**IN THE HIGH COURT OF JUSTICE** **CLAIM NO: FL-2020-000018**
**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**

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# FCA'S SKELETON ARGUMENT IN RELATION TO CONSEQUENTIAL MATTERS FOR THE HEARING ON 2 OCTOBER 2020

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1. These are the FCA's written submissions in relation to consequential matters following the hand down of judgment on 15 September 2020. The issues to be determined are as follows:

   1.1. The terms of the draft order;

   1.2. Applications for leapfrog certification under section 12 Administration of Justice Act 1969 (**AJA 1969**) and permission to appeal to the Court of Appeal;

   1.3. A contingent application of joinder (and for a leapfrog certificate) by QIC if RSA does not apply on RSA3.

2. No costs issues arise because the parties have agreed to pay their own costs of and associated with this case, including any appeals.[1]

[1] Framework Agreement, clause 10.1 {F/1/11}. The FCA regrets that this skeleton exceeds the page limit of 20-pages but note that the limit was set before the Court acknowledged that it had no objection to the FCA's proposal of providing the

## A. Draft Order

3. The parties to the test case and the Interveners have discussed a set of draft declarations. The FCA sent its mark-up of the declarations to insurers openly on 27 September 2020 at 4pm and received a response at 8.30pm on 29 September 2020. The FCA appreciates the difficulty of coordinating comments between 8 Defendant insurers. In the time available the FCA has sought to address the main outstanding points between the parties below by reference to the current paragraphs of the draft Order, but there are points that will have to be dealt with orally. The parties will seek to narrow any outstanding areas of disagreement before the hearing and the FCA will circulate an updated draft Order, identifying only the remaining areas of dispute, when possible. Accordingly, the wording of the declarations extracted in this skeleton may change slightly by the time of the hearing.

Prevalence [8]

4. Insurers seek to insert the requirement that the distribution-based or undercounting analysis must be 'reliable' in [8.2(e)-(f)]. But while insurers submitted that it should be, the Court declined to make a ruling to that effect and it should not form part of the declarations. In Judgment [579] the Court identified that the insurers conceded that the types of methodologies in the form of averaging and undercounting could in principle discharge the burden of proof. When the court stated that the issues between the parties "*were as to reliability*" [579], that in no way amounted to a determination by the court that reliability was a criterion for discharging the burden of proof. Insurers made submissions during the trial as to the reliability of certain methodologies; the FCA addressed the relevance and features of the reports to which it had referred. There was no ruling by the court as to reliability.

5. As to [8.3], this directly quotes from Judgment [569] and should be included.

6. As to [8.4], the FCA has proposed wording relating to the number of individuals who have been infected with COVID-19 on relevant dates which it considers is acceptable.

detail of its leapfrog application certificate in the skeleton. The application documents submitted by the FCA at {O/1}-{O/3} are consequently far shorter than those of insurers at just 7 pages; compare MSAmlin's 90+ pages at {O/17}-{O/20} and Hiscox's 60+ pages at {O/13}-{O/16}.

The Quantum Point [11.3]

7. First, there is 'the Quantum Point'. This is very important and of high value. Its effect is potentially particularly acute in relation to Prevention of Access/hybrid clauses when combined with the finding that government action or the necessary restrictions must have force of law such that the trigger will not be met in mid-March. For example, subject to further clarification by this Court or agreement by Insurers to the contrary, insurers may argue that businesses which closed because the Government told them to do so (e.g. on 20, 23 or 24 March 2020) have no or very limited effective cover despite the fact that legislation mandating closure followed very shortly thereafter, by the 21 or 26 March 2020 Regulations.

8. The point arises as follows:

   8.1. The Court held that the counterfactual when calculating the indemnity is one which excludes "*any part of the insured peril*" i.e. there was no COVID-19 or related government action or public reaction, and that trends and circumstances clauses and quantification machinery do not alter that outcome but merely put the insured in the position "*had the insured peril not occurred*": see Judgment at paragraphs [121-122, 148, 168, 191, 199, 229, 278, 347-348, 385-388, 476, and 530-533]. This provides that an insurer cannot reduce the indemnity (whether under the trends clauses or otherwise) by demonstrating that even if the complete combination of the insured peril had not occurred, and so the cover had not been triggered, some of the elements would still have occurred and interrupted or interfered with the business. Thus at [279]:

> "We do not consider that it would give effect to the intentions of the parties for the assumption to be that there were no mandatory government restrictions and no inability to use the premises as a result specifically of such restrictions, but that the national outbreak of the disease and other governmental responses to it, and the economic and social consequences of these, were assumed to have been the same as occurred. That would not, in our judgment be how a reasonable person would understand what was agreed. It would involve an unrealistic and artificial exercise, and one which fails to recognise that the occurrence of the disease is an essential element of the insured peril, and of what the insured has covered itself against."

   8.2. However, there are elements of the reasoning in paragraphs [350]-[351] in a section on Arch and [389] in an *obiter* section on Ecclesiastical[2]—above all the last sentence of

[2] *Obiter* because there was no cover under Ecclesiastical as a result of the exclusion: Judgment [376].

paragraph [351][3]—which insurers could assert as having the effect that the business cannot recover indemnity after the policy has been triggered to the extent that it had already closed or suffered severely reduced revenue prior to the policy being triggered due to COVID-19 or related government action, and/or that such matters would very significantly reduce any indemnity. If that were right, as HAG believes that Hiscox may be arguing (see Mr Leedham's Second Witness Statement at paragraph 13 {O/29/6}), and contrary to the reasoning identified in sub-paragraph 8.1 above (including in the quotation there), a trends clause can take account not only of "*downturn in business irrespective of the pandemic*" such as due to the loss of a chef [347], but also downturn due to the pandemic: [351] and [389]. Paragraph [389] contemplates a 20% COVID-19-related reduction pre-trigger that would have continued but for the insured peril (while also being an element of that peril), but it could easily be argued to be 100% if the premises closed pre-trigger having been told to do so by the government or in anticipation of such advice, including for example on the day that the government announced that businesses must close but before (on the next day) the legislation was enacted.[4] That seems inconsistent with the clear principles that the court found at [279]. To be clear, an example would be where a business closed on 23rd (when it was told to) but the legislation took effect at 1pm on 26th: insurers may argue that there are 3.5 days of zero revenue which is a "trend or circumstance" that carries through the indemnity period, which could lead insurers to argue that the insured can make no recovery.

8.3. See further the elaboration in paragraph 35 below in relation to the Grounds of Appeal (of which this is the most important to the FCA and insureds). See also Mr Leedham's identification of the inconsistency in paragraphs 12 to 15 of his Second Witness Statement for the Hiscox Action Group {O/29/5-7}.

9. As a result of this inconsistency, the FCA and 6 insurers in relation to whom cover was found on the test Wordings (i.e. not Ecclesiastical or Zurich), have not been able to agree on all of the causation declarations at the time of the filing of this Skeleton, and the FCA's key priority is that the Court clarifies through its declarations what it meant in the Judgment.

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[3] "*Any downturn in turnover before the date(s) when businesses closed pursuant to government advice or the Regulations was a trend or circumstance which affected the business before the Damage i.e. as manipulated before "the Prevention of access to The Premises due to the actions or advice of government due to an emergency which is likely to endanger life" within the meaning of (i) of the trends provision.*"

[4] Albeit that it would be subject to proof that the pre-trigger closure would have arisen/continued but for the insured peril elements. Thus, for example, if the pre-trigger closure was in anticipation of or wrapped up in legislation or other triggering action then a pre-trigger closure may not satisfy that 'but for' test, even on Insurers' case as to the meaning of [389].

10. The following declarations are believed to be largely agreed although there may be minor areas of dispute:

> 11. In Arch1 (denial of access clause), Argenta1, MSAmlin1-2, RSA3-4, QBE1 (disease clauses), Hiscox1-4, RSA 1 (hybrid clause):
>
> 11.1 Losses do not fall to be reduced by reason of rules of factual or proximate causation, or under the trends or similar clauses, or otherwise, by reason that but for the insured peril losses would have been suffered (after the date on which cover is triggered) anyway as a result of any one or more elements of the insured peril separately or in combination, including COVID-19 (including outside any Relevant Policy Area), and/or or any consequences of it (including via the authorities' and or the public's response thereto).
>
> 11.2 The correct counterfactual when calculating an indemnity is to assume that once cover under the policy is triggered none of the elements of the insured peril were present, which:
>
> (a) for disease clauses means after the date on which cover under the policy is triggered there was no COVID-19 in the UK, or any public authority or public response thereto;
>
> (b) for prevention of access clauses, means (for example) no prevention or hindrance, no government action and no emergency; and
>
> (c) for hybrid clauses means (for example) no inability to use the premises, no public authority restrictions and no COVID-19.

11. Paragraph 11.1 is a summary of the composite peril conclusion for disease and prevention of access wordings, as summarised above in paragraph 8.1. It is agreed.

12. Paragraph 11.2 derives from the summary of how the composite peril conclusion operates in the three types of clause, see especially Judgment [530-2]. It is agreed, save that Argenta seeks to insert words not found in those paragraphs of the Judgment and which seek to deal with the issue of pre-trigger downturns and pre-trigger public authority response which is dealt with separately in paragraph 11.3. Here is Argenta's proposed additional wording, which the FCA disputes:

> (a) for disease clauses means after the date on which cover under the policy is triggered there was no COVID-19 in the UK, or any further public authority or public response thereto (beyond that which had already occurred at the date when the policy was triggered);
>
> (b) for prevention of access clauses, means (for example) no prevention or hindrance, no government action and no emergency; and
>
> (c) for hybrid clauses means (for example) no inability to use the premises, no public authority restrictions and no national COVID-19 outbreak.

13. The more heavily disputed draft declaration relates to the inconsistency identified above. The FCA's proposed version includes in various colours alternative wordings that allow the Court to give guidance as to what it meant by the apparently inconsistent passages in the Judgment,

and what scope is intended as to when revenue drop due to pre-trigger insured peril elements affects recovery post-trigger:[5]

> "11.3 As to the proper application of the trends clauses declared applicable in declaration [13] below:
>
> a) The object of the quantification machinery (including any trends clause or provision) in the policy wording is to put the insured in the same position as it would have been in if the insured peril had not occurred.
>
> b) What amounts to a trend or circumstance will be a question of fact and construction of the policy terms in each case, and may (in general terms, and subject to sub-paragraph (e) below) require an upwards or downwards adjustment;
>
> c) Unless the policy wording so requires, loss is not limited by the inclusion of any part of the insured peril in the assessment of what the position would have been if the insured peril had not occurred.
>
> d) If there was a measurable downturn in the turnover of a business due to any component of the insured peril before the full insured peril was triggered, then [it is not appropriate for the counterfactual to take into account the continuation of that measurable downturn and/or increase in expenses as a trend or circumstance (under a trends clause or similar) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative] OR [for Arch and Ecclesiastical] [it is in principle appropriate for the counterfactual to take into account the continuation of that measurable downturn and/or increase in expenses as a trend or circumstance (under a trends clause or similar) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative, but only if the particular effect amounts to a trend or circumstance (as required under the particular clause) and is sufficiently distinct from the insured peril. The court did not address when that would or would not be the case. For example, where a business closed in the days immediately before legislation qualifying as a trigger, the brief closure is unlikely to amount to a trend or circumstance, and would not be distinct from the insured peril. That will, however, be a question of fact and construction in each individual case. Further, the downturn will only apply to the extent that as a matter of fact the downturn would have continued during the indemnity period absent the insured peril];
>
> e) Any such continuation must be at no more than the level at which it had previously occurred."

14. The red wording reflects the FCA's understanding as to HAG's position, i.e. that there was no intention for pre-trigger elements of the insured peril to have any effect on recovery during the indemnity period (at least with respect to Hiscox), when all elements of the insured peril have to be excised from the counterfactual.

15. Alternatively, the green and blue wording reflects some other suggestions by the FCA as to a menu of ways by which the Court could permit a pre-trigger effect to reduce recovery post-

[5] Note that the blue text in this version is slightly different to that originally circulated to insurers.

trigger without having the effect of seriously undermining the clear principles found by the Court in *e.g.* Judgment [279]. It is hoped that these are helpful. Thus:

15.1. It may be that the comments, which were only in sections relating to Arch and Ecclesiastical (and which were simpler than some other clauses) and not made in any of the general discussion on causation, were limited to those Wordings. (See the green text.)

15.2. It may be that the insurer first has to show that the pre-trigger cause was a 'circumstance' or 'trend'—not all events or matters will be. The court did not consider in detail with reference to policy wordings what amounted to a "trend" or "other circumstance", it being agreed that detailed matters of quantum were not for the test case. Not making this clear could inadvertently undermine the clear principles explained in the judgment and mean that proper effect is not given to them.

15.3. This is not a point of detail: see Mr Leedham's identification of the possible impact on policyholders in paragraphs 13 and 14 of his Second Witness Statement for the Hiscox Action Group {O/29/5-7} where he identifies that some businesses would recover nothing under their policies on Hiscox's apparent approach.

15.4. It may be that the insurer first has to show that the pre-trigger cause was sufficiently 'distinct' from the insured peril. This would not be the case where the pre-trigger conduct was in anticipation of or merely the immediate emergence of the insured peril—e.g. an announcement by an authority instructing businesses to close shops that day, which was followed within days by a law to that effect; the hurricane-proofing of premises in the day before the hurricane hits; voluntary closure of a restaurant upon discovering vermin prior to the public authority visiting and ordering closure.

15.5. It is important to record that it will be a question of fact as to whether any pre-trigger downturn does qualify under the trends clause, and also whether it would in fact have continued (and at the same level). For example, an insured may be able to show as a matter of fact that a downturn in turnover in the days before Government action was partly caused by public anticipation of that action, which would have reversed had that action not been taken

15.6. Other options not identified in the draft wording above include:

(a) Clarifying that pre-trigger *closure* (dropping revenue to *zero* not merely, say, 80%) can never be such a trend or circumstance taken into account when considering revenue if premises had not been ordered to close by the clause-triggering public authority action.

(b) Clarifying that the level of the pre-trigger revenue drop due to COVID-19 is a ceiling for the amount of reduction in the indemnity period, and that the insurers cannot argue that the pre-trigger elements (e.g. the outbreak and social reactions to it) would in fact have increased in effect during the indemnity period.

16. The insurers' proposed wording is at the other extreme:

> "11.3 As to the proper application of the trends clauses declared applicable in declaration 13 below:
>
> a) What amounts to a trend or circumstance will be a question of fact and construction of the policy terms in each case, and may require an upwards or downwards adjustment;
>
> b) If there was a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered, then it is in principle appropriate for the counterfactual to take into account the continuation of that measurable downturn and/or increase in expenses as a trend or circumstance (under a trends clause or similar) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative; and
>
> c) Any such continuation must be at the level at which it had previously occurred."

17. The core of this approach is *prima facie* to allow any pre-trigger downturn due to elements of the insured peril (before all the composite elements were present) to reduce the indemnity, and without making clear that (a) and (b) are potentially inconsistent in assuming *prima facie* any downturn due to COVID-19 is a trend or circumstance without the court giving proper consideration of whether that is the case (given issues of detailed quantum were not before the court). The following points should be noted:

17.1. The insurers say that this is 'in principle appropriate'. This is an implicit but not explicit acceptance that it will not always be appropriate in fact, i.e. it can only apply where the revenue reduction would in fact have continued and continued at that level.

17.2. The insurers propose that the continuation must be at the same level as previously, an acknowledgement that it was plainly not intended that insurers be able to re-impose the enquiry found by the Court to be impractical and unrealistic of seeking to work

out at what level the revenue would have been earned in a hypothetical world with COVID-19 and certain consequences of it but without the actual consequences (e.g. the 21 March 2020 Regulations) that triggered cover.

17.3. The trouble with this, is that it will *never* be the case that in fact the pre-trigger revenue reduction would have continued *at exactly the same level*. (At best, this sub-paragraph should specify 'at no more than the level' not 'at the level'.)

18. As mentioned, the FCA's priority is that as much certainty is achieved as is possible. This is essential for policyholders, and so that claims can be paid out, and also informs whether the parties will want to pursue an appeal.

19. That said, the FCA considers the insurers' approach gives a larger and more uncertain a role to the trends clauses than the Judgment contemplated and is not mandated by the Judgment, and invites the Court to make either the form of declaration proposed by HAG or a form of a declaration based on the intermediate approach the FCA proposes.

Hiscox [17]-[19]

20. There are three main disputed points on Hiscox. The first is whether the Court's conclusion on the meaning of the word "interruption" in the Hiscox stems only applies to Hiscox1 and Hiscox4, and that policyholders on Hiscox2 and 3 policies have not been given an answer by this Court, as Hiscox argues: [17.2] and [18.3].

21. The FCA considers that the Court's conclusion on the meaning of the word "interruption" must have extended to Hiscox2 and Hiscox3 by necessary implication (which both have extensions in respect of "damage at the premises of one of your suppliers"), otherwise it would have given no decision on the meaning of that word in those policies. Hiscox relies on Judgment [414] as omitting any reference to Hiscox2 and 3, but that reads the paragraph too literally, does not explain why Hiscox2/3 should be any different. Hiscox's stand would leave all its policyholders on Hiscox2/3 having no answer from this Court, despite the point being debated at length before it. The FCA notes that Hiscox did not make clear that this was its position at the point of corrections or explain to the Court that it considered it had not given an answer on Hiscox2/3 so that clarity could have been sought from the Court at that stage. The Court is invited to declare that its conclusions on the word "interruption" also extend to Hiscox2/3.

22. The second point is whether Regulation 6 could satisfy the test of an "inability to use the insured premises due to restrictions imposed": [17.4]. The FCA considers that the Judgment is clear on this: Regulation 6 is a mandatory restriction which could, depending on the facts, lead to an inability to use premises: see Judgment [266]-[270]. An obvious example is a business whose employees could work from home: Regulation 6 would make it an offence for those employees to enter their place of work, thus there would have been an inability to use the insured premises due to restrictions imposed. Hiscox's objection appears to be premised on the fact that such businesses would never in fact have suffered a loss – but (i) that goes to the meaning of the word "interruption" and/or the quantum of any losses, not "inability to use" and "restrictions imposed", and (ii) is plainly a question of fact which this Court cannot decide. Hiscox may be right that such businesses may not be able to claim substantial damages, but that is not a reason not to grant this declaration.

23. The third point is [19] by which Hiscox seeks to reflect Judgment [283] in a way which may be contrary to the 'quantum point' declarations at [11]. The FCA considers that the declaration at [11] should reflect the Court's findings on the quantum point, and it would be wrong (and risk inconsistency) for a specific declaration for Hiscox to trespass across the Court's express findings included in [11] (whatever it decides them to be).

Exclusions that MSAmlin and Zurich conceded: MSAmlin [20.3], [21.7], [22.7]; Zurich [33.10].

24. A point arises in relation to whether exclusions which were not before the Court because insurers did not rely on them should form part of the declarations. Argenta have not disputed that the exclusion they conceded was inapplicable should be addressed in the declaration (the 'micro-organism' exclusion: [15.3(b)]). QBE and RSA initially objected but have now conceded that there should be declarations on these exclusions: QBE [24.4], [25.3], [26.3]; RSA [27.4], [28.9]. But MSAmlin and Zurich have persisted in their objections: MSAmlin [20.3], [21.7], [22.7]; Zurich [33.10].

25. The FCA's position is that where MSAmlin and Zurich did not raise an exclusion, that was a concession that the exclusions did not apply, and there can be no objection to recording that in the draft Order. In particular:

    25.1. The FCA made clear in its Particulars of Claim [50] that it understood insurers only to be relying on a limited set of exclusions and "*To the extent the Defendants intend to rely upon other exclusions as operating generally in these circumstances, they should raise them in the Defence, failing which they will be taken to accept that no other generally operative exclusions apply*"

{A/2/34}. Various insurers did raise certain exclusions which the Court decided. QBE expressly conceded in its Defence [53] that it "*has not and does not intend to rely upon*" the exclusions it is now objecting to {A/11/14}. MSAmlin and Zurich did not raise the exclusions, thus admitting the FCA's pleaded case that they were not relying on those exclusions.

25.2. The exclusions were not before the Court only because MSAmlin and Zurich, aware that clarity was sought as to all relevant arguments on these Wordings, deliberately did not raise them as potential defences to these claims. No draft declarations were included in the Particulars of Claim because it was not known at the date of the Particulars of Claim which exclusions would be raised, but it cannot be right that insurers are in a *better* position for deciding that certain exclusions were so obviously inapplicable that they chose not to rely on them, rather than raising them and losing them.

25.3. These declarations should be included by way of consent and the FCA notes that insurers do not agree. The only reason why insurers would not wish to record those concessions is because they might seek to rely on them in later cases – but that would be wholly contrary to the test case process, and in particular to their obligations to act constructively and in good faith to promote the mutual objective in the Framework Agreement, *viz.* to achieve the maximum clarity possible for the maximum number of policyholders on these Wordings: Framework Agreement [6.1] {F/1/9}.

26. This point applies to paragraphs MSAmlin [20.3], [21.7], [22.7]; Zurich [33.10]. The Court is invited to make the declarations sought by the FCA, *viz.* that those exclusions cannot be relied on by MSAmlin and Zurich to decline cover on the clauses relied on in this case.

Other disputed points

27. Any remaining disputed points will be addressed orally.

## B. Certification for leapfrog appeal by the FCA

28. The FCA seeks permission for a leapfrog appeal to the Supreme Court pursuant to its short-form application filed on 28 September 2020 (and pursuant to the Court confirming that the FCA could expand in more detail on the grounds in its application notice by way of this skeleton).

29. If there is to be an appeal, the parties agreed in their Framework Agreement on the need for its expedition, and also to explore the possibility that such an appeal would be a leapfrog appeal (clauses 8.2 and 8.3 **{F/1/11}**). The parties of course cannot agree that permission should be granted. For the reasons set out below, the FCA contends that a leapfrog appeal is justified in relation to four points/themes and a certificate should be granted to permit the parties to seek leave from the Supreme Court on those points if so advised.

Leapfrog appeals

30. So far as relevant, section 12 of the AJA 1969 provides:

> **12.— Grant of certificate by trial judge**.
>
> (1) Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied—
>
> (a) that the relevant conditions are fulfilled in relation to his decision in those proceedings or that the conditions in subsection (3A) ("the alternative conditions") are satisfied in relation to those proceedings , and
>
> (b) that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring such an appeal,
>
> the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.
>
> (2) This section applies to any civil proceedings in the High Court which are— […]
>
> (c) proceedings before a Divisional Court.
>
> (3) […]
>
> (3A) The alternative conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in the decision and that—
>
> (a) the proceedings entail a decision relating to a matter of national importance or consideration of such a matter,
>
> (b) the result of the proceedings is so significant (whether considered on its own or together with other proceedings or likely proceedings) that, in the opinion of the judge, a hearing by the Supreme Court is justified, or
>
> (c) the judge is satisfied that the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal.
>
> […]
>
> (8) In this Part of this Act "civil proceedings" means any proceedings other than proceedings in a criminal cause or matter, and "the judge" , in relation to any proceedings to which this section applies, means the judge referred to in paragraph (a) of subsection (2) of this section, or the Divisional Court referred to in paragraph (c) of that subsection, as the case may be.

31. For the reasons set out in detail below, the FCA's case is that each of these three, cumulative conditions are met in relation to each point on which permission is sought, and a certificate should be granted in respect of each point:

    31.1. A point of law of general public importance is involved in the decision: s12(1a), (3A);

    31.2. Each of the alternative conditions in s12(3A) is satisfied, although it is sufficient for the FCA that any one condition is satisfied: s12(3A); and

    31.3. A sufficient case for an appeal to the Supreme Court has been made out to justify an application for leave to bring such an appeal: s12(1b).[6]

32. The effect of the certificate would be to enable the FCA to seek leave to appeal directly from the Supreme Court, within one month of the certificate being issued: s13(a) AJA 1969. The Supreme Court would then make its own decision on whether permission should be granted.

33. There is concise commentary on section 12, including other cases which have considered the section, in the White Book at Volume 2, paragraph 9B-32 (p2723-2724), although these provide very limited assistance in this case.

Grounds of appeal

34. There are four issues on which FCA considers there is a sufficient case for an appeal to the Supreme Court.

*(1) The Quantum Point:*

35. The proposed grounds of appeal in relation to the Quantum Point (introduced above at paragraphs 7 and following) are, subject to any further clarification by the Court at or following this hearing, that there were the following errors of law in paragraphs [351] and [389]:

    35.1. There is a fundamental logical inconsistency between the reduction of the indemnity for a COVID-19-related revenue reduction that existed pre-trigger and would have

[6] It may also be necessary by virtue of s15(3) AJA 1969 that the case would be suitable for appeal to the Court of Appeal (see e.g. *Al-Waheed v Ministry of Defence* [2014] EWHC 2714 (QB) para 18), although the FCA would argue that those requirements are also satisfied, *viz.* that the appeal on every point would have a real prospect of success and/or there are compelling reasons why the appeal should be heard, for the reasons given in the skeleton. Section 15(3) states "*Where by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would lie to the Court of Appeal from the decision of the judge except with the leave of the judge or of the Court of Appeal, no certificate shall be granted under section 12 of this Act in respect of that decision unless it appears to the judge that apart from the provisions of this Part of this Act it would be a proper case for granting such leave*".

continued post-trigger (as set out in paragraph 8.2 above), and the core reasoning set out in paragraph 8.1 that COVID-19 and its effects must be excluded from the counterfactual. The basic idea that the Court was rejecting in its analysis of the combined peril (and expressly rejected post-trigger) was the idea that the cover is only for the incremental amount by which the combined peril increases losses beyond those which would have resulted from elements of the peril absent a 'full house' of all the ingredients (e.g. the amount by which closure by the public authority decreased revenue beyond that if there had been an 'emergency' and public action falling short of closure). The Quantum Point wrongly reverses that conclusion. Although one or more of the elements of the combined peril will be present pre-trigger in most cases, and indeed both Arch and Ecclesiastical admitted that an 'emergency' was present before trigger, the correct construction excludes such elements and their revenue effects from the counterfactual during the indemnity period (i.e. from the date of the trigger).

35.2. This logical inconsistency is highlighted by requiring radically different results merely because an element of the combined trigger happened to have caused some loss of revenue pre-trigger, as compared with the situation in which no such pre-trigger effect was discernible. Thus if rats are discovered and reported to the authority and the authority acts fast to shut down the restaurant, the rats are taken out of the counterfactual and are not a trend, even if in one sense 'but for' the authority action there would still have been rats (Judgment at [281]). But if (as would be usual) vermin are discovered and reported but it takes (for example) two days before the authority acts, and in that pre-trigger two days there is a 20%/50%/100% reduction in revenue due to the public response or a voluntary closure (which may or may not be in anticipation of public authority action), then the maximum recovery following the trigger is 80%/50%/0% (Judgment at [389], on this assumed version of the Quantum Point). Further, as this example shows, and the Court accepted, the Quantum Point would render cover "illusory" in this situation [281].

35.3. The Court appeared incorrectly to understand (at [174]) and to state at [351] that the FCA's argument would have had the effect that *pre-trigger losses* were recoverable, when it only ever related to *post-trigger* losses. The FCA's argument was considering the continuation post-trigger of pre-trigger elements of the insured peril.[7] In short, the

[7] See e.g. Day3/53-58 (esp 55.22-56.6), Day 8/76-80 (esp 78.8-130), FCA Skeleton para 267.

issue is quantum, not timing: the FCA agrees that the indemnity period can only start once the insured peril has been triggered (in its entirety); the only question is how that indemnity should be calculated. The Court was therefore wrong to elide submissions on this issue with those made in *New World Harbourview* [2012] HKCFA 21, [2012] Lloyd's Rep IR 537. That case concerned timing, not quantum: could losses be recovered for the period when SARS had caused interruption/interference but before it became notifiable? The FCA has not argued the timing point in this case (putting aside the particular terms of RSA4 (Disease)). Conversely, the FCA's point in relation to whether revenue effects pre-trigger which arise where one or more ingredients of the insured peril exist but there is not yet 'full house' of ingredients triggering cover[8] are assumed to continue post-trigger was not advanced in *New World Harbourview*.

35.4. The Court was therefore wrong to conclude that, where one element of a combined trigger reduces revenue pre-trigger, to exclude that element and its effects from the post-trigger counterfactual allows recovery or cover for "*losses… before… the occurrence of that insured peril*" [351]. That confuses timing with quantum. The relevant question is only what would have happened *during the indemnity period* but for the insured peril. Excising from the counterfactual a pre-trigger circumstance (such as the 'emergency') that would have continued post-trigger, even if the other elements (public authority action) had not combined with it to trigger cover, (i) firstly, is correct on the proper construction of the Wordings and (ii) secondly, does not award pre-trigger losses.

35.5. This analysis leads to irrational results. It would mean that those Category 1 & 2 businesses which obeyed Government instructions to close will have stopped trading on 20 March (see [32]), before the 21 March Regs. Category 4 businesses and places of worship may well have done the same on 23 March ([40]) and Category 6 businesses were told they should have closed on 24 March [42], in both cases before the 26 March Regs made closure mandatory. If revenue dropped to nil on closure, and that drop is counted as a trend or circumstance that should be applied to the counterfactual, it could be argued that there would be no cover for those businesses even though they were closed by mandatory regulations, because that closure caused no *further* or incremental loss beyond that caused pre-trigger by some separate elements of the

[8] E.g. there is Notifiable Disease but it is not yet present in the Relevant Policy Area; or there is an emergency likely to endanger life but not yet the government 'action' preventing access to the insured premises. The FCA did *not* seek to argue that reduction in revenue which occurred at a time when *none* of the ingredients of the insured peril were in existence should not be taken into account in the post-trigger period.

combined peril before it combined to trigger cover. This would not be a reduction in revenue of only 20% of the sort the Court was referring to at [389] but would potentially shut out a claim entirely. Take Pub 1 which closed on 20 March (when told to do so), and Pub 2 which closed (when the legislation took effect) on 21 March. Both Pubs trigger their policies and suffered the same loss after 21 March. There is no rationale for giving Pub 2 a full indemnity and Pub 1 no indemnity.

35.6. Further, the Court did not fully engage with the role of trends clauses in this situation: in most of the Wordings the standard turnover is set at the turnover in the equivalent period the prior year or financial year immediately before the date of the Damage or 12 months immediately prior to the date of the Damage, i.e. in an entirely or largely non-COVID-19 period. Accordingly, to reach the 20% reduction result contemplated in the example in [389] requires the invocation of a trends clause to extrapolate the continuation of the immediately pre-trigger COVID-19 (which caused a 20% reduction) into the indemnity period because it would have occurred 'but for' the insured peril, which runs (again) counter to the express conclusions of the Court as to the counterfactual given the combined nature of the peril, but also fails to engage with whether and why an (often very short, e.g. perhaps less than a day) pre-trigger COVID-19 revenue effect is a 'trend' or 'circumstance' or neither, and if so when, i.e. is that the case even if the pre-trigger effect is very short and/or anticipates the triggering public authority action and/or is properly regarded as related to it rather than distinct.

35.7. The court did not engage with the fact that even if components of the insured peril should be taken into account in an emerging peril situation, a point is reached at which it is unrealistic and/or contrary to the commercial purpose of the cover and/or findings of the court to distinguish between the business subject to the insured peril and the business at the point in time immediately before the peril. The cover contemplates emerging perils (emergencies, diseases etc) behind which the public authority action will typically lag by at least some period of time (it is implicit in [95] and [97] that public authority action will *follow* the disease later once the public authority reacts), and it is contrary to the commercial purpose of the cover to reduce the indemnity by reason for revenue effects of that peril during its contemplated period of emergence. Just like a hotel that spends the day before a hurricane preparing the hotel and ensuring it is safely closed and organised would not have its fall in income for that day be taken into account in a claim for business interruption for property damage that the hurricane caused the next day, a business that closed or suffered a dramatic loss of

revenue in the days leading up to 21/26 March 2020 Regulations should not be subject to any reduction in respect of that.

*(2) The Mandatory/Force of Law Point:*

36. The FCA seeks to appeal the holdings that the hybrid wordings (Hiscox1-4, RSA1), and some prevention of access wordings (Hiscox NDDA 1-4, MSA1-2, Zurich and RSA4 as to 'enforced closure') are only triggered by the consequences of regulation 2 of the 21 March Regulations and regulations 4-5 of the 26 March Regulations and not by prior Government guidance/exhortation/advice, including as to instructions to close or to 'stay at home' or advice as to social distancing because they are not mandatory (see [266-267], [294], [434-5], [497]). This is related to the Quantum Point above, because the effect of either point is exacerbated by the existence of the other.[9] The FCA contends that the Court erred in law in that:

36.1. The statements made by the Prime Minister on 20 March 2020 [32] and 23 March [40] and 24 March [42] were clear directions to businesses to close expressed in mandatory and imperative terms.

36.2. They were plainly "actions". "Action" in the context of action by government is wider than mandatory legislation and includes other forms of action including giving advice and guidance. Further, 'prevention of access' does not connote there being force of law [434] and [497], as a matter of language or otherwise, as is demonstrated by the existence of clauses (doing no damage to the language they employ) requiring 'prevention of access due to… actions or advice' i.e. providing that advice can prevent access (such as Government advice to close or fundamentally change in nature [308] and [310]).[10] Advice or instruction from Government, especially if "strongly worded" ([435]), can prevent access within the ordinary and contractual meaning of those words. Further, elsewhere the Judgment confirms that 'prevention' does not connote legal impossibility [431], [464], [494].

[9] The Quantum Point has a greater effect the more COVID-19 effects that can lead to closure or other substantial revenue impairment there are which do not trigger cover. Without the Mandatory/Force of Law Point, there are no or fewer Government actions leading to closure or substantial revenue reduction pre-trigger (because they do not amount to a trigger). Without the Quantum Point, the Mandatory/Force of Law Point merely delays the date of trigger (or prevents trigger), but with the Quantum Point, the Mandatory/Force of Law Point potentially means that even with cover triggered there will be little or no recovery for many insureds.

[10] Such clauses are noted in [434], where the Court nevertheless makes the finding that prevention connotes force of law.

36.3. They were also plainly "restrictions" that were "imposed" by the Government as the reasonable impartial observer would understand it and giving the language of the clause its natural and ordinary meaning.

36.4. The Court was wrong to say that individuals would be breaking the law if they cross a police cordon [434]. The Court referred to "various statutory regimes" but the only regime referred to in argument was s.36 Terrorism Act 2000. That does not address the (un)lawfulness of crossing a police cordon in all (non-terrorism) situations. There is no authority that crossing a police cordon is an offence in itself. The only case before the Court was *DPP v Morrison* [2003] EWHC Admin 683, whose result was accurately summarised in Hiscox's skeleton argument at [199.1]: it decides only that the police have a power to close a *public* right of way over *private* land (on the facts, a shopping mall), in order to *preserve and examine a crime scene*. It did not address (*e.g.*) whether the police could enforce a cordon over wholly public land, or over wholly private land when the private landowner refused their consent; on the facts, there was no evidence that the defendant ever crossed a cordon at all. This is significant because a police cordon <u>does</u> (the parties agreed) amount to a prevention of access, even though its legal enforceability is uncertain and probably requires further separate enforcement measures (just like a Government announcement).

*(3) The Total Closure Point:*

37. The FCA further seeks to appeal the holdings that prevention of access wordings (Arch, Hiscox NDDA, MSA1-2, Zurich) and the hybrid wordings (Hiscox1-4) are only triggered by complete closure of the business for the purposes of carrying on the business or almost total inability to use the premises respectively.

38. The FCA would seek to argue that the Court erred in law in that:

38.1. There is nothing in the terms 'prevention of access' or 'inability to use' which requires that it prevents access *for all*. The distinction between 'prevention' and 'hindrance' of access, or between 'inability' to use and 'hindrance', is between not being able to access or use on the one hand and being able to access or use but with more difficulty than previously (such as closure of one access route) the other. The question of *whose* access must be affected (prevented or hindered) or who must be unable to use is an entirely separate one.

38.2. The Court is right that where a business is fundamentally changed from that described in the policy schedule then there has been prevention of access to the premises for the purposes of that business [326] or inability to use, and that there is no need for prevention of all access to the premises for all purposes [330], but wrong to find that providing any existing part of the business that is more than de minimis/ 'vestigial' could continue there was no such fundamental change [268], [327], [330-1], [334], [432], [495]. The loss of an eat-in or in-person shopping business that provides 90%/the majority of the revenue and custom is a fundamental change and amounts to prevention of access to the premises for the purposes of the business, and indeed a *total* prevention of access to much of the premises (the dining/browsing area). The same is true for the loss of any substantial element of the business. The Court was wrong to find that there was no prevention of access for a cinema or a theatre with a pre-existing small part of the business of transmitted viewings, alongside its main live attendance business; a book shop with a small (but not de minimis) delivery business; a school that stayed open only for children of essential workers.[11] Arch's concession noted at [336] in relation to churches that are closed having had access prevented is inconsistent with this position: all or almost all churches had a pre-existing part of the business of conducting funerals, alongside its main religious and community services business, so by the Court's test, access was not prevented.

38.3. And the same applies where the loss is of a substantial part but not all of the in-person business, i.e. the food or hardware shop (Category 3), estate agents and solicitor's office (Category 5) to which visits are *prohibited* by Regulation 6 of the 26 March Regulations (contra [270], [329], [333], [433], [496]).[12] The loss of revenue is not total, but for non-essential business access is prohibited and so prevented, not merely hindered.

38.4. The position is *a fortiori* where the entire business *as conducted from the premises* had to close because none or insufficient employees could access the premises by reason of Regulation 6. Although it is a question of fact in the individual case, this would apply to the majority of Category 5 cases, for which employees could work remotely and so may not access or use the premises, leading directly to closure of the premises (other than to collect post, do building maintenance etc). The Court appears wrongly to have

[11] The approach of the Commercial Court of Nanterre in *SA Holding Hoteliere de Paris v SA Albingia* (21 July 2020) should be preferred. It was there held that the closure of a hotel save for caregivers and hotel staff was still 'closure' of the insured establishment for the purposes of a policy of insurance.

[12] See further ground 4 of the Hiscox Action Group, and paragraphs 22-3 of the Second Witness Statement of Mr Leedham {O/29/9}.

focused only on whether the insured or customers could access the premises ([269]-[270]) and ignored arguments on employees, then wrongly finding at [335] that the fact that some business can be continued to be operated from home negates prevention of access: continuing the business from *other premises* cannot disprove prevention of access to the insured premises. The insurance is of business at the property (and by extension to property cover), not the business in the abstract.

*(4) The Incident/Event point:*

39. This point concerns whether the ancillary use of the terms 'incident' or 'event' in the disease clause QBE2-3 Wordings confines the cover to local-only outbreaks.

40. The Court correctly found (in relation to Argenta1, Hiscox4, MSAmlin1-2 (disease clauses) QBE1, RSA1, RSA3 and RSA4) that the requirement that COVID-19 occur or manifest within a radius of the premises meant that the cover responded to the disease (as a whole) when the disease came near the premises, and not just to the particular occurrences of the disease that were near the premises: *e.g.* [99]-[109] (RSA3).

41. It was wrong to arrive at the opposite conclusion (at [231]) in relation to the QBE2-3 Wordings:

    41.1. They contain materially similar insured peril clauses to the Wordings referred to in paragraph 40 above. The fundamental matters identified at [102] and [104] in relation to such wordings applied here too: these extensions are not expressly confined to cases where the interruption has resulted only from the occurrences within the 25 mile radius, and notifiable disease was inherently capable of widespread dissemination. The Court's construction would render these clauses illusory and contrary to business common-sense.

    41.2. The Court correctly concluded that multiple occurrences of COVID-19 *within* the radius (so, for QBE2, the entirety of the outbreak within a 2,000 square mile area) can constitute an "event" (at [231]).[13] It was illogical and wrong to conclude that occurrences of COVID-19 outside the radius could not also constitute part of the same 'event', especially as the term 'event' is merely the general shorthand noun used to introduce and refer to the six insured perils covered by the extension. Similarly, all the

[13] Similarly, in *Silversea* at [p66] Tomlinson J held that numerous State warnings given from September 2001 to the end of 2002 were a single "occurrence".

insured perils in RSA4, including notifiable disease within the Vicinity were described in clauses 17 and 42 (quoted at [127]) as an "event" and "Covered Event", yet that term was held to extend to the entire UK [138-40] and alternatively the cover extended even to the effects of the disease even outside the Vicinity [142-3], 'event' merely being "*a shorthand for what is in the various insuring clauses*" [145].

41.3. Further, the Court placed undue reliance on the meaning of 'event' in case-law relating to aggregation clauses in reinsurance contracts (*Axa Reinsurance v Field* [1996] 1 WLR 1026 at 1035: see [231]) to interpret its meaning in an insuring clause which was a different context. It took the opposite approach to another common example of aggregation wording ("occurrence") in construing the Hiscox hybrid clauses at [271 and correctly gave it a broader meaning. It should have adopted the same approach to 'event' in QBE2/3.

41.4. As for the use of the term 'incident', the primary use in QBE2-3 is in the ancillary standard clause which, as the Court concluded elsewhere, is simply aimed at ensuring that there is no cover for the effects on the business which do not arise from those premises which are impacted by the insured peril: see re: RSA3 at [97], Argenta1 at [166]. This clause merely deals with multi-premises businesses; it does not show what the "*focus*" of the clause is (at [232]). Again, the term, not appearing in the insuring clause itself, is just a shorthand for insured perils, as in RSA4 which covers 'Notifiable Diseases and Other Incidents' (quoted at [126-7]), in relation to which the Court observed (emphasis added) that "*It is… reasonably expected that some such <u>incidents</u> would have a very wide-ranging, and possibly national, impact*" [138]. Similarly, Arch1 also had a carve out for "*any <u>incident</u> lasting less than 12 hours*" [308] but this did not limit the scope of the emergency contemplated there.

41.5. As for the aggregation clause in QBE2 (but not QBE3) (limiting liability 'in respect of any one incident' under the disease, murder etc clause to £100,000 or 15% of the sum insured for any one claim: [208]), exactly the same phrase appears in QBE1 at {B/13/51} but rightly was not thought relevant to the scope of the insured peril itself. Many other policies before the Court employ similar limits by reference to the words "series of events" – *e.g.* Ecclesiastical1.1 at {B/4/34} in relation to loss avoidance measures. These clauses might give rise to issues about aggregation but are not intended to cut down the scope of the insuring clauses themselves, and it is novel and strange to read them as doing so.

41.6. Had the parties intended to alter the natural scope and effect of the cover clause and reach a scope which the Court itself described as producing "*highly anomalous results*" [105], they would have done so more clearly than through oblique references to "events" and "incidents" (words which were rightly regarded as insignificant in other clauses). On this argument QBE gave cover with one hand (through "occurrence" of "notifiable disease") but immediately took it away, for example in an ancillary clause relating to multiple premises (through "event" and "incident") – an argument which the Court roundly and rightly rejected in the context of RSA2.1-2.2 at [456] in relation to an ancillary clause referring to 'prevention' but not 'hindrance'.

41.7. It is also significant that the Court's distinction between QBE1 and QBE2/3 was one which none of the parties or interveners suggested. It is striking that QBE described QBE1 and QBE2 as being "*in very similar form*" in its skeleton [44], and never made this argument, despite the size of its legal team and number of minds directed at the clause. It was a distinction which even QBE was not prepared to countenance. As a result, the FCA and interveners were never given the opportunity to address this argument.

41.8. Finally, it is to be noted that the Court itself considered that QBE3 was 'less clear' [236] given that it exhibited even less of these minor features held to make the difference for QBE2.

Points of law of general public importance

42. This case in general terms is one of general public importance. In admitting this case to the Financial Markets Test Case Scheme, the Court has already decided that it raises issues of general importance in relation to which immediately authoritative English law guidance is needed (PD51M [2.1]).

43. Further, in sitting in effect as a Divisional Court (Judgment at [3]) consisting of a Financial List judge and a Lord Justice of Appeal, the Court has decided that the case justifies a more senior level of court and is one of particular importance or urgency (PD51M [2.5(d)]). That urgency was accepted and reflected in the highly expedited timetable that was imposed (with the parties' agreement) by the Court.

44. The FCA has estimated that some 700 types of policies across more than 60 insurers and 370,000 policyholders could potentially be affected by the Court's decision. It is not possible to give a reliable estimate of the value of those claims, but the FCA considered in June 2020

that the value of c.8,500 claims was approximately £1.2 billion – see the FCA's CMC1 skeleton at [31b]. The total value of affected claims is therefore very high. The Court's decision will also impact BI claims more generally, the reinsurance industry, and the approach taken by other jurisdictions to COVID-19-related BI claims. The public interest in the decision has accordingly been very high.

45. [INTENTIONALLY LEFT BLANK]

46. The above points of law are all themselves of general importance. They relate:

(i) in the case of Point 1 (which is inter-related with Point 2): to the general issue of causation and loss adjustment at the heart of most relevant policies in the market,

(ii)in the case of Points 2 to 3: to how general terms defining the trigger in public authority wordings are to be applied to the COVID-19 events, and

(iii) in the case of Point 4, to the way the insured peril is to be characterised on the proper construction of certain disease clause wordings exemplified by QBE2-3.

The alternative conditions

47. The FCA considers that each of the three alternative conditions set out in s12(3A) is satisfied; however, it is sufficient for any one of these to be satisfied.

48. First, the proceedings entail a decision relating to a matter of national importance or consideration of such a matter (s12(3A)(a)), for the same reasons as are given above at paragraphs 42 and following.

49. Further and alternatively, the result of the proceedings is so significant (whether considered on its own or together with other proceedings or likely proceedings) that a hearing by the Supreme Court is justified (s12(3A)(b)). See again paragraphs 42 and following above

50. In the further alternative, the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal (s12(3A)(c)). The judgment is rendered by a two-member panel including a Lord Justice of Appeal already and there continues to be

a pressing need for expedition and urgent resolution of the issues arising out of whether losses related to COVID-19 are recoverable under the relevant policies of BI insurance.

Sufficient case for an appeal to the Supreme Court

51. There is very little guidance on what amounts to a 'sufficient case for an appeal to the Supreme Court' (separate from the requirements of a point of law of general public importance and the alternative conditions, all addressed below). In *IRC v Church Commissioners for England* [1975] 1 WLR 251, Megarry J at 271, applying the predecessor provision which also required a 'sufficient case for an appeal to the Supreme Court', held that the condition was satisfied because "*the amount involved is large, and the law is both complex and arguable*".[14]

52. It is submitted that there is here a sufficient case for appeal to the Supreme Court. The points above are points of construction—therefore of law—that are well arguable (for the reasons given above); the importance to the market is great; and the amounts involved are very significant.

53. For the above reasons, the FCA respectfully invites the Court to grant a leapfrog certificate on the points addressed above pursuant to section 12 AJA 1969.

## C. Permission for the FCA to appeal to Court of Appeal

54. If the High Court grants certification, but the Supreme Court does not grant permission, the FCA would need to consider (if so advised) appealing to the Court of Appeal. To avoid the need to return to this Court a second time, and to avoid any issues as whether the Court has the power to decide a second permission application, the FCA therefore also seeks:

    54.1. Permission to appeal to the Court of Appeal on the same points identified above, on the grounds that the FCA has a real prospect of success and/or there are compelling reasons why the appeal should be heard, for the reasons given above; and

    54.2. An extension of time for filing the Appellant's Notice with the Court of Appeal to (i) 14 days after the decision by the Supreme Court of any leapfrog application, or (ii) if no leapfrog application is made to the Supreme Court, 7 days after the deadline for filing such an application.

[14] The prospects of success were also relevant to the satisfaction of this requirement in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2017] 1 WLR 2673 per Jay J at paras 99 and 101.

55. If the Supreme Court grants permission, then the above will fall away.

## D. The Insurers' and Interveners' Potential Appeals

56. 7 of the insurers (not Zurich) are seeking a certificate for leapfrog, save that Ecclesiastical's application is contingent on its exclusion being appealed (which does not presently appear likely—the FCA is not seeking to appeal it), so it may also fall away. Hiscox's position is opaque, seeking to reserve its rights to appeal but not explaining in what circumstances it would actually appeal (see the witness statement of Mr Caisley [5] {O/15/2}).

57. The Hiscox Action Group ('HAG') is also seeking a certificate in relation to the quantum point, and the meaning of 'restrictions imposed' and 'inability to use' in the Hiscox policies. (This overlaps with FCA's second point of appeal.) The Hospitality Insurance Group Action ('HIGA') has not applied for a certificate.

58. The FCA does not oppose any applications for certificates by insurers and does not comment at this stage on any applications made by the interveners.

## E. QIC's application to be added as a party

59. Less than 24 hours before this skeleton was due to be filed the FCA discovered on the Court file that QIC Europe Limited ('**QIC**') had applied to be joined as a party for the purposes of an appeal. The FCA has not been served with this application and reserves its position on the effect of that.

60. It appears that QIC seeks to 'stand in the shoes' of RSA should it not appeal RSA3. If RSA does in fact wish to appeal RSA3 (and obtains permission to do so), the application should fall away.

61. If, however, QIC's application remains live (because RSA does not wish to appeal RSA3), the FCA objects to it on the following grounds:

    61.1. Whenever there is a court decision on a contract, it can affect third parties who are not formally bound, and played no part in the proceedings. The third party may be unhappy with the points the litigating party took, or did not take, or how they took them, or whether they appealed them. It has no standing.

61.2. If such a party wishes to join a claim, it can do so at the beginning. This Claim was issued very publicly as a test case on certain wordings. QIC did not apply to be a party; the claim proceeded with 8 insurers and 21 wordings, and has proceeded to Judgment. The parties will decide what points they wish to appeal.

61.3. It is not appropriate for a third party to be able to join at this stage to force on the FCA litigation it never chose. The FCA engaged in a test case with specific insurers pursuant to a Framework Agreement governing the parameters of the test case. QIC is not party to that Agreement or case. If the FCA or RSA do not, whether by agreement or for other reasons, wish to pursue a point in relation to RSA3, that must be the end of it.

61.4. QIC argues that allowing its joinder would be in the parties' and the Court's interests because it would avoid the need for QIC to "*commence fresh proceedings in order to be able to challenge the Judgment*", something which would "*cause delay for policyholders*" (QIC skeleton [4]). But allowing QIC to appeal where RSA chose not to would be the matter which causes delay for policyholders. If QIC wishes to commence fresh proceedings on its own policy then it is entitled to do so (although not against the FCA), and it can pursue those proceedings as far as it wishes.

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**30 September 2020**