 (Business Interruption), Definitions on pp. 53-54, including definitions of "*Adjusted*" (i.e. the trends clause) and "*Damage*" **{B/30/53-54}**
ME869 Care	Policy Section 3 (Business interruption), Cover Clause, Amount Payable (pp. 35-36) **{B/31/35-36}**	Policy Section 3 (Business Interruption), Definitions on p. 34, including definitions of "*Adjusted*" (i.e. the trends clause) and "*Damage*" **{B/31/34}**

PD3259 (ME872) Heritage Arts and Culture	Policy Section 4 (Business interruption), Basis of Settlement Clause (pp. 55-56) **{B/32/55-56}**	Policy Section 4 (Business Interruption), Definitions on pp. 54-55, including definitions of "*Adjusted*" (i.e. the trends clause) and "*Damage*" **{B/32/54-55}**
***ME857 Parish Plus**	Policy Section 3 (Loss of Income), Basis of Settlement Clause (pp. 43-44) **{B/4/43-44}**	Policy Section 3 (Loss of Income), Definitions on p. 42, including the definition of "*Damage*" **{B/4/42}**
ME858 Parishguard	Policy Section 2 (Loss of Income), Basis of Settlement Clause (pp. 37-38) **{B/33/37-38}**	Policy Section 2 (Loss of Income), Definitions on p. 36, including the definition of "*Damage*" **{B/33/36}**
PD2513 Pound Gates Nursery	Policy Section 3 (Business interruption), Basis of Settlement Clause (pp. 42-43) **{B/34/42-43}**	Policy Section 3 (Business Interruption), Definitions on pp. 41-42, including definitions of "*Adjusted*" (i.e. the trends clause) and "*Damage*" **{B/34/41-42}**
Type 1.2		
***ME886 Nurseries**	Policy Section 3 (Business interruption), Cover Clause, Amount Payable (pp. 40-41) **{B/5/40-41}**	Policy Section 3 (Business Interruption), Definitions on p. 39, including definitions of "*Annual Revenue*" and "*Standard Revenue*" (which both contain the trends clauses) and "*Damage*" **{B/5/39}**
MGM602 Marsh School and College	Business Interruption Policy Section, Cover Clause, Amount Payable (pp. 35-36) **{B/35/35-36}**	Business Interruption Policy Section, Definitions on pp. 34-35 including definitions of "*Adjusted*" (i.e. the trends clause) and "*Damage*" **{B/35/34-35}**