N244(CHFL)

# Application Notice

CPR Part 23

- You must complete Parts A **and** B, **and** Part C if applicable
- Send any relevant fee and the completed application notice to the court with any draft order, witness statement or other evidence
- It is for you (and not the court) to serve this application notice

| | |
|---|---|
| **In the** | **High Court of Justice**<br>**Chancery Division**<br>**Financial List**<br>**Royal Courts of Justice** |
| **Claim No.** | FL-2020-000018 |
| **Warrant no.** (if applicable) | |
| **Claimant(s)** (including ref.) | The Financial Conduct Authority |
| **Defendant(s)** (including ref.) | (1) Arch Insurance (UK) Limited<br>(2) Argenta Syndicate Management<br>(3) Ecclesiastical Insurance Office Plc<br>(4) Hiscox Insurance Company Limited<br>(5) MS Amlin Underwriting Limited<br>(6) QBE UK Limited<br>(7) Royal & Sun Alliance Insurance Plc<br>(8) Zurich Insurance Plc |
| **Date** | 28 September 2020 |

**You should provide this information for listing the application**

Time estimate 0 (hours) 30 (mins)

Is this agreed by all parties? Yes | I No

Please refer to the Financial List Guide and the Commercial Court Guide for details of how applications should be prepared and will be heard, or in a small number of exceptional cases can be dealt with on paper.

## Part A

1. Where there is more than one claimant or defendant, specify which claimant or defendant

(The claimant)(The defendant)[1]

The Fifth Defendant

2. State clearly what order you are seeking (if there is room) or otherwise refer to a draft order (which must be attached)

intend(s) to apply for an order (a draft of which is attached) that[2]

grants certificates under section 12 of the Administration of Justice Act 1969 in the terms set out in the draft order.

3. Briefly set out why you are seeking the order. Identify any rule or statutory provision

because[3]

the alternative conditions set out in section 12(3A) of the Administration of Justice Act 1969 are satisfied in relation to these proceedings, and a sufficient case for an appeal to the Supreme Court under Part II of the Act has been made out to justify an application for leave to bring such an appeal.

Financial List cases issued in the Chancery Division are managed after issue by the Admiralty and Commercial Registry, The Rolls Building, 7 Rolls Building, Fetter Lane, London, EC4A 1NL is open between 10am and 4.30pm Monday to Friday. When corresponding with the court, please address forms or letters to the Court Manager and quote the claim number.

## Part B

*(The claimant)(The defendant)[1] wishes to rely on: ***tick one***

the attached (witness statement)(affidavit) | I | (the claimant)(the defendant)'s[1] statement of case evidence in Part C overleaf in support of this application

**Signed** Chris Willkes

(Applicant) ('s legal representative)

**Position or office held** (if signing on behalf of firm, company or corporation) Partner

4. If you are not already a party to the proceedings, you must provide an address for service of documents

Address to which documents about this claim should be sent (including reference if appropriate)[4]

| | | If applicable | |
|---|---|---|---|
| DAC Beachcroft LP<br>The Walbrook Building<br>25 Walbrook<br>London<br><br>Ref: CJW/EIG002-1488639 | | Tel. no. | 020 7894 6800 |
| | | Fax no. | 020 7894 6801 |
| | | DX no. | 45 London |
| Postcode | EC4N 8AF | e-mail | cwilkes@dacbeachcroft.com |

## Part C

Claim No. FL-2020-000018

**(Note: Part C should only be used where it is convenient to enter here the evidence in support of the application, rather than to use witness statements or affidavits)**

*(The claimant)(The defendant)[1] wishes to rely on the following evidence in support of this application:

**Statement of Truth**

*(I believe)(The applicant believes) that the facts stated in this application notice are true

*I am duly authorised by the applicant to sign this statement

Full name CHRISTOPHER JOHN WILKES

Name of*(Applicant)('s litigation friend)('s legal representative)

DAC BEACHCROFT LLP

**Signed** Chris Wilkes

*(Applicant)('s legal representative)

**Position or office held** (if signing on behalf of firm, company or corporation) Partner

**Date** 28 Sep 2020

**delete as appropriate*

Signable

| | |
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Fifth Defendant
Christopher John Wilkes
Third
CJW3
28 September 2020

**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**

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# THIRD WITNESS STATEMENT OF CHRISTOPHER JOHN WILKES

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**I, CHRISTOPHER JOHN WILKES, of DAC Beachcroft LLP, 25 Walbrook, London EC4N 8AF, will say as follows:**

1. I am a solicitor of the Senior Courts and a Partner in the firm of DAC Beachcroft LLP. I have conduct of this matter on behalf of the Third and Fifth Defendants. I now give this statement on behalf of the Fifth Defendant. For convenience, in this Statement, I

shall refer to this firm as “DACB” or “we”, to the Claimant as “the FCA”, and to the Fifth Defendant as “MS Amlin”.

2. The facts and matters in this Statement are true insofar as they are within my own knowledge. Where facts and matters are not within my knowledge, I state the source of my belief and confirm that they are true to the best of my knowledge and information.

3. There is now produced and shown to me a paginated bundle of true copy documents marked "CJW3". All references to documents in this statement are in the format **[Exhibit CJW3/page reference]** unless otherwise stated.

## Introduction

4. On 15 September 2020, the Court handed down its judgment in these Financial Markets Test Case Scheme proceedings[1] (“**the Judgment**”) and also made an order by which it adjourned consequential directions (including any applications for permission to appeal and the determination of any application for a ‘leapfrog certificate’ under section 12 of the Administration of Justice Act 1969) to 10.30 am on a date to be fixed (paragraph 2).

5. The consequentials hearing has since been fixed for 2 October 2020. I understand that the issues to be considered at that hearing are (a) the form of declarations to be made, (b) applications for permission to appeal to the Court of Appeal, (c) the time when any Appellant’s Notice is to be filed at the Court of Appeal, and (d) applications for leapfrog certificates for permission to appeal direct to the Supreme Court.

6. I make this witness statement in support of the application (“**the Application**”) contained in MS Amlin’s Application Notice dated 28 September 2020 **[Exhibit CJW3/1-4]**. This application seeks relief in the form of an order granting a leapfrog certificate under section 12(1) of the Administration of Justice Act 1969 in respect of permission to appeal to the Supreme Court. The Application is made by the deadline of 4pm on 28 September imposed by paragraph 4 of the order of 15 September 2020.

[1] https://www.bailii.org/ew/cases/EWHC/Comm/2020/2448.html

**The leapfrog application**

7. MS Amlin intends to apply for permission to appeal against the declarations to be made consequential upon the Judgment. The proposed grounds of appeal on which MS Amlin intends to rely are set out in Appendix 1 to this statement.

8. The grounds of appeal identify what MS Amlin considers to be errors of law in the Judgment in relation to the proper construction of the so-called disease clauses in MSA1 and MSA2 ("**the MSA Disease Clauses**") and the correct approach to causation under those clauses. They relate to the declarations to be made by the Court ("**the Disease Clause Declarations**") which will embody or reflect, in terms or effect, the decision of the Court in relation to the MSA Disease Clauses, addressed at paragraphs 93-113, 121-122, 175-199, 503-529, 532-533 of the Judgment.

9. MS Amlin seeks a certificate pursuant to section 12(1) of the Administration of Justice Act 1969 ("**the 1969 Act**") certifying that:

9.1 The conditions in section 12(3A) – referred to as "*the alternative conditions*" – for the granting of a leapfrog certificate are satisfied in relation to the Disease Clause Declarations (see section 12(1)(a) of the 1969 Act); and

9.2 A sufficient case for an appeal to the Supreme Court has been made out to justify MS Amlin's application for leave to bring such an appeal (see section 12(1)(b) of the 1969 Act).

10. As explained below, MS Amlin seeks a leapfrog certificate on the basis of the exceptional public importance and urgency of this test case. It is also mindful of the parties' agreement in clauses 8.2 and 8.3 of the Framework Agreement to have any appeal "*heard… conducted and determined on an expedited basis*" and to "*explore the possibility and appropriateness of seeking a leapfrog appeal to the Supreme Court…*" **[Exhibit CJW3/15]**

11. The statutory conditions for the granting of a leapfrog certificate under section 12(3A) of the 1969 Act are as follows:

> "*(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.*"

12. I will refer to these as "**the Alternative Conditions**". It is a requirement of each that "*a point of law of general public importance is involved in the decision*".

13. The principal purpose of this Statement is to explain why the grounds of appeal set out in Appendix 1 relating to the Disease Clause Declarations involve points of law of general public importance, and why the Alternative Conditions are otherwise satisfied.

Point(s) of law of general public importance

14. These test case proceedings are exceptional. They have been driven by the unprecedented circumstances faced by many businesses during the COVID-19 pandemic. As the Framework Agreement records in Recital A, "*Covid-19 and the Government controls imposed as a result of it are causing a substantial level of loss and distress to businesses, in particular (although not solely) SMEs*" **[Exhibit CJW3/5]**.

15. In these circumstances, and because of "*uncertainty created by differences of opinion expressed by interested parties as to whether the terms of policies require that claims in respect of some or all business interruption losses are paid*" (Recital B to the Framework Agreement) **[Exhibit CJW3/5]**, the FCA commenced proceedings against selected insurers under selected wordings to advance the arguments which the FCA considered should properly be raised by policyholders.

16. This unprecedented step by the FCA - as the conduct regulator of insurers in the UK - itself reflects, in my view, the general public importance of these proceedings and the issues determined in them which are, by and large, issues of law (including issues as to the proper construction of various policy terms, such as the MSA Disease Clauses).

17. These proceedings are also the first to be determined under the Financial Markets Test Case Scheme. In order to qualify for inclusion in that Scheme, the parties had to satisfy the Court that the FCA's claim "*raises issues of general importance in relation to which immediately relevant authoritative English law guidance is needed*" (PD51M, paragraph 2.1). Further, as is permitted under the Scheme in cases of

"*particular importance or urgency*" (PD51M, paragraph 2.5(d)), the Court sat at first instance with a Lord Justice of Appeal and a Financial List Judge. This again underscores that the issues raised in this case are of general public importance.

18. Against that background, I turn to a number of more specific points that confirm that the points of law raised by MS Amlin in its grounds of appeal are indeed ones of general public importance.

19. First, I note that the parties to these proceedings have expressly recorded in the Framework Agreement that the issues raised in these proceedings are of general public importance. The Court is referred to Recitals E, G and K of the Framework Agreement **[Exhibit CJW3/6-8]**.

20. Secondly, this is not a 'one-off' case concerned with a private dispute between private parties regarding 'one-off' contractual provisions. Instead, the number of policies and policyholders, as well as the value of claims, potentially affected by the Judgment and these proceedings is likely to be very large.

    20.1 These proceedings have been brought with the very objective of achieving "*maximum clarity possible for the maximum number of policyholders… and their insurers consistent with the need for expedition and proportionality*" (Recital I of the Framework Agreement), "*taking into account the potential impacts of the Covid-19 pandemic on customers of the policies and customers with similar policies*" (Recital G of the Framework Agreement) **[Exhibit CJW3/6-7]**. The implications of the Judgment, and the issues decided therein, therefore go far beyond the parties to these proceedings.

    20.2 The policy provisions in these proceedings, including the MSA Disease Clauses, are not 'one-off'. As the FCA records in its Amended Particulars of Claim, the policies of the Insurers are in standard form and "*a large number of policyholders*" have such policies (Amended Particulars of Claim, paragraph 32). Indeed, I understand from Neil Winterbourne, Assistant General Counsel at MS Amlin that the numbers of insureds potentially affected by the MSA Disease Clauses are at least 11,200. 4,990 of those policyholders are through one coverholder, Instant Underwriting, on one of 4 possible wordings: Leisure, Office & Surgery, Commercial Combined and Retail. MSA1 and MSA2 are both Instant wordings.

    20.3 Moreover, the issues of law which arise in relation to the MSA Disease Clauses are of interest not only to MS Amlin and any of its policyholders

affected by the COVID-19 outbreak but to other insurers and policyholders in the market who have clauses in their policies in materially identical or similar terms. I believe that there are a number of such policies in the market.

20.4 That this is likely to be the case is demonstrated by the other disease clauses considered by the Court in these proceedings which are in similar terms to the MSA Disease Clauses: e.g. the disease clause in RSA3. It is also a fact recorded in the Framework Agreement at Recital K **[Exhibit CJW3/7-8]**:

> "The *FCA* considers that the *relevant terms* and the *Insurers* are a representative sample of a wider set of policy wordings and insurers, where such wider insurers are advancing the same or similar contentions to those as set out in Recital D. The *Parties* believe that the proceedings will set a legal precedent which will be helpful to resolve to a substantial degree the legal uncertainties relating to the wider set so as to meet the *mutual objective*."

20.5 It was said by Mr Brewis of the FCA in his witness statement dated 9 June 2020 that the value of affected claims "*may exceed £1 billion*" (paragraph 57 of his statement) and the Judgment notes at [7] the FCA's estimates as to the numbers which could be affected by the outcome in these proceedings (700 types of policies across over 60 different insurers and 370,000 policyholders). I invite the Court to read Mr Brewis' witness statement, on this point, particularly at paragraphs 52 and 57 **[Exhibit CJW3/49-50]**.

20.6 There can be little doubt, therefore, that there are large numbers of policyholders, and their insurers, to whom the legal issues arising in this test case, including in relation to the MSA Disease Clauses, are of considerable importance in the context of the COVID-19 outbreak.

21. Thirdly, there are other parties who are also likely to be affected by the points of law. The Court's ruling which admitted the present proceedings to the test case on grounds of issues of general importance acknowledged that "*the issues which will be decided are relevant to a considerable number of reinsurances*" (First CMC Transcript from page 8). This was also a point made by Mr Brewis at paragraph 59 **[Exhibit CJW3/51]**.

22. Fourthly, the financial markets in the UK and the UK generally are much affected by the outcome of these proceedings including in terms of levels of reserves, financial impact on insurers, and payment of dividends. Mr Brewis addressed the FCA's views on the importance of the claim to the markets in paragraph 56 and following of his statement **[Exhibit CJW3/50 and following]**.

23. Fifthly, the case is extremely urgent because of the need for finality and certainty in the immediate future as to the state of the law in relation to the issues raised by these proceedings: I would particularly refer to the Recitals to the Framework Agreement, as well as to clause 8 of the Framework Agreement as to the need for expedition in the context of appeals (see also Brewis statement, paragraph 70 **Exhibit CJW3/54]**). The issues in these proceedings need to be authoritatively determined as a matter of urgency given the very large number of policyholders who are affected by these proceedings and have suffered (and continue to suffer) significant losses as a result of the COVID-19 pandemic (see Brewis statement, paragraph 8 **[Exhibit CJW3/30]**).

24. I also note the reality that there are or are likely to be many other sets of proceedings which turn in part on the final outcome of this litigation. As an example only, I refer to a claim issued in the Commercial Court with Claim No. CL-2020-00038 concerning a business interruption policy with a 25 mile radius disease clause **[Exhibit CJW3/56-67]**. The potential scale of customer proceedings against insurers was also noted in Recital G of the Framework Agreement **[Exhibit CJW3/6-7]**. Finality and certainty are therefore also urgently required to avoid the real possibility of inconsistent decisions on materially similar issues, with the consequent negative impact that would have on policyholders.

25. Sixthly, there is now a very extensive collection of professional commentary on the legal issues to which this case gives rise: I could not begin to attempt to compile an exhaustive list, but a search engine can easily make good this point. Much of that commentary is focused on *Orient-Express* but there are equally many professional commentaries on issues concerning notifiable disease within a specified radius.

26. Seventhly, the state of the authorities indicates that this case does raise points of law of considerable general public importance. The FCA acknowledges the "*novel and important legal issues*" in Mr Brewis's witness statement at paragraph 60.d., by reference to *Orient-Express* **[Exhibit CJW3/52]**. As to this:

    26.1 *Orient-Express* was an appeal from an arbitration award on a point of law of "*general public importance*" under s. 69 of the Arbitration Act 1996.

    26.2 After determining the appeal, Hamblen J also granted permission to appeal to the Court of Appeal pursuant to s. 69(8) of the Arbitration Act 1996, for which the alternative conditions are that "*the question is one of general importance*" or the case is one which for "*some other special reason should be considered by the Court of Appeal*".

26.3 I believe that the state of the authorities in advance of these proceedings was at least one reason why the Framework Agreement referred in paragraph 8.3 to the possibility of a leapfrog appeal.

27. Eighthly, this Court's reasoning on *Orient-Express*, even if expressly *obiter*, is of seismic importance to the market, given the potential for wide area damage to affect a whole range of cover extensions (both non-damage and damage). It is also potentially significant to any case where there could be a dispute about the operation of "trends clauses" and the characterisation of a peril with multiple components.

28. In relation to the remaining points of law arising in relation to the MSA Disease Clauses, it is notable that there has never before been a reported case in England and Wales on disease clause extensions to standard business interruption cover in spite of the fact that insurers have for decades been offering cover for notifiable disease in a similar form against the background of the regime of the Public Health (Control of Disease) Act 1984. Clarity on the proper construction of such clauses would therefore be of importance to the insurance market and to English law on business interruption insurance.

29. Ninthly, insurance disputes are often resolved in arbitration and many of the policies at issue in this test case contain arbitration clauses, with the result that the present case offers a rare opportunity for appellate guidance on the points of law raised. By way of illustration of this point, the 'wide area damage' to which I refer above had been of interest to practitioners (and even addressed privately in arbitration) for many years before being addressed in authority by the happenstance of an arbitration appeal in 2010.

30. Bearing all of the above points in mind, I believe that the Court's decision on the Disease Clause Declarations involved points of law of general public importance as reflected in the grounds of appeal attached at Appendix 1 to my witness statement.

<u>The remaining requirements of the Alternative Conditions</u>

31. While MS Amlin would need to satisfy only one of the three Alternative Conditions in section 12(3A), I believe it can satisfy all three.

32. The first Alternative Condition is that the proceedings entail a decision relating to a matter of national importance or consideration of such a matter (section 12(3A)(a)).

33. I believe that this case is one of national importance. I expect that this will be common ground, but that it is in any event illustrated by what I have said above and underlined by the number of national news organisations which have provided news coverage of the Judgment. For example:

33.1 https://www.bbc.co.uk/news/business-54158830;

33.2 https://www.thetimes.co.uk/article/businesses-wait-to-see-if-policies-will-pay-out-over-virus-after-judges-rule-against-insurers-lhpzf0x3k

33.3 https://www.ft.com/content/6eaab06d-463e-4e7a-871e-5bbeb7aa510b

33.4 https://www.telegraph.co.uk/business/2020/09/15/covid-insurance-ruling-may-mean-pain-small-firms/;

33.5 https://www.theguardian.com/business/2020/sep/15/uk-small-companies-covid-insurance-test-case-fca

33.6 https://uk.reuters.com/article/idUKKBN2661J4;

33.7 https://www.cityam.com/high-court-rules-in-favour-of-struggling-firms-in-business-interruption-insurance-case/;

33.8 https://www.itv.com/news/2020-09-15/landmark-covid-insurance-payout-ruling-a-lifeline-for-businesses; and

33.9 https://news.sky.com/story/coronavirus-small-firms-welcome-insurance-judgment-but-some-could-lose-out-12072371;

34. The second Alternative Condition is that 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 (section 12(3A)(b)).

35. I believe, for the reasons I have already given in the previous section of this witness statement discussing general public importance, that this is a case where the result of the proceedings (considered either on its own or together with other proceedings) is of such significance that a hearing by the Supreme Court is justified. The ultimate outcome of these proceedings is of significance to large numbers of policyholders and insurers, as well as third parties (e.g. reinsurers) so as to justify a direct appeal to the Supreme Court.

36. The third Alternative Condition is that the Court is satisfied that the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal (section 12(3A)(c)). If an appeal is required to proceed via the Court of Appeal, that will significantly prolong the length of these proceedings, especially bearing in mind the risk that an appeal to the Supreme Court ultimately occurs in any

event. This is a case where urgency and expedition are of key importance in order to achieve legal certainty as soon as is reasonably possible not only for the parties to this litigation, but also for the numerous other affected parties (most notably, policyholders). I therefore believe that in the special circumstances of this case earlier consideration by the Supreme Court outweighs the benefits of consideration by the Court of Appeal.

Satisfaction of other requirements of Part II of the Administration of Justice Act 1969

37. I understand that a further threshold exists in the form of section 15(3) of the 1969 Act, which reads as follows:

> "*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*."

38. I understand this to mean that MS Amlin's proposed appeals must meet the relevant thresholds for an appeal to the Court of Appeal set out in CPR 52.6. The merits of the proposed appeal will be addressed as appropriate by my clients' counsel, but I believe that MS Amlin has at least a real prospect of success on the proposed questions of law (CPR 52.6(1)(a)). I also believe that there are other compelling reasons of public interest for the appeal to be heard, for reasons which I have already discussed above (CPR 52.6(1)(b)).

39. I also believe for reasons made sufficiently clear above that a sufficient case for an appeal to the Supreme Court has been made out to justify an application for permission to bring the appeals outlined above, such that the requirements of section 12(1)(b) of the Administration of Justice Act 1969 are satisfied.

40. I understand that, under section 12(1) of that Act, the grant of a certificate is a matter for the Court's discretion even if the statutory conditions are met. I believe that this case is an appropriate one for a certificate to be granted in order for the Supreme Court to be able to consider for itself the question whether it wishes to entertain any appeal.

41. I believe therefore that the requirements of section 12(1) of the Administration of Justice Act 1969 are met, and that this is an appropriate case for the grant of a leapfrog certificate.

**Statement of truth**

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed Chris Wilkes ……
Chris Wilkes (Sep 28, 2020, 3:10pm)

**CHRISTOPHER JOHN WILKES**

Date 28 Sep 2020 ……

**Appendix 1 to**

**Third Witness Statement of Christopher John Wilkes**

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**MS Amlin's Grounds of Appeal**

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**Proper construction of the insured peril**

1. The Court erred in law in wrongly identifying the insured peril in the MSA Disease Clauses.

   a. The Court was wrong to construe the MSA Disease Clauses as providing cover for all the business interruption consequences at or in connection with an insured's premises of COVID-19 both within and outside the 25 mile radius provided that there had been at least one instance of COVID-19 within the 25 mile radius (Judgment, [102][2], [108]-[109], [113], [532]). On the true construction of the MSA Disease Clauses, cover is only provided for the business interruption consequences at or in connection with an insured's premises of a person or persons within the 25 mile radius of the insured premises sustaining illness resulting from COVID-19.

   b. Further, the Court was also wrong to conclude that the absence of any reference to an "occurrence" in the MSA Disease Clauses – unlike in other clauses before the Court, namely RSA 3 and Argenta 1 – makes it "*relatively straightforward to conclude that the cover extended to the effects of a notifiable disease if and from the time it is within the 25 mile radius and is not limited to the specific effects only of the instances of the disease within the radius*" (Judgment, [196]). In so holding, the Court erred by failing to give effect to the specific words used in the MSA Disease Clauses, and in particular the definition of notifiable disease which, in both policies, requires the insured to prove "*illness sustained by any person resulting from*" COVID-19 within the 25 mile radius of the insured premises.

   c. Further, the Court was also wrong in failing to conclude that (i) the reference to "*illness sustained by any person*" resulting from COVID-19 in the definition of "*notifiable disease*" in the MSA Disease Clauses was materially equivalent to an

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[2] A number of the paragraph references in these Grounds of Appeal are to paragraphs in the Judgment addressing the "disease clause" in RSA 3. This is because the Court has held that its conclusions in relation to RSA3 apply to the MSA Disease Clauses: see Judgment, [189], [191].

"*event*", and (ii) consistently with its approach to event language in QBE 2 and 3 the reference to "*illness sustained by any person*" meant that the cover was intended to be confined to the results of relatively local cases (as at [231] of the Judgment), and, therefore (iii) cover is only provided for the business interruption consequences at or in connection with an insured's premises of a person or persons within the 25 mile radius of the insured premises sustaining illness resulting from COVID-19.

**Causation**

2. Without prejudice to paragraph 4 below, even if the Court was correct to hold that "*following*" in the MSA Disease Clauses did not import a proximate cause requirement but imported a "*looser causal connection than proximate cause*" (Judgment, [95], [111], [194]), the Court erred in law (i) in adopting a supposed concept of causal connection which did not involve a test of factual (i.e. "but for") causation; and/or (ii) in failing to hold that such a "*looser causal connection*" required, at a minimum, the application of a factual (i.e. "but for") causation test, and/or (iii) in failing to hold that "*any **notifiable disease** within a radius of twenty five miles of the premises*" was neither a factual nor proximate cause of loss suffered by insureds.

3. The Court was further wrong as a matter of law to hold that, even if "*"following" imports the requirement of proximate causation*" the requirement is "*satisfied in a case in which there is a national response to the widespread outbreak of a disease*" because "*the proximate cause of the business interruption is the Notifiable Disease of which the individual outbreaks form indivisible parts*" (Judgment, [111]; see also [532]), or alternatively, that each individual occurrence of COVID-19 in the UK was a separate but equally effective proximate cause of the government action and the loss caused to insureds (Judgment, [112], [533]).

    a. In so holding, the Court erred by (i) failing to give effect to the specific words used in the definition of notifiable disease which, in both policies, requires the insured to prove "*illness sustained by any person resulting from*" COVID-19 within the 25 mile radius of the insured premises and (ii) failing to recognise that the illness sustained by any one person is not indivisible from the illness sustained by another person and so (iii) failing to conclude that "*individual outbreaks*" do not form an indivisible part of a "***notifiable disease***" (as defined).

b. The Court should have concluded (i) that the causal connecter "*following*" required at least the application of a factual (i.e. "but for") causation test, and (ii) that cases of "*illness sustained by any person resulting from*" COVID-19 within the 25 mile radius of the insured premises were neither a factual nor proximate cause of loss suffered by insureds.

4. The Court further erred in law by failing to hold that, on a proper construction of the MSA Disease Clauses, the word "*following*" in the MSA Disease Clauses imported a proximate cause requirement (Judgment, [94]-[95]). Instead, the Court wrongly held that "*following*" imported a "*looser causal connection than proximate cause*" and that it did not require "but for" causation, without any explanation of the concept being applied of causal connection which was not a "but for" cause (Judgment, [194]; see also [94]-[95]).

5. To the extent it matters, the Court erred in law in holding that the insured peril is the "*composite peril of*" interruption of or interference with the business following any notifiable disease within a radius of twenty five miles of the insured premises (Judgment, [94]). The insured peril was any notifiable disease (as defined) within 25 miles of the premises.

6. The Court further erred in law in its approach to the so-called "trends clauses". While it (rightly) accepted that the "trends clauses" in MSA1 and MSA2 applied to the non-damage coverage clauses including the MSA Disease Clauses (Judgment, [198]), it was wrong to hold that on an application of the trends clauses to the MSA Disease Clauses, "*the business interruption referable to COVID-19 including via the authorities' and/or the public's response thereto*" had to be stripped out of the applicable counterfactual (Judgment, [122], [199]).

7. The Court erred in law in holding that ***Orient-Express Hotels Ltd v Assicurazioni Generali*** [2010] Lloyd's Rep IR 531 was distinguishable as a matter of principle and/or was wrongly decided.

**Fifth Defendant**
**Christopher John Wilkes**
**Third**
**CJW3**
**28 September 2020**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**COMMERCIAL COURT (QBD)**
**FINANCIAL LIST**
**FINANCIAL MARKETS TEST CASE SCHEME**
**CLAIM NO: FL-2020-000018**

**B E T W E E N:**

**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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**THIRD WITNESS STATEMENT OF CHRISTOPHER JOHN WILKES**

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DAC Beachcroft LLP
The Walbrook Building
25 Walbrook
London
EC4N 8AF

Tel: 020 7894 6800
Fax: 020 7894 6801

Ref: CJW/EIG002-1488639

Solicitors for the Third and Fifth Defendants

Signable

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Fifth Defendant
Christopher John Wilkes
Exhibit CJW3
28 September 2020

**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**

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**EXHIBIT CJW3**

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This is the exhibit marked "CJW3" referred to in the Third Witness Statement of CHRISTOPHER JOHN WILKES dated 28 September 2020.

Signed Chris Wilkes ……..
Chris Wilkes (Sep 28, 2020, 1:48pm)
**CHRISTOPHER JOHN WILKES**

Date 28 Sep 2020 ……...

| No. | Document | Date | Page number |
|---|---|---|---|
| 1. | Application Notice by MS Amlin Underwriting Limited | 28 September 2020 | 1 - 4 |
| 2. | The Framework Agreement | 28 May 2020 | 5 - 26 |
| 3. | Witness statement by Mr Matthew Brewis of FCA (without exhibits) | 9 June 2020 | 27 - 55 |
| 4. | Claim No. CL-2020-00038 Claim Form and Particulars of Claim | 19 June 2020 | 56 - 67 |

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N244(CHFL)

# Application Notice

CPR Part 23

- You must complete Parts A **and** B, **and** Part C if applicable
- Send any relevant fee and the completed application notice to the court with any draft order, witness statement or other evidence
- It is for you (and not the court) to serve this application notice

| | |
|---|---|
| **In the** | **High Court of Justice**<br>**Chancery Division**<br>**Financial List**<br>**Royal Courts of Justice** |
| **Claim No.** | FL-2020-000018 |
| **Warrant no.** (if applicable) | |
| **Claimant(s)** (including ref.) | The Financial Conduct Authority |
| **Defendant(s)** (including ref.) | (1) Arch Insurance (UK) Limited<br>(2) Argenta Syndicate Management<br>(3) Ecclesiastical Insurance Office Plc<br>(4) Hiscox Insurance Company Limited<br>(5) MS Amlin Underwriting Limited<br>(6) QBE UK Limited<br>(7) Royal & Sun Alliance Insurance Plc<br>(8) Zurich Insurance Plc |
| **Date** | 28 September 2020 |

**You should provide this information for listing the application**

Time estimate 0 (hours) 30 (mins)

Is this agreed by all parties? Yes | I No

Please refer to the Financial List Guide and the Commercial Court Guide for details of how applications should be prepared and will be heard, or in a small number of exceptional cases can be dealt with on paper.

## Part A

1. Where there is more than one claimant or defendant, specify which claimant or defendant

(The claimant)(The defendant)[1]

The Fifth Defendant

2. State clearly what order you are seeking (if there is room) or otherwise refer to a draft order (which must be attached)

intend(s) to apply for an order (a draft of which is attached) that[2]

grants certificates under section 12 of the Administration of Justice Act 1969 in the terms set out in the draft order.

3. Briefly set out why you are seeking the order. Identify any rule or statutory provision

because[3]

the alternative conditions set out in section 12(3A) of the Administration of Justice Act 1969 are satisfied in relation to these proceedings, and a sufficient case for an appeal to the Supreme Court under Part II of the Act has been made out to justify an application for leave to bring such an appeal.

Financial List cases issued in the Chancery Division are managed after issue by the Admiralty and Commercial Registry, The Rolls Building, 7 Rolls Building, Fetter Lane, London, EC4A 1NL is open between 10am and 4.30pm Monday to Friday. When corresponding with the court, please address forms or letters to the Court Manager and quote the claim number.

## Part B

*(The claimant)(The defendant)[1] wishes to rely on: ***tick one***

the attached (witness statement)(affidavit) I (the claimant)(the defendant)'s[1] statement of case evidence in Part C overleaf in support of this application

**Signed** Chris Willkes

(Applicant) ('s legal representative)

**Position or office held** (if signing on behalf of firm, company or corporation) Partner

4. If you are not already a party to the proceedings, you must provide an address for service of documents

Address to which documents about this claim should be sent (including reference if appropriate)[4]

| | | If applicable | |
|---|---|---|---|
| DAC Beachcroft LP<br>The Walbrook Building<br>25 Walbrook<br>London<br><br>Ref: CJW/EIG002-1488639 | | Tel. no. | 020 7894 6800 |
| | | Fax no. | 020 7894 6801 |
| | | DX no. | 45 London |
| Postcode | EC4N 8AF | e-mail | cwilkes@dacbeachcroft.com |

## Part C

Claim No. FL-2020-000018

**(Note: Part C should only be used where it is convenient to enter here the evidence in support of the application, rather than to use witness statements or affidavits)**

*(The claimant)(The defendant)[1] wishes to rely on the following evidence in support of this application:

**Statement of Truth**

*(I believe)(The applicant believes) that the facts stated in this application notice are true

*I am duly authorised by the applicant to sign this statement

Full name CHRISTOPHER JOHN WILKES

Name of*(Applicant)('s litigation friend)('s legal representative)

DAC BEACHCROFT LLP

**Signed** Chris Wilkes

*(Applicant)('s legal representative)

**Position or office held** (if signing on behalf of firm, company or corporation) Partner

**Date** 28 Sep 2020

**delete as appropriate*

Signable

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# BUSINESS INTERRUPTION INSURANCE TEST CASE FRAMEWORK AGREEMENT

**This Agreement is made on 28 May 2020**

**BETWEEN**

**(1) The Financial Conduct Authority** (the ***FCA***);

**AND**

**(2)** the firms listed in the Schedule to this Agreement (each an ***Insurer*** and together, the ***Insurers***);

(each a ***Party*** and, together, the ***Parties***).

## BACKGROUND

A. Covid-19 and the Government controls imposed as a result of it are causing a substantial level of loss and distress to businesses, in particular (although not solely) SMEs. A large number of claims are being made to insurers under the terms of insurance policies providing cover for (among other matters) property damage and business interruption insurance losses. Several businesses and groups of businesses have indicated their intention to challenge the rejection of their claims.

B. The *FCA*, as the conduct regulator of insurers in the United Kingdom, has been considering many of the policies in the market and is concerned that there are a significant number of policies where there is uncertainty created by differences of opinion expressed by interested parties as to whether the terms of policies require that claims in respect of some or all business interruption losses are paid.

C. The *FCA* has an interest in the resolution of this uncertainty through the *test case*, acting in a way that is compatible with its strategic objective to ensure the relevant markets function well and to advance its operational objectives to ensure appropriate protection for consumers and to ensure market integrity. This is in order to facilitate the *FCA*'s: (1) assessment of whether insurers are complying with their regulatory obligations in relation to the handling of claims and associated complaints;[1] (2) determination of its policy and principles for

[1] For the avoidance of doubt, the *FCA* has no intention to 'retrospectively' apply a judgment in the *test case*. The question of whether an insurer has acted reasonably and fairly and generally in accordance with its regulatory obligations in rejecting claims will be a matter to be judged against the circumstances which existed at the time.

supervising those matters, and; (3) consideration of what if any further rules and guidance it should issue in relation to those matters.

D. The *Insurers* have confirmed to the *FCA* their views that certain policies which they underwrite (the ***policies***) and which provide cover in principle for business interruption losses without the need for physical/property damage may not cover losses resulting from the Covid-19 pandemic (the ***coverage issue***). The *Insurers* (or some of them) further dispute whether as a matter of law and fact and in the light of the *policies* the necessary causal link to any loss suffered by customers which is the subject of claims under the *policies* can be established, including the impact, if any, of any trends clauses or similar/equivalent provisions (the ***causation issue***).

E. The *Insurers* acknowledge that there is a dispute between them and certain policyholders in respect of the *coverage issue* and the *causation issue* (the ***disputed issues***) and the correct interpretation and effect of the terms within the *policies* relevant to those issues (the ***relevant terms***). For the purposes of this Agreement, the term policyholders is being used as a general term to refer to customers and/or policyholders and/or beneficiaries under the *policies*. The *FCA* considers that there is uncertainty (as identified at Recital B), that the fulfilment of its regulatory objectives requires that uncertainty to be resolved (as identified at Recital C), and that the dispute raises issues of general market importance. The *Insurers* and the *FCA* agree that these issues are suitable to be determined by the courts through proceedings for declaratory relief brought by the *FCA* in which the opposing arguments on the *disputed issues* are fully and properly advanced.

F. The *Insurers* acknowledge that the proper advancement of the arguments on the *disputed issues* would be managed constructively and expeditiously by the *FCA* presenting to the Court, in the best way it considers appropriate, all arguments that the *FCA* considers should properly be raised by policyholders.

G. The *Insurers* and the *FCA* believe that, consistently with CPR Part 1 (the overriding objective), taking into account the potential impacts of the Covid-19 pandemic on customers of the *policies* and customers with similar policies, the *disputed issues* need to be determined expeditiously and, in light of the complexity and importance of the issues, in a fair and orderly way. The potential scale of customer proceedings against insurers is likely to cause increased expense for all parties, as well (where litigation, not arbitration or other avenues, is contemplated) as the courts, and may present significant administrative problems for the courts in handling such cases. There is also a significant risk that different courts and tribunals will reach inconsistent decisions on materially similar issues, leading to further cost and uncertainty for insurers and policyholders. The resolution of the *disputed issues* in proceedings between the *Insurers* and the *FCA* is likely to save

considerable costs for policyholders and *Insurers* and resolve their disputes regarding the *disputed issues* in a shorter time. It will also achieve a swifter resolution of the uncertainty which will enable the *FCA* more quickly to fulfil its regulatory objectives.

H. Accordingly, to ensure that the *disputed issues* are brought before the Courts in accordance with CPR Part 1, in an efficient, expeditious, and orderly way, the *FCA* and the *Insurers* have agreed that the *FCA* should commence proceedings for a declaratory judgment against the *Insurers* in the High Court of England and Wales in accordance with the terms of this Agreement as soon as possible. Both the *Insurers* and the *FCA* believe that the *disputed issues* are capable of determination in this way, and seek an outcome as soon as reasonably practicable.

I. The ***mutual objective*** is to achieve the maximum clarity possible for the maximum number of policyholders (especially, although not solely SMEs) and their insurers consistent with the need for expedition and proportionality. It is recognised that not all issues that may arise between individual policyholders and insurers can be resolved if the objective of resolving the *disputed issues* (at least at first instance court level) is to be achieved as soon as possible and having regard to the target timetable set out in this Agreement. In particular, the *Parties* acknowledge that:

    a. Some policyholders may raise issues of law and/or fact which are not raised by the *FCA* and will therefore not be resolved in the proceedings, and in response to which Insurers may wish and should be entitled to raise defences of law and/or fact in addition to those dealt with in the proceedings.

    b. Other issues flowing from the determination of the *disputed issues* (such as aggregation, additional causation issues specific to loss of rent and similar claims under a property owners policy and the specific quantum of any particular claims) will not form part of the *disputed issues* but will be determined according to the claims process of each *Insurer*, taking into account in particular any policy terms setting limits to claims amounts or indemnity periods. Such issues in (a) and (b) will not form part of the *disputed issues*.

J. It is recognised that the *FCA* and its advisors will engage as it deems appropriate, consistent with the need for expedition, with policyholders on the various matters, issues and documents referred to in this Agreement and this Agreement (including in draft form) so as to meet the *mutual objective*.

K. The *FCA* considers that the *relevant terms* and the *Insurers* are a representative sample of a wider set of policy wordings and insurers, where such wider insurers are advancing the same or similar contentions to those as set out in Recital D. The *Parties* believe that the proceedings will set a legal precedent which will be helpful to resolve

to a substantial degree the legal uncertainties relating to this wider set so as to meet the *mutual objective*.

In consideration of the mutual promises contained herein, the *Insurers* and the *FCA* hereby agree as follows:

## 1. ISSUES TO BE DETERMINED

1.1 The *Parties* agree that, in light of the *disputed issues*, the matters to be determined in these proceedings are the correct interpretation and application (by reference to each *policy* as a whole) of *relevant terms* in a sample of the *policies* appropriately representative of the *disputed issues* (the ***representative sample of terms***) and their application in relation to a set of ***agreed facts*** and ***assumed facts*** including:

(a) whether on the *agreed facts* and *assumed facts* the *policies* provide cover in principle; and

(b) whether on the *agreed facts* and *assumed facts* the policyholders of the *policies* can establish the necessary causal link (as a matter of the application of the law and the wording of the *policies*) between the assumed losses sustained by policyholders and any relevant peril, event or circumstance that is covered by *relevant terms* in the *policies*, including to take into account the relevance (if any) of a trends clause or similar/equivalent provision (if any).

1.2 The *agreed facts* will be facts necessary to resolve the *disputed issues*, such as (by way of example only) the date and nature of steps taken by the UK Government or any other relevant public authority in relation to Covid-19.

1.3 The *assumed facts* will be an appropriate set of illustrative factual assumptions such as (by way of example only) the nature of the affected business(es), how the business(es) were affected, whether the affected business(es) closed entirely or partially (and why), whether that was before or after the steps referred to in paragraph 1.2 of this Agreement, and the possible impact of other measures by the UK Government or any other relevant public authority in relation to Covid-19. It is recognised that the *assumed facts* are a menu of potential fact patterns which will be drawn upon by the Court and the *Parties* to assist resolution of the issues in the *test case*. For the avoidance of doubt it is not intended that all *assumed facts* will be applied to all of the *representative sample of terms* in resolving the *disputed issues*.

1.4 The *Parties* agree that the *disputed issues* can be most expeditiously determined by asking the Court to consider the *representative sample of terms,* the *agreed facts*, the *assumed facts* and specified ***questions for determination***. A ***matrix*** setting out *disputed issues* which arise in relation to *the representative sample of terms* will also be prepared.

The declaratory relief pleaded will reflect the clarity sought from the Court in respect of the *questions for determination*.

## 2. PROCESS FOR AGREEING THE AGREED FACTS ETC.

2.1 The *agreed facts* will be agreed between the *Parties* as soon as practicable. Should full agreement not be possible with all *Insurers* on all *agreed facts*, the *FCA* will present all the *agreed facts* that have been agreed with all *Insurers* and, for the remaining *agreed facts*, the *agreed facts* in relation to the majority of *Insurers* so as to further the *mutual objective*. The *FCA* will identify which *agreed facts* are agreed by all *Insurers* and which by the majority of *Insurers*. Whilst it is not anticipated that there will be any significant disagreement, if and insofar as any relevant facts do not constitute *agreed facts*, this paragraph does not prevent the *FCA* and/or *Insurers* from advancing facts that are not agreed as part of their respective cases and the Court may determine and/or take such facts into account as it thinks fit in relation to deciding the *questions for determination*.

2.2 The *FCA* has provided the *representative sample of terms,* and has proposed the *matrix,* the *assumed facts* and the *questions for determination* by the Court that will enable the *disputed issues* to be determined expeditiously. The *Insurers* will by no later than 5pm on **3 June 2020** comment on the contents of the *FCA*'s proposal for the *assumed facts, questions for determination* and *matrix* without prejudice to their right to propose additions, deletions or amendments under paragraph 2.3. The *FCA* will take the *Insurers*' comments into account in finalising its proposed *assumed facts*, *questions for determination* and *matrix* which will be included in the Particulars of Claim. The Particulars of Claim will be based on the generic reasons given by the *Insurers* for refusing indemnity under their policies including the requirements for establishing causation of loss.

2.3 After the Particulars of Claim have been served then each *Insurer* agrees that, prior to applying to the Court to propose any additions, deletions or amendments to the *assumed facts*, *questions for determination*, and *matrix* it shall: (i) discuss such additions, deletions or amendments with the *FCA* and the other *Insurers*; (ii) take into account any reasonable comments or objections expressed by the *FCA* or another *Insurer*; and (iii) have regard to the *overriding objective (under CPR Part 1)* and the terms of this Agreement, including paragraph 6.1. Any such application will be made at the first Case Management Conference or (if later) by **15 June 2020**.

2.4 The *Insurers* recognise that they will not have the population of information which was available to the *FCA* in relation to the selection of the *Insurers* or the *representative sample of terms* and the *FCA* should decide as Claimant the *representative sample of terms* given the *mutual objective*. However each *Insurer* will as soon as possible and by 5pm on **2 June 2020** comment if it considers that the *representative sample of terms* is inaccurate or incomplete so far as

its own wording and *relevant terms* are concerned. The *FCA* will take the *Insurer*s' comments into account in determining if any changes need to be made to the *representative sample of terms* for accuracy and completeness. In addition, the FCA will accept a request from an *Insurer* to add a limited number of additional wordings written by that *Insurer* subject to the *mutual objective.* If any dispute arises in relation to either of these matters between *Insurers* and the *FCA* and cannot be resolved then this will be determined in like manner to paragraph 2.3.

2.5 It is acknowledged and agreed that, prior to providing the documents referred to in paragraph 2.2 to the *Insurers*, the *FCA* may also engage or have engaged as it deems appropriate with policyholders, other insurers and the Association of British Insurers in relation to these matters, including the content of the *assumed facts*, *questions for determination* and *matrix*. It is recognised that the *FCA* and policyholders may wish to share their own privileged information on a confidential (and/or common-interest basis) and the *Insurers* agree not to challenge the application of such privilege. It is recognised that the *Insurers* may wish to share privileged information with each other (and with other insurers and reinsurers) on a confidential (and/or common-interest) basis and the *FCA* agrees not to challenge the application of such privilege.

2.6 The *Insurers* agree that the *FCA* may disclose to policyholders, other insurers and the Association of British Insurers and publish on its website after this Agreement comes into force this Agreement, the identity of the *Insurers*, the *assumed facts*, *representative sample of terms*, *relevant terms*, *questions for determination* and *matrix* and other documents prepared for the purpose of the *test case*. The *FCA* may similarly disclose or publish the *policies* after this Agreement comes into force, with any appropriate redactions agreed in consultation with the *Insurers*.

2.7 Each *Insurer* will confirm by the date of serving their defence whether the *questions for determination* are the only issues of general legal principle (subject to Recital I) that each *Insurer* believes need to be determined in order to resolve the *disputed issues* in so far as they relate to whether and how each *Insurer's* terms within the *representative sample of terms* will in principle respond to a business interruption claim resulting from claims received to date made in respect of the Covid-19 pandemic by policyholders on the basis of the *agreed facts* and *assumed facts*. In so far as such positive confirmation cannot be provided each *Insurer* will, no later than the date of serving their Defence, confirm all further *questions for determination* that it considers need to be determined in order to do so together with a supporting explanation. The *Insurers* shall immediately inform the *FCA* if, at any time after service of their defence, any amendment to or deletion from the *questions for determination* mean that the confirmations in this paragraph are no longer correct. Any dispute concerning the *questions for determination*

that should be included in the *test case* shall be resolved by the Court and nothing in this clause shall prevent an *Insurer* from applying to the Court to seek permission to amend its Defence in any way it sees fit.

2.8 The *Parties* agree that, on application by the *FCA*, the Court may be asked to consider a further *relevant term* to be added to the *representative sample of terms*, and further *assumed facts* and *questions for determination* added in respect of that term. Prior to the *FCA* making an application to add any such further *relevant term*, the *FCA* may consult with such insurer(s) as it considers appropriate, having regard to the proportion of the total business written on the relevant policy wording that is underwritten by such insurer(s). If not already a *Party*, one or more of such insurer(s) will be requested to apply to join the *test case* and agree to become a *Party* to this Agreement, and the other *Insurers* will have regard to the *overriding objective (under CPR Part 1)* and the terms of this Agreement in deciding how to respond to such application and accession.

## 3. COMMENCEMENT OF PROCEEDINGS

3.1 Nothing in this Agreement shall prevent any *Party* from seeking further or other case management directions or substantive relief insofar as such request is consistent with and and/or promotes the *mutual objective*. Subject to the approval of the Court, the *Parties* are free to agree changes to the timetable and the terms of this Agreement that further the *mutual objective*.

3.2 The *FCA* will, by **9 June 2020**, file and serve a Claim Form in the Commercial Court (the ***test case***) for a declaration in respect of the issues agreed to be determined in accordance with this Agreement. The current intention is to file a Part 7 Claim in the Commercial Court, Financial List with the intention of it being admitted to and conducted under the Financial Markets Test Case Scheme.

3.3 The *Insurers* will be cited in the *FCA's* Claim Form as Defendants to the *test case* and will support the *FCA's* standing to bring the *test case* and support the suitability of the Financial Markets Test Case Scheme for the *test case*.

3.4 The *FCA* and the *Insurers* will use all reasonable endeavours to present, by **9 June 2020**, a joint application to the Court for expedition of the *test case* and its admission to the Test Case Scheme. The application will propose the timetable materially set out in paragraph 5 of this Agreement.

3.5 If the *FCA* and the *Insurers* are unable to agree a joint application for admission to the Test Case Scheme and for expedition, the *FCA* will make an application that it considers to be reasonable, taking into account any comments or objections raised by the *Insurers*, and the

*Insurers* shall have regard to their obligations under paragraph 6.1 in deciding how to respond to such application.

## 4. AGREED EVIDENCE

4.1 The *FCA* and the *Insurers* shall discuss with a view to agreeing between themselves (and subject to any directions of the Court) prior to the first Case Management Conference what type of evidence, if any, will be submitted to the Court. It is expected that if any evidence is required it will be limited in nature, with as much information as possible being part of the *agreed facts*. The *FCA* expects that any evidence over and above information contained in the documents referred to in this Agreement will be limited to scientific evidence on discrete issues to assist policy interpretation.

## 5. PROPOSED TIMETABLE

5.1 The *Parties* agree on the following target timetable (subject always to paragraph 3.1 and the supervision of the Court), which the *FCA* and the *Insurers* will invite the Court to endorse in the application for expedition:

1. The *FCA* will, by **9 June 2020**, file and serve a Claim Form in the Commercial Court;

2. Each *Insurer* to file and serve an Acknowledgement of Service as soon as practicable after service of the *FCA's* Claim Form and in any event within 7 days;

3. The *FCA* to serve one composite set of Particulars of Claim relating to the *disputed issues* and the *policies* of each *Insurer*, and an application for expedition by **9 June 2020**;

4. A Case Management Conference to be held no later than the first available date after service of the Particulars of Claim to address (at least), use of the Financial Test Case Scheme, expedition, immediate directions, designation of judge(s) on the Financial List and/or a Lord or Lady Justice of Appeal, and listing of trial.

5. The *Insurers* to serve their Defences by **23 June 2020.** Each *Insurer* will plead separately to the part of the composite Particulars of Claim which concern it and will, so far as practicable, avoid unnecessary duplication in responding to aspects of the Particulars of Claim which are common to all *Insurers*;

6. A further Case Management Conference to be as soon as possible after **25 June 2020**.

7. The *FCA* to serve a Reply by **3 July 2020**;

8. Directions to be sought at the earliest opportunity to include (in addition to those above):

   a. Filing and service of evidence, if any;

   b. Settling the list of issues for trial (having regard to the *questions for determination*);

   c. Timing and sequencing of the exchange of skeleton arguments;

   d. Listing of trial, including time estimate, with the *Parties* seeking a trial as soon as reasonably practicable, the current intention being that such trial concludes (with the exception of any judgment) during July 2020;

   e. If applicable, intervention or otherwise by any representatives of policyholders or any other person desiring to join the *test case,* and the form any such interventions should take (including whether any interventions should be limited to written submissions or include oral submissions).

   f. Timetable for trial, to include time limits for oral submissions.

5.2 As soon as reasonably practicable, and prior to issuing the *test case* the *FCA* shall, in conjunction with the *Insurers,* liaise with the Commercial Court (such communications having commenced) to make enquiries concerning the feasibility of the target timetable and specifically in respect of the timing of:

   (a) the hearings referred to in paragraphs 5.1.4 and 5.1.6 above; and

   (b) the trial in paragraph 5.1(h)(d).

5.3 Upon signing this Agreement and prior to the *test case* being issued the *Parties* will comply with CPR 39.8 as though the *test case* had been issued and the *Parties* were parties to the *test case*.

## 6. MUTUAL OBJECTIVE, EXPEDITION, RELATED PROCEEDINGS

6.1 The *Parties* agree to act at all times constructively and in good faith to promote the *mutual objective*.

6.2 Subject always to the *overriding* objective, each *Party* agrees to cooperate with other *Parties* and to use reasonable endeavours to ensure that final resolution of the *test case* is achieved expeditiously and so far as reasonably practicable in accordance with the above target timetable. This will include in relation to matters such as electronic service of documents.

6.3 Subject always to any applicable legal duties and obligations and any applicable legal privilege, *the Insurers* must regularly keep the *FCA* updated about the progress of other court or arbitration proceedings to which it is a party and which is relevant to the questions to be determined in the *test case* and provide such information as the *FCA* requests in relation to them, but for the avoidance of doubt the *FCA* will not seek to prevent such proceedings from progressing.

## 7. SETTLEMENT AND EFFECT ON THE TEST CASE

7.1 Where an *Insurer* (the ***Settling Insurer***) settles any claim in respect of a *relevant term* in the *representative sample of terms* and the settlement has the effect that there is no longer any dispute or potential dispute between the *Settling Insurer* and its policyholders in respect of the *coverage issue* and the *causation issue* without prejudice to any other issues that may arise in resolving such claims, the *Settling Insurer* agrees to notify all other *Parties* in writing as soon as possible.

7.2 This shall not automatically lead to that part of the *test case* ceasing but, if the *FCA* considers that a replacement *relevant term* is required to resolve the same or similar questions that were to be determined in respect of the original *relevant terms* concerned, the *Parties* will endeavour to agree a replacement *relevant term* in a *policy* issued by an *Insurer* so that the *questions to be determined* can be properly considered by the Court.

7.3 Where it is not possible to identify a replacement *relevant term* in a policy issued by an existing *Insurer,* the *Parties* will endeavour to agree a replacement *relevant term* issued by a non-*Party* insurer that is willing to join the *test case.* Following agreement, that insurer will be invited to apply to be joined as a defendant in the *test case* and to agree to become a *Party* to this Agreement (and thereby become an *Insurer* as defined in this Agreement) and the *FCA* and the existing *Insurers* will support that application and agreement.

7.4 The *FCA* and the *Insurers* agree not to object to any application to amend statements of case that may be required as a result of such replacement.

7.5 The *FCA* and the *Insurers* agree that in the event of any amendments to the *test case* being required as a result of such replacement, they will take all reasonable steps to minimise any delay to the resolution of the *test case*.

7.6 If the *Parties* are unable to identify a suitable replacement *relevant term*, the *Settling Insurer* agrees to continue the *test case* to resolve the questions to be determined in respect of the original *relevant term*.

7.7 For the avoidance of doubt, but subject to the *Insurers'* legal obligations including under the *FCA*'s rules, the *FCA* confirms (in respect of its own functions) that full and final settlements entered into

between *Insurers* and policyholders before any judgment is handed down in the *test case* will not be affected by such judgment (in itself), and that such judgment (in itself) will not give rise to any regulatory obligation to revisit such settlements.

## 8. APPEALS

8.1 The *FCA* or any *Insurer* may appeal the decision of the Court determining the issues in the *test case* subject to the normal procedural rules for seeking permission for, and making appeals.

8.2 Where the *FCA* or any *Insurer* seeks to appeal the decision of the Court, whether to the Court of Appeal or beyond, that *Party* will seek to have their appeal heard on an expedited basis, and undertakes to take all reasonable steps to ensure that the appeal is conducted and determined on an expedited basis as soon as is reasonably practicable.

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

## 9. CO-ORDINATION OF LEGAL REPRESENTATION

9.1 The *Parties* agree that, taking into account the need for the *test case* to be resolved expeditiously (including therefore the need to resolve the issues within a practical trial length) and at proportionate cost, the *Parties* should use their best endeavours to co-operate.

9.2 The *Insurers* agree, so far as reasonably practicable and efficient in the time available, to coordinate their correspondence with the *FCA*'s solicitors relating to the *test case* and their written and oral submissions to the Court so as to minimise duplication, albeit that:

(a) each *Insurer* and the *FCA* recognises that each *Party* has separate independent legal representation and each of the *Insurers* has written different *policies* and *relevant terms*; and

(b) accordingly, each *Insurer* remains entitled to communicate and make submissions separately.

9.3 For the avoidance of doubt, nothing in this paragraph 9 shall preclude each *Insurer* appointing its own counsel and firm of solicitors to advise and represent it in the *test case*.

## 10. COSTS

10.1 Each *Party* is to pay its own costs of and associated with the *test case* and its own costs of any appeals initiated by any *Party*, and accordingly no *Party* will seek an order for costs against any other.

## 11. PUBLICITY

11.1 The *Parties* agree that this Agreement is not confidential and that this Agreement and the following documents may be published or disclosed to any person: the *representative sample of terms, agreed facts* and *assumed facts*, the *matrix*, and the *questions for determination.*

11.2 All pleadings, orders, skeleton arguments and evidence or other documents provided to or deployed in court shall be published by the *FCA* to the extent and in the manner and at the time directed by the Court at the first Case Management Conference save that the *Insurers* agree that the *FCA* may publish its own pleadings, orders, skeleton arguments evidence and documents.

11.3 The *Parties* agree that, in principle, publication of the *representative sample of terms*, *agreed facts*, *assumed facts*, the *matrix*, the *questions for determination*, all pleadings, orders, skeleton arguments and evidence or other documents provided to or deployed in court is necessary for transparency and to achieve the *mutual objective*. The *Parties* recognise that certain disclosures will take place after this Agreement comes into force, as set out in paragraph 2.5 and 11.1 above, and agree to this without reservation.

11.4 If a *Party* considers there is any reason why any documents should not be disclosed as envisaged in paragraph 11.2 and 11.3 of this Agreement then it must identify that material as soon as possible (and, unless impracticable, before it is deployed in or to Court) and provide reasons to the *FCA* as to why it should not be disclosed. If there is any dispute in relation to publication of this material then the Court hearing the *test case* will be asked to decide the issue. For the avoidance of doubt, paragraph 11 of this Agreement does not require any *Party* or the *FCA* to share any information which is subject to legal professional privilege.

11.5 This Agreement does not prevent or restrict the *FCA* from disclosing any confidential information (as defined in section 348 of the Financial Services and Markets Act 2000) as permitted under the provisions of section 349 of that Act.

## 12. THIRD PARTY RIGHTS

12.1 This Agreement does not give rise to any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

## 13. COMPETITION

13.1 This Agreement does not affect the *Insurers'* obligations under competition law, and it remains their responsibility to assess and

ensure their compliance. In the event that any *Insurer* considers that anything required to carry out the terms of this Agreement engages their obligations under competition law, the *Insurers* agree to put in place appropriate mechanisms with a view to ensuring that the *test case* continues and the *disputed issues* are determined according to the timetable specified by the Court. If any *Insurer* considers, after having taken competition law advice, that those arrangements will not be effective, the *Insurer* may consult with the *FCA*.

## 14. GENERAL

14.1 Words and phrases in italics have the meanings given to them where they appear in bold italic text.

14.2 No *Insurer* may contend that any documents or information sought by the *FCA* in the exercise of its regulatory functions are not to be produced because of the existence of the *test case* (subject to the usual constraints attaching to the exercise of the *FCA*'s powers). For the avoidance of doubt, paragraph 2.4 addresses the sharing of privileged information between *Insurers* and reinsurers.

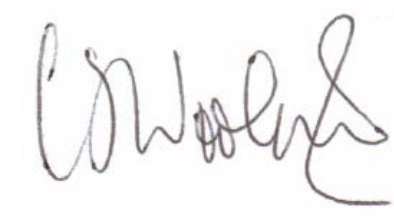
14.3 This Agreement may be executed in any number of counterparts, but is effective as between each *Insurer* and the *FCA* when executed by both of them.

14.4 A copy of the signature page to this Agreement that is sent electronically shall constitute adequate proof of the execution of this Agreement by the relevant *Party*.

14.5 This Agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales. The English courts shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement and the *Parties* submit to the exclusive jurisdiction of the English courts.

14.6 This Agreement will come into force at 7am on 1 June 2020.

Signed for and on behalf of **The Financial Conduct Authority**



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14.6 This Agreement will come into force at 7am on 1 June 2020.

Signed for and on behalf of **The Financial Conduct Authority**

By: _____

Signed for and on behalf of **MS Amlin Underwriting Limited**

By: 

Signed for and on behalf of **Arch Insurance (UK) Limited**

By: _____

Signed for and on behalf of **Argenta Syndicate Management Limited**

By: _____

Signed for and on behalf of **Ecclesiastical Insurance Office Plc**

By: _____

By: _____

Signed for and on behalf of **Arch Insurance (UK) Limited**

By: Clyde & Co LLP (solicitors for Arch Insurance (UK) Limited)

Signed for and on behalf of **Argenta Syndicate Management Limited**

By: _____

Signed for and on behalf of **Ecclesiastical Insurance Office Plc**

By: _____

Signed for and on behalf of **Hiscox Insurance Company Limited**

By: _____

Signed for and on behalf of **QBE UK Limited**

By: _____

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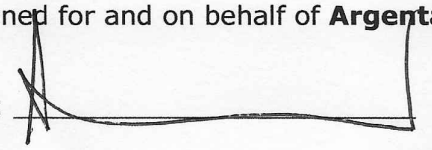
By: 

Signed for and on behalf of **Ecclesiastical Insurance Office Plc**

By: _____

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By: _____

Signed for and on behalf of **Argenta Syndicate Management Limited**

By: _____

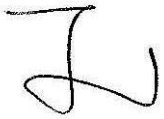
Signed for and on behalf of **Ecclesiastical Insurance Office Plc**

By: DocuSigned by: Mark Hews 244568F5E20B4D0...

Mark Hews

Group Chief Executive Officer

Signed for and on behalf of **Hiscox Insurance Company Limited**

By: 

Bob Thaker, Chief Executive Officer

Signed for and on behalf of **QBE UK Limited**

By: _____

Signed for and on behalf of **Royal & Sun Alliance Insurance plc**

By: _____

Signed for and on behalf of **Zurich Insurance Plc**

By: _____

Signed for and on behalf of **Hiscox Insurance Company Limited**

By: _____

Signed for and on behalf of **QBE UK Limited**

By: _____

Signed for and on behalf of **Royal & Sun Alliance Insurance plc**

By: _____

Signed for and on behalf of **Zurich Insurance Plc**

By: _____

Signed for and on behalf of **Hiscox Insurance Company Limited**

By: _____

Signed for and on behalf of **QBE UK Limited**

By: _____

Signed for and on behalf of **Royal & Sun Alliance Insurance plc**

By: _  _____

Signed for and on behalf of **Zurich Insurance Plc**

By: _____

Signed for and on behalf of **Royal & Sun Alliance Insurance plc**

By: _____

Signed for and on behalf of **Zurich Insurance Plc**

By: Tulsi Naidu, UK Chief Executive

Schedule
Insurer parties

1. MS Amlin Underwriting Limited
2. Arch Insurance (UK) Limited
3. Argenta Syndicate Management Limited
4. Ecclesiastical Insurance Office Plc
5. Hiscox Insurance Company Limited
6. QBE UK Limited
7. Royal & Sun Alliance Insurance plc
8. Zurich Insurance Plc

Claimant
M Brewis
First
[MB1]
9 June 2020

Claim No. FL-2020-000018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
FINANCIAL LIST
B E T W E E N:

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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WITNESS STATEMENT OF MATTHEW BREWIS

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I, Matthew Brewis, of The Financial Conduct Authority, 12 Endeavour Square, London, E20 1JN, WILL SAY AS FOLLOWS

## (1) Introduction

1. I am the Director of General Insurance and Conduct Specialists at the Financial Conduct Authority (the FCA) and have responsibility for the supervision of insurance firms, Lloyd's managing agents, insurance brokers and other intermediaries in accordance with the

regulatory framework established by the Financial Services and Markets Act 2000 (FSMA). I am duly authorised to make this statement in support of the FCA's application for expedition of the claim and for its admission to the Financial Markets Test Case Scheme. This statement has been prepared through discussions over the telephone and by email with the FCA's legal team and relevant colleagues. Save where otherwise indicated, the facts and matters set out in this witness statement are within my knowledge and true. Where they are not within my knowledge, they are based on the sources indicated and are true to the best of my knowledge and belief. I exhibit to this witness statement a bundle marked **[MB1]** containing true copies of the documents to which I refer below. Any references to "*insurers*" or "*insurance firms*" in this witness statement should be read as including Lloyd's managing agents.

2. The FCA believes that COVID-19 and the public health controls imposed by the Government as a result (which for ease I shall refer to as the "*COVID-19 pandemic*") are causing a substantial level of loss and distress to businesses, in particular (but not solely) to small and medium-sized businesses (SMEs). A large number of claims are being made to insurers under the terms of policies of insurance covering business interruption losses. Based on the FCA's review of the information available to it, insurers are currently paying or accepting liability for certain claims under certain policies. However, there remain a significant number of policies in the market under which claims have been and are continuing to be rejected, and in respect of which there is legal uncertainty as to whether the policies ought to respond.

3. Insurance for business interruption losses is an insurance that indemnifies a business for loss of profits, revenue or other forms of consequential loss arising from either physical/property damage or a non-damage peril. Smaller entities frequently buy this cover as part of a commercial combined policy. Larger businesses may buy this insurance as standalone cover. It is typically purchased through a broker. A commercial combined policy will generally include cover for property damage, employers' liability, business interruption and other risks. The larger an entity and the higher the sums insured the more likely they are to buy tailored products to fit their needs through a broker, but at the smaller end of the market business interruption cover is rarely bought on a standalone basis. Policies sold to smaller entities are often sold through schemes (tailored insurance products targeted at similar groups of businesses, such as nurseries, golf courses, or holiday lets). Brokers may act as an intermediary in these sales, or, potentially for some very small businesses, these may be bought via online platforms.

4. Many policies are written to allow for a business interruption claim when there is physical damage caused by insured perils (such as a fire or flood type scenario) to a building which means that the business is interrupted. Some firms, however, opt to buy policies that include cover or extensions for business interruption linked to triggers that do not involve damage. Business interruption cover is often subject to sub-limits and/or provides cover only for a limited period.

5. The FCA, as the conduct regulator of insurers in the United Kingdom, has been considering many of the policies in the market following concerns raised by policyholders and their representatives. It is concerned that there are a significant number of policies where there is legal uncertainty created by differences of opinion expressed by interested parties as to whether the terms of policies require that claims in respect of some or all business interruption losses are paid. Several businesses and groups of businesses have indicated their intention to challenge the rejection of their claims.

6. The FCA seeks resolution of this legal uncertainty for the purposes of exercising and performing its statutory powers and duties under FSMA in accordance with its strategic objective of ensuring that the relevant markets function well and its operational objectives of protecting and enhancing the integrity of the UK financial system and of securing an appropriate degree of protection for consumers. In particular, the pursuit of the FCA's regulatory and supervisory approach and policy-making in relation to insurers' handling of business interruption claims arising from the COVID-19 pandemic requires certainty as to the relevant legal obligations of the Defendants and other insurers.

7. In seeking to resolve this legal uncertainty and assist it in discharging its statutory functions, the FCA would, in presenting the claim to the court, advance arguments in the interests of policyholders in opposition to those of insurers, who will put forward their own cases, with the object of ensuring that all relevant arguments in respect of these opposing interests are put before the court. The FCA considers that, in seeking to obtain declaratory relief that will benefit policyholders in relation to questions concerning the scope of cover for COVID-19 business interruption claims, it is advancing its consumer protection objective. It would not be necessary or appropriate for the purposes of the FCA's regulatory objectives to test all issues under all policies. I shall explain below (at paragraph 46) the basis on which the FCA has identified the issues it wishes to test. The FCA has made clear its position that most SME insurance policies are focused on property damage (and only have basic cover for business

interruption losses as a consequence of property damage) so, at least in the majority of cases, insurers are not obliged to pay out in relation to the COVID-19 pandemic. This case is focused on the remainder of policies that are, in the FCA's view, suitable for consideration within the constraints of the test case procedure and in terms of the most effective use of court time. The fact that a particular issue in relation to a policy is not being tested should not be taken to indicate that the FCA does not consider such issues to be properly arguable.

8. The matter is urgent because insureds with policies in respect of which legal uncertainties arise as to whether there is cover for business interruption losses, and which are underwritten by the defendants and other insurers that wrote materially similar policies, are suffering widespread financial distress on a very large scale. It is important that the FCA can determine and pursue its regulatory supervisory approach and policy making based on a correct understanding of firms' legal obligations. For the avoidance of doubt, the FCA has no intention to 'retrospectively' apply a judgment in the test case. The question of whether an insurer has complied with its regulatory obligations as set out in paragraphs 20 to 22 below will be a matter to be judged against the circumstances which existed at the time. However, the FCA is consulting on guidance which, if issued, would set out the FCA's expectations on firms to determine whether their decisions on claims under their business interruption policies will be affected by the present claim, and how firms should handle those claims. The expectation being consulted on is that, once final resolution of the present claim has been reached, firms should apply the court's judgment where relevant to outstanding and previously rejected business interruption claims arising from the COVID-19 pandemic made under their affected policies.

9. I wish to make it clear that the FCA considers that the litigation is important not only to assist it in the discharge of its own statutory functions in the public interest but also for all market participants. The FCA understands that the defendants recognise that achieving legal certainty on an urgent basis on the issues raised by the claim is in the interests of all affected parties. I refer below to complaints made by others concerning the handling of claims for business interruption losses arising from the COVID-19 pandemic for the purpose of conveying to the court the degree of financial distress that the legal uncertainty regarding insurance for COVID-19 related business interruption losses is causing and the reasons why the FCA requires that uncertainty to be resolved to assist it in discharging its statutory functions. (Whether or not complaints made are justified may well depend on the outcome of the

litigation and I express no comment on this, other than as set out in this statement. I also acknowledge that the FCA may not have all the relevant context to the complaints and other information that it has received.) The FCA also understands that the defendants do not agree with everything that is stated in this witness statement, although we have sought to address as appropriate any specific factual points raised by insurers. By reason of its position as the conduct regulator of insurance firms, Lloyd's managing agents and insurance brokers, the FCA is well-placed to assess, and to seek to respond to, the consequences of the legal uncertainty surrounding insurance cover for business interruption losses in respect of the COVID-19 pandemic.

10. The remainder of this statement is divided into the following sections:

a. the FCA and the regulatory framework;

b. the FCA's initial policy and supervisory work to address the financial harm resulting from the rejection of business interruption claims arising from the COVID-19 pandemic;

c. the decision to bring the claim to assist the FCA to discharge its statutory functions;

d. consultation with policyholders and insurance intermediaries;

e. consultation with insurers, preparation of the claim and the conclusion of the Litigation Framework Agreement;

f. the suitability of the Financial Markets Test Case Scheme; and

g. urgency.

## (2) The Financial Conduct Authority and the regulatory framework

11. The regulatory framework for the supervision of insurance firms provides important context for my evidence below regarding the FCA's policy and supervisory work in relation to insurance claims for business interruption losses and the FCA's reasons for bringing this claim. Although this is not a matter of evidence, it may help the court to understand my statement if I provide a brief outline of the relevant aspects of the regulatory framework. The FCA's General Counsel's Division has assisted in the preparation of this section of my statement.

The FCA's statutory functions

12. The FCA has the functions conferred on it by or under FSMA (s1A(3)).

13. No person may carry on a regulated activity in the UK unless he is an authorised person or an exempt person (s19). Effecting and carrying out contracts of insurance in the UK are regulated activities (s22 and article 10 of the FSMA (Regulated Activities) Order 2001). Managing the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's is a regulated activity (s22 and article 57 of the of the FSMA (Regulated Activities) Order 2001).

14. The FCA is the conduct regulator of insurance firms in the UK. It must maintain arrangements for supervising authorised insurance firms (s1L(1))[1].

15. By s1B(6), the FCA's general functions include:

    a. making rules under FSMA;

    b. the giving of general guidance under FSMA;

    c. determining the general policy and principles by reference to which it performs particular functions under FSMA; these include the general policy and principles for supervising the conduct of insurance firms.

16. In discharging its general functions, the FCA must, so far as reasonably possible, act in a way which is compatible with its strategic objective (s1B(1)(a)). The FCA's strategic objective is ensuring that the relevant markets function well (s1B(2)). The relevant markets include the financial markets and the markets for services provided by insurance firms in carrying on regulated activities (ss1F and 1H(2)(a)).

17. In discharging its general functions, the FCA must also, so far as reasonably possible, act in a way which advances one or more of its operational objectives (s1B(1)(b)). The FCA's operational objectives are as follows:

    a. *securing an appropriate degree of protection for consumers (ss1B(3)(a) and 1C(1)).* Consumers are broadly defined to include all persons (including incorporated businesses)

[1] The Prudential Regulation Authority, which is a part of the Bank of England, is responsible for the prudential regulation and supervision of insurers.

who use, have used or may use services provided by authorised persons in carrying on regulated activities: ss1B(3)(a), 1C(1) and 1G(1)(a).

b. *protecting and enhancing the integrity of the UK financial system (ss1B(3)(b) and 1D(1)).* The UK financial system means the financial system operating in the UK and includes financial markets and exchanges and regulated activities (s1I). The *integrity* of the UK financial system includes, so far as relevant, its soundness, stability and resilience and the orderly operation of financial markets (s1D(2)).

c. *promoting effective competition in the interests of consumers (ss1B(3)(c) and 1E).*

18. The FCA may make such rules applying to authorised persons with respect to the carrying on by them of regulated activities as appear to the FCA to be necessary or expedient for the purpose of advancing one or more of its operational objectives (s137A(1)(a)).

19. The FCA has a broad power to give guidance consisting of such information and advice as it considers appropriate:

a. with respect to the operation of specified parts of FSMA and any rules made by the FCA;

b. with respect to any other matter relating to the functions of the FCA;

c. with respect to any other matters about which it appears to the FCA to be desirable to give information or advice (s139A(1)).

<u>The regulatory obligations of insurance firms</u>

20. Firms authorised to effect and carry out contracts of insurance or manage the underwriting capacity of a Lloyd's syndicate as a managing agent at Lloyd's in the UK must comply with the following regulatory obligations (among others) when handling insurance claims for business interruption losses arising from the COVID-19 pandemic.

a. A firm must pay due regard to the interests of its customers and treat them fairly (Principle 6).

b. A firm must act honestly, fairly and professionally in accordance with the best interests of its customer (ICOBS 2.5.-1 R).

c. A firm must:

(1) handle claims promptly and fairly;

(2) provide reasonable guidance to help a policyholder make a claim and appropriate information on its progress;

(3) not unreasonably reject a claim (including by terminating or avoiding a policy); and

(4) settle claims promptly once settlement terms are agreed (ICOBS 8.1.1 R).

21. The FCA's Handbook also contains rules governing firms' complaints procedures and their handling of complaints in DISP 1. Specific rules setting out firms' regulatory obligations in resolving complaints are set out in DISP 1.4. These include provisions regulating the investigation and assessment of customers' complaints and the provision of appropriate redress (DISP 1.4.1R). Factors that may be relevant to the assessment of a complaint include relevant guidance provided by the FCA (DISP 1.4.2G).

22. Treating customers fairly is the core regulatory principle that governs the relationship between authorised firms and their customers. The FCA has set out six consumer outcomes that firms should strive to achieve to ensure fair treatment of customers:

a. Outcome 1: Consumers can be confident they are dealing with firms where the fair treatment of customers is central to the corporate culture.

b. Outcome 2: Products and services marketed and sold in the retail market are designed to meet the needs of identified consumer groups and are targeted accordingly.

c. Outcome 3: Consumers are provided with clear information and are kept appropriately informed before, during and after the point of sale.

d. Outcome 4: Where consumers receive advice, the advice is suitable and takes account of their circumstances.

e. Outcome 5: Consumers are provided with products that perform as firms have led them to expect, and the associated service is of an acceptable standard and as they have been led to expect.

f. Outcome 6: Consumers do not face unreasonable post-sale barriers imposed by firms to change product, switch provider, submit a claim or make a complaint.

23. FSMA provides for disciplinary measures that may be taken if authorised persons breach the relevant requirements (ss204A-211). A breach of regulatory requirements may also enable the FCA to exercise other powers, including to seek injunctions (s.380) and restitution orders (s382).

**(3) The FCA's initial policy supervisory work to address the financial harm resulting from the rejection of business interruption claims arising from the COVID-19 pandemic**

24. On 16 March 2020 the Prime Minister issued a statement urging everybody in the UK to avoid non-essential contact and travel, work from home if possible, and avoid *"pubs, clubs, theatres and other such social venues"* **[MB1/20-22]**. As a result the FCA sought to identify the insurance products that might be particularly impacted by the COVID-19 pandemic so that it could start to plan for any regulatory issues that might arise as a result.

25. On 17 March 2020, I attended a call with the Economic Secretary of the Treasury, representatives of the Association of British Insurers (ABI), the Prudential Regulation Authority (PRA), Lloyd's and approximately 10 insurance firms. The matters discussed included whether the Government's advice to the public not to visit pubs, clubs and restaurants would be treated, for insurance purposes, as a closure order. That was of particular relevance to policies covering business interruption losses where coverage can be triggered by such an order. I believe there may have been subsequent communications by or with the Treasury following the meeting in which I was not involved. Later that day, the Chancellor of the Exchequer made the following statements in Parliament:

> "*for those businesses that do have a policy that covers pandemics, the Government's action is sufficient and will allow them to make an insurance claim against their policy*"
>
> and
>
> "*after extensive meetings today between my hon. Friend the Economic Secretary to the Treasury and the insurance industry, the insurance industry will honour insurance contracts that would have been triggered if the advice had been to ban certain things, rather than it being advisory not to do them*." **[MB1/23-97]**.

26. The FCA published a statement on 19 March 2020 setting out our expectations for insurance firms in light of the COVID-19 pandemic **[MB1/98-101]**. This outlined our expectation that firms must treat their customers fairly and consider the needs of any potentially affected by COVID-19. This publication was not directed solely at insurers with policies covering business interruption losses. Rather it was a statement directed at insurers generally, outlining the FCA's expectations that insurers consider the needs of their customers and the need for flexibility in the treatment of them.

27. On 23 March 2020, the Prime Minister instructed the public that people must stay at home other than for the limited purposes of: shopping for basic necessities, as infrequently as possible, one form of exercise a day, any medical need, to provide care, or to help a vulnerable person, and travelling to and from work where this is absolutely necessary and cannot be done from home. I will refer to these measures as the "*public health controls*" **[MB1/102-104]**.

28. As noted above, the FCA understands that insurers have accepted liability under certain policies and denied liability under other policies. Furthermore, a number of insurers have discussed with the FCA their approach to claims for business interruption losses. Since the announcement of 23 March 2020 the FCA has received significant correspondence and information from various sources about the rejection of a significant number of claims for business interruption losses in relation to non-damage terms across the market and of the ongoing hardships that policyholders believe that they are suffering as a result. Those sources included letters from MPs on behalf of constituents, complaints made by policyholders and media reports of actions groups. I provide the following overview of this information.

<u>Letters from Members of Parliament on behalf of constituents</u>

a. Since the public health controls began on 23 March 2020 the FCA has been receiving correspondence from MPs requesting support for their constituents who are not receiving payments from insurers for what they believe to be valid claims for business interruption losses and are suffering financial and possibly emotional distress as a result. As of 1 June 2020 the FCA had received 105 emails/letters from MPs about these issues. I shall give some examples of these.

b. On 25 March 2020, an MP wrote to the FCA to express his concern that his constituents were facing the "*likelihood of bankruptcy*" in the absence of successful business interruption claims **[MB1/105-106]**.

c. Another MP echoed this concern in an email to the FCA on 30 March 2020, less than a week after the public health controls were imposed, where he described himself as *"inundated"* by correspondence from constituents concerned that insurers are not paying out for legitimate claims and urging the FCA to take action **[MB1/107-108]**. The MP gave an example of one small business which he felt would have no option but to file for bankruptcy if they did not receive business interruption cover:

> "*I am especially worried for one small business, whose bank is not accredited to take part in the Coronavirus Business Interruption Loan Scheme and whose landlord has been unwilling to offer them rent relief. They were reliant on an insurance pay out on a business interruption claim to keep the business ticking over both so that their 14 employees could access the Coronavirus Job Retention Scheme and until they were able to reopen following the de-escalation of the health crisis. However, their insurance provider refuses to pay out. What recourse do they now have other than to file for bankruptcy?*"

d. This MP passed on correspondence from a number of constituents, including one who said that he had been told by a broker that they would have cover available if there was an outbreak within 25 miles, but that he was later told this cover was not available **[MB1/107-108]**:

> "*I have a clause in my business interruption insurance for our cafe which states 'Human contagious infection' and was in touch with the broker … for a few weeks before we had to close. The guy there said I could make a claim with that clause and that I was lucky to have that clause at all. He also said that it would be valid if there was an outbreak within 25 miles radius of the cafe.*
>
> *The response I have just had basically tells me it's now not valid for a claim. How can this be right?*
>
> *It's not even like it will be that much in the grand scheme of things but would be a huge help for us.*
>
> *I thought maybe if there was a confirmed case in [location] or within 25 miles I might get somewhere? I just think this is very very wrong. Especially with the policy having a contagious disease clause.*"

e. A further MP has similarly described himself as being *"inundated with owners of pubs, hotels and other leisure businesses in my constituency"* **[MB1/120-125]**.

f. On 14 April 2020, a further MP raised with the FCA concerns from a constituent who has a café that had only been open nine weeks and five days before it had to close due to COVID-19. Having invested heavily in the business before the imposition of the public health controls, his constituent said he had insufficient cash to replace the stock which would deteriorate during the period of the public health controls and was in a severe financial situation **[MB1/126-131]**.

g. On 11 May 2020, a further MP's office forwarded to the FCA an email sent by one of his constituents who works in the wedding industry, noting that:

> "*if we are unable to re-open our venues until after July, as an industry, we will need further financial support to avoid businesses from going under, and the mass redundancies that will likely ensue. Without continued financial support the cost to the Treasury will be substantially increased, due to unemployment costs, and the reduced tax take*" **[MB1/197-199]**.

h. On 19 May 2020, a further MP wrote to the FCA in support of his constituent, whose business had been adversely affected by flooding in February 2020 and was only re-opened for a week when it was required to close as a result of the COVID-19 pandemic **[MB1/214-215].**

i. On 19 May 2020, a further MP wrote to the FCA in support of a charity, which is expecting to lose a third of its income as a result of having to close its charity shops and day centres, in the absence of its business interruption cover responding **[MB1/216-220]**.

j. Some 51 of the MP letters relate to the RSA Cottagesure policy which has a Business Interruption Extension providing cover in respect of a Notifiable Disease within 25 miles of the premises. These set out a standard form complaint, in the following terms:

> "*We are insured through RSA/Gallagher's Cottagesure Policy, which has a Business Interruption extension. Over 2200 small rural businesses are covered by this policy, many of which are now facing considerable hardship and potential financial ruin. The policy offers broad cover in respect of Covid-19 and states*

*clearly that we are covered if closure of our business happens as a result of a notifiable human disease manifesting itself at the premises or within a radius of 25 miles of the Premises, which is the case. However, we are being refused cover on the basis of RSA's view that we are not covered because of the Government lockdown. There is nothing in the policy which allows for this exclusion. The Financial Conduct Authority are bringing an action against insurers to try and bring about an early resolution to this issue, and are looking at a range of policies from a number of Insurance Companies. Please may I ask you to write to the Financial Conduct Authority and press them to make sure that the RSA/Gallagher's Cottagesure Policy is included in their review? This would help both us and the other 2200 rural businesses that have this policy, some of which I'm sure will be in your constituency*."

For the avoidance of doubt the FCA understands that RSA does not accept this characterisation of its position **[MB1/200-201]**.

Complaints to the FCA

k. The FCA had also received a considerable number of complaints from policyholders in connection with claims for COVID-19 related business interruption losses either through our online and telephone "*Supervision Hub*", or sent directly to the FCA's senior management or contact centre. As at 28 May 2020, there had been 353 calls to the contact centre from March to May, including 327 consumer queries and 26 firm queries. HM Treasury has referred to the FCA some of the complaints that it has received. In circumstances where the COVID-19 pandemic is having a huge impact on financial services contracts generally and on the capacity of businesses and consumers to meet their financial commitments, complaints related to insurance in relation to business interruption losses have been one of the most significant category of complaints over the last two months.

l. The FCA has sought to log these complaints to inform supervisory activity. As noted above, these started following the Prime Minister's announcement of public health controls on 23 March 2020. The vast majority of the complaints that were logged to inform supervisory activity related to business interruption claims under non-damage extensions of the kind contemplated in this claim.

Media reports of action groups

m. There has been increasing media coverage of insurers declining claims for business interruption losses. This coverage initially focussed particularly on two policyholder action groups that had been formed, the Hiscox Action Group and the RSA Cottagesure Action Group, but other policyholder action groups have also been formed and have received media coverage (details of which I outline below).

n. The Hiscox Action Group describes its purpose as to "*take any action necessary to ensure that Hiscox Insurance is forced to pay out on thousands of valid BI insurance claims*" **[MB1/232-233]**. It is said to have been launched on behalf of around 400 SMEs with up to £40 million in claims to bring group arbitral proceedings against Hiscox. This action group is represented by the law firm Mishcon de Reya LLP. By way of example of the kind of complaint being made, one member of the Hiscox Action Group has commented *"for many of our members, this insurance is the difference between survival and bankruptcy, and we are determined that they should get the money they are entitled to as soon as possible"* **[MB1/211-213]**.

o. The RSA Cottagesure Action Group comprises 250-300 business owners **[MB1/223-224]** in the holiday-let cottage sector operating in the self-catering accommodation market. They bought policies underwritten by RSA through the Cottagesure scheme **[MB1/143-144]**. The group is represented by the law firm Edwin Coe LLP **[MB1/223-224]**.

p. A further group action against RSA and Hiscox is said to be being prepared by Edwin Coe LLP **[MB1/225-228]**. The group action against Hiscox is said to be in conjunction with a claims specialist. There are so far said to be around 60 claimants in this group **[MB1/223-224]**.

q. Edwin Coe LLP is also said to be working with Harris Balcombe to represent claimants in claims against Allianz under its Resilience MD&BI policy wording **[MB1/186]**.

r. The Hospitality Insurance Group Action (HIGA) was launched on behalf of hospitality sector businesses. They are also represented by Mishcon de Reya LLP, who have identified at this stage two insurers against whom group claims may be brought, Aviva and QBE. They have said that the next steps will be disclosed by 10 June 2020 **[MB1/221-222]**.

s. The Night Time Industries Association (NTIA) is a trade association for night time premises such as restaurants, pubs and bars. The NTIA has announced that it will, together with the NDML, an insurance broker for nightclubs, bars, pubs, restaurants and hotels, be coordinating COVID-19 related business interruption claims against Hiscox **[MB1/137] [MB1/173-174]**.

t. Potentially over 40 insureds represented by the law firm Fieldfisher are said to be joining a group action against QBE **[MB1/149-151]**. Fieldfisher's website also has sign-up pages for insureds with policies with Ecclesiastical, Hiscox and RSA so further groups may soon follow **[MB1/234-236]**.

u. Fieldfisher is also representing claimant businesses in the childcare provision sector. The claimants bought their policies through the Early Years Alliance, an early years membership association in England, and the packages were underwritten by RSA. Around 40 businesses are so far said to be looking to join the action **[MB1/138-142]**.

v. The "QIC Action Group" has appointed Shepherd and Wedderburn LLP to advise on its legal action against QIC Europe (QEL) and Eaton Gate **[MB1/168]**.

w. The "Covid Claims Group" has been formed to represent more than 850 small business owners affected by the declinature of coverage. The group has said in an open letter to the ABI that "*denying claims for business interruption due to COVID-19 will directly result in the collapse of thousands of companies that might otherwise have survived this crisis. Thousands more jobs will be needlessly lost and the burden on the British taxpayer will increase*" **[MB1/191-196]**.

x. Finally, Michelmores LLP announced on 6 May 2020 that it is launching a series of group actions on behalf of businesses affected by the COVID-19 pandemic and is currently accepting registrations of interest from policyholders **[MB1/189-190]**.

29. By early April 2020, we had begun to discuss the options that the FCA might pursue by way of supervisory action in light of the complaints made by policyholders. We were concerned, by that stage, that if valid claims were being rejected insureds might face failure of their business as a result. The FCA began to consider what steps should be taken to ensure that business interruption claims were handled promptly and fairly in accordance with insurers' regulatory obligations. A number of options were under consideration at that stage.

30. On 15 April 2020, the FCA published a letter addressed to Chief Executive Officers of insurance firms **[MB1/132-133]**. We use what are known as "*Dear CEO letters*" when we need to send a message quickly to a regulated market, or to a significant portion of the market, around the FCA's views, which can be made public. The letter was directed at insurers of SMEs and focused specifically on insurance for business interruption losses. The letter stated that, based on the FCA's conversations with the industry to date, our estimate was that most policies have basic cover, do not cover pandemics and therefore would have no obligation to pay out in relation to the COVID-19 pandemic. However, the letter also stated that, in the FCA's view, there were policies where it was clear that the insurer has an obligation to pay out and, in respect of those claims, it would be important that insurers assess these claims and settle them quickly.

31. The FCA issued the Dear CEO letter because there was considerable uncertainty in the market as to whether a large number of policies ought to respond to COVID-19 claims and policyholders urgently needed this uncertainty to be resolved to alleviate financial distress and where possible to avoid businesses being at risk of insolvency. We were conscious of the importance of business interruption payments being made to policyholders as swiftly as possible where cover was accepted. Even in ordinary circumstances it can take a long time for payments to be made under a policy for business interruption losses because the sum due often has to be calculated by reference to anticipated income. We were keen to ensure that, where cover was accepted, interim payments were made to policyholders so as to ensure they had sufficient liquidity. Following the Dear CEO letter, the ABI set out on their website certain principles for handling business interruption claims ("*ABI Principles for Handling Business Interruption Claims related to COVID-19*") including with regard to interim payments that:

> "*5. Insurers will seek, where possible, to make interim or part payments where claims are ongoing.*
>
> *6. These interim or part payments will flow from the claim and evidence presented, helping to relieve some of the more immediate pressures that customers are facing*".

32. The ABI have also stated on their website as follows:

> *"In the instance where there are valid claims, ABI members are working tirelessly to support their customers, through the swift payment of valid claims, interim payments*

*to their customers, and providing clear and quick answers to their questions. Insurers have been managing an unprecedented level of activity, with some insurers reporting a 200% rise in call volumes"* **[MB1/237-238]**.

33. Lloyd's also stated in an update on their website:

> "*Many of you are receiving and asking various questions regarding policy coverage relating to COVID-19 claims […] There have been many varied and very specific questions that have been raised and answered, whilst some of the more 'general' ones are noted below:*
>
> ***Pandemic / contagious disease extensions:*** *where such unspecified extensions are provided, on business interruption or contingency covers, Lloyd's would expect this to include losses related to COVID-19*" [**MB1/271-272]**.

34. Our Dear CEO letter also highlighted that smaller businesses could seek to resolve disputes through the Financial Ombudsman Service. The rules on this are set out at DISP 2.7.3R. Smaller businesses for this purpose are (in summary) those businesses with an annual turnover below £6.5 million, and fewer than 50 employees or a balance sheet total of less than £5 million. The Ombudsman operates the statutory scheme under which certain disputes may be resolved quickly and with minimum formality by an independent person (s225(1) FSMA). A complaint is to be determined by reference to what is, in the opinion of the Ombudsman, fair and reasonable in all the circumstances of the case (s228(2) FSMA). In considering what is fair and reasonable in all the circumstances of the case, the Ombudsman will take into account relevant law and regulations, relevant regulators' rules, guidance and standards and relevant codes of practice and, where appropriate, what he considers to be good industry practice at the relevant time (DISP 3.6.4R). It follows that although the Ombudsman may, where appropriate in the circumstances, direct a firm to provide redress notwithstanding that it has not breached any legal obligation owed to the customer, the legal rights and obligations of the parties under the relevant contract are material to the determination of what is fair and reasonable in all the circumstances. The Ombudsman has informed us that, as at 28 May 2020, 103 complaints are at the investigation stage of the Ombudsman process. To bring a complaint to the Ombudsman, a customer must first make a complaint to the firm. The firm has eight weeks in which to provide a final response setting out whether the firm accepts the complaint and where appropriate offers remedial action or redress, offers remedial action or

redress without accepting the complaint, or rejects the complaint and the firm's reasons for doing so (DISP 1.6.2R). It is the customer's decision whether to submit a complaint to the Ombudsman and (subject to the time limits in DISP 2.8.1R and DISP 2.8.2R) when to do so. Unless the parties agree to earlier consideration, the Ombudsman can usually only consider a complaint if the firm has already sent the customer its final response or, if sooner, eight weeks have elapsed since the firm received the complaint (DISP 2.8.1R). The FCA is aware from the response to its data request that many insurers have only come to decisions recently on claims and consequently time will still be running under DISP 1 for the response to any complaints made about the decision on the claim. The FCA expects that the number of complaints to the Ombudsman will grow as insurers complete their claims and complaints procedures.

35. The feedback we received from policyholders following our Dear CEO letter of 15 April 2020 was that the issues between policyholders and insurers generally continued to remain unresolved.

**(4) The decision to bring the claim to assist the FCA to discharge its statutory functions**

36. On 15 April 2020 we sent an information request to certain insurance firms who sold insurance covering business interruption losses asking them to confirm the policies under which they were paying COVID-19 business interruption claims. At this time a number of options were under review, including a court process.

37. We ultimately determined that a test case brought by the FCA was the most appropriate and expeditious way of achieving the degree of legal certainty required at a proportionate cost. The FCA seeks to establish that cover is available for business interruption claims under the policies that are the subject of the claim and in any event, to have the essential legal issues resolved in order to assist it to discharge its statutory functions, and in particular to enable it to:

    a. assess whether insurers, and intermediaries handling claims on their behalf, are complying with their legal (including regulatory) obligations in relation to the handling of business interruption claims and associated complaints;

    b. determine and pursue the FCA's regulatory and supervisory policy in relation to insurers' and intermediaries' handling of business interruption claims arising from the COVID-19

pandemic and to further develop the policy and principles for supervising those matters; and

c. consider what, if any, further rules and guidance it should issue in relation to those matters.

38. The announcement of the FCA's intention to bring a test case was made publicly on 1 May 2020 **[MB1/169-170]**. On 1 June 2020, the FCA issued draft guidance for consultation regarding the handling by insurers and intermediaries of business interruption claims under policies which may be affected by the court's judgment in the present claim **[MB1/263-266]**. In summary, the draft guidance highlights particular steps that the FCA considers that firms should take to identify whether their decisions on business interruption claims under their policies will be affected by the test case; to keep policyholders informed about the test case and its implications for policies, claims and any settlement offers; and to treat policyholders fairly when the test case is resolved. It is intended that, if issued, the guidance will come into force when the FCA issues the claim form or shortly thereafter.

**(5) Consultation with policyholders and insurance intermediaries**

39. Once the decision had been made to proceed with a test case, we were concerned to ensure that we captured and took into account as much feedback and information from policyholders and insurers as we reasonably could. This was so as to ensure that the test case addressed the most critical and widespread business interruption coverage and causation issues, and would therefore provide the degree of certainty that the FCA and the markets require in relation to as many claims for COVID-19 business interruption losses as possible in an expeditious and proportionate way. We therefore issued a further announcement on 15 May 2020 explaining what was intended for the proceedings **[MB1/209-210]**.

40. Our announcement of 15 May 2020 also invited policyholders and insurance intermediaries to provide information, in particular:

a. arguments as to why policyholders consider cover is available, together with details of policies that policyholders consider have not responded appropriately to a claim; and

b. a brief statement of the relevant facts of the case.

41. As at 21 May 2020, the FCA had received upwards of 1,200 email submissions from policyholders, policyholder groups, brokers, lawyers and interested groups during a period of 5 days.

42. The submissions made by policyholders in response to the FCA's announcement of its intention to bring a test case present a picture of widespread closures of business premises, cancellations of bookings across a variety of businesses and consequential loss of income, which for many businesses is substantial. Insurance claims have been made under various notifiable disease, non-damage denial of access or closure by public authority extensions, many of which have been denied by insurers.

43. The FCA has also received correspondence and submissions from a number of insurance brokers. Many have said that they are finding that claims are being rejected by insurers and that disputes are arising under wordings. The following are some of the points made by insurance intermediaries:

a. The FCA's proactive stance in seeking clarity on the key coverage issues is welcomed.

b. Clarification is needed now at a time of "*unprecedented stress to the insurance industry and the British economy generally*".

c. It is in all parties' interests to secure clarity as early as possible.

d. Some insurance brokers are concerned about long-term damage to the reputation of the insurance industry.

e. A number of brokers referred to the urgency of achieving certainty as to cover. By way of example, one group of insurance intermediaries referred to the *"swift resolution needed"*, commenting that it is *"widely known many businesses are struggling through the current pandemic and that many VSMEs [very small and micro-enterprises] simply do not have the cash reserves and/or cash flow to last this out. It would be regrettable if cover was established, but if it were too late for many small businesses, which we fear may happen due to Insurers delay and intransigence."* Another broker asked that *"where Insurers can provide cover or where there is ambiguity that these claims are met as quickly as possible"*.

f. Some brokers have suggested that many policies are clear and do not provide cover under their business interruption sections for claims relating to COVID-19 and that insurers are responding quickly to clients.

44. Also in this correspondence and these submissions insurance brokers have suggested that, in dealing with claims, insurers are doing the following:

a. Insurers are not considering individual policy wordings properly.

b. Insurers are not providing enough detail in declinature letters.

c. Insurers are declining cover where brokers believe that cover should be provided.

d. Insurers are referring to the *"intentions"* behind certain clauses as a reason to deny cover, in some scenarios leaving *"clients confused, frustrated and often angry, as the wordings… read like they should respond to this event, despite any argument the insurer may have around the original design and intention"*.

**(6) Consultation with insurers, preparation of the claim and the conclusion of the Litigation Framework Agreement**

45. As I have mentioned, in order to assist the FCA in the discharge of its statutory functions and in particular to determine and pursue its regulatory and supervisory policy, the FCA seeks to establish that cover is available for business interruption losses under the policies that are the subject of the claim and, in any event, to achieve legal certainty in relation to as many claims for COVID-19 business interruption losses as possible in an expeditious and proportionate way.

46. A thorough and urgent process has been undertaken in order to identify appropriate relevant wordings to be tested in the test case, details of which were set out in our announcement of 1 June 2020 **[MB1/261-262]**. Since the FCA's announcement on 1 May, we have approached 56 insurers and reviewed over 500 relevant policies from 40 insurers. As mentioned in paragraph 41, over 1,200 emails from policyholders and brokers have also been carefully reviewed and considered. Supported by external counsel, we have thoroughly considered the information we received to enable us to decide which selection of policy wordings would be representative of the key issues in dispute between policyholders and insurers. We have identified a sample of approximately 20 policy wordings that capture the majority of the key

issues that could be in dispute. Each defendant has policies with one or more of the policy wordings. The overall approach has been to identify an appropriate selection of policy wordings and insurers that will enable the majority of the key issues to be expeditiously and justly resolved in a proportionate and efficient way.

47. The claim is intended to promote the objective of informing the FCA's regulatory and supervisory policy and achieving the maximum clarity possible for the maximum number of policyholders and their insurers consistent with the need for expedition and proportionality. It will not test all policies or all issues. We are confident that we have identified sample wordings which will provide clarity in relation to the majority of contentious issues between insurers and policyholders.

48. The ABI and British Insurance Brokers Association (BIBA) welcomed the FCA's proposal for a test case in a public statement issued on 1 May 2020 **[MB1/171]** and [**MB1/172**]. The FCA, certain insurers and the ABI then liaised to consider in principle how the appropriate legal certainty could best be achieved. This included the initial development of a framework agreement for the litigation pursuant to which the FCA would commence proceedings against an appropriate selection of insurers for declaratory relief. The draft agreement covered a range of matters in principle, including the nature of the issues to be resolved, how they would be resolved by reference (where applicable or necessary) to assumed facts, and an expedited timetable directed towards a trial in July 2020.

49. From 23 May 2020, following the selection by the FCA of a short list of potential defendant insurers following the process summarised at paragraph 46 above, the FCA engaged with those insurers to seek to agree the draft framework agreement and various related documents intended to identify the relevant policies and terms, assumed facts and issues for determination.

50. The Framework Agreement was entered into between the FCA and the defendants on 31 May 2020 **[MB1/239-260]**.

51. The FCA is confident that, following the thorough and robust process described in paragraph 46 above, it has identified sample wordings which, together with assumed facts (which, based on the consultation which has taken place with insurers, policyholders and brokers, are regarded as representative of actual claims made by insureds under policies that provide cover for business interruption losses that will be refined and agreed with insurers for the purpose

of the trial), will enable the court to grant declarations that will provide clarity in relation to the majority of contentious issues between insurers and policyholders and will assist the FCA to discharge the statutory functions described in paragraph 37 above.

**(7) The suitability of the Financial Markets Test Case Scheme**

52. For the reasons I have explained above, the FCA considers that there is legal uncertainty as to whether certain policies issued by insurance firms cover business interruption losses arising from the COVID-19 pandemic. Although it is not possible to give a firm estimate of the number of affected claims and their value, based on information up to early May 2020, the FCA has been informed of approximately 8,500 claims under policy wordings likely to be affected by the test case. The value of those claims was calculated at approximately £1.2 billion, on the assumption that those claims were fully paid up to any policy limit or sub-limit identifiable from the policy wording. This estimate is derived from preliminary calculations undertaken by the PRA based on information and data provided by the FCA. The figure may be updated in due course as further data is received from insurers. It was not possible, based on information readily available to the FCA, to independently assess the likely quantum of these claims in such a way that would provide an accurate assessment of the actual exposure of the relevant insurers. However, I note that Zurich identified its potential exposure in 2020 to all UK business interruption claims related to COVID-19 as USD$200 million net of reinsurance if all industry wordings reviewed provide cover for business interruption in relation to COVID-19 **[MB1/267-270]**. Hiscox has carried out a UK business interruption risk scenario which models the impact of a 12-week lockdown and, based on that scenario, it estimates a range of modelled outcomes of between £10 million and £250 million net of reinsurance **[MB1/175-185]**. RSA has reported that as at the end of April 2020, RSA Insurance Group had received valid claims across travel, wedding cancellation (UK only) and commercial lines business interruption and related policies with an estimated cost of c.£25 million net of reinsurance. RSA confirmed on 1 June 2020 that this estimated cost has not changed materially since then **[MB1/273-274]**.

53. I understand from the FCA's legal advisers that, to have this matter heard under the Financial Markets Test Case Scheme, the court must be satisfied that the requirements of Practice Direction 51M – Financial Markets Test Case Scheme are met.

54. I understand that there will be legal submissions in due course on whether the claim is suitable for the Scheme. It may assist if I explain the following matters that may be relevant to the court's assessment of this:

a. the FCA's view on the importance of the claim for the financial markets;

b. why, in the FCA's view, the proceedings raise issues of general importance in relation to which immediately relevant authoritative English law guidance is needed; and

c. why this claim is suitable as a test case.

55. I take each of these points in turn.

<u>The importance of the claim for the financial markets</u>

56. This matter raises important issues for the financial markets. I explain the various potential impacts on the market below.

57. *Quantum in issue:* Exposure to business interruption losses has a potentially very significant financial impact on insurers. As I have set out above at paragraph 52, the value of the affected claims may exceed £1 billion. I note further that Lloyd's of London has indicated that it expects to pay between $3 billion and $4.3 billion to global customers as a result of COVID-19 across all classes of business. This would be on a par with the 9/11 terrorist attacks and the combined impact of hurricanes Harvey, Irma and Maria in 2017 **[MB1/205-208]**.

58. *Insurer dividends:* The impact of COVID-19 has already caused financial uncertainty for insurers in the market. The PRA wrote an open letter to insurers on 31 March 2020 stating that it expected that, when insurers' boards were considering any distribution to shareholders or making decisions on variable remuneration, it expected them to pay close attention to the need to protect policyholders and maintain safety and soundness. It stated:

> "*In the current situation of high uncertainty, it is therefore critical that insurers manage their financial resources prudently in order both to ensure that they are able to meet the commitments they have made to policyholders in a way that is consistent with the expectations of the Financial Conduct Authority, and to enable them to continue to invest in the economy.*" **[MB1/109]**

On 2 April 2020 the European Insurance and Occupational Pensions Authority released a statement that "*in the context of the current crisis all (re)insurers should take measures to preserve their capital position in balance with the protection of the insured, following prudent dividend and other distribution policies […]*" and that "*Against this background of uncertainty, EIOPA urges that at the current junction (re)insurers temporarily suspend all discretionary dividend distributions and share buy backs aimed at remunerating shareholders*" **[MB1/110-11]**. On 8 April 2020, Hiscox, RSA and Aviva withdrew their recommendations to pay 2019 dividends to their shareholders, all citing COVID-19, and referring variously to "*the uncertain impact of COVID-19 on the global economy*", the "*extraordinary challenges presented to us all by COVID-19*" and the "*significant uncertainties presented by COVID-19*" **[MB1/114-115, MB1/116-117, MB1/118-119]**. These uncertainties and challenges do not relate solely to cover for business interruption losses. The PRA also released a statement on 8 April 2020 welcoming the "*prudent decision from some insurance companies today to pause dividends given the uncertainties associated with Covid-19*" **[MB1/112-113]**.

59. *Impact on reinsurance market:* The FCA understands that there is concern amongst the insurance market that, absent clarity on whether insurers are liable, insurers may be unwilling to pay policyholders in respect of claims because of the lack of certainty regarding recovery from reinsurers.

<u>Why in the FCA's view the proceedings raise issues of general importance in relation to which immediately relevant authoritative English law guidance is needed</u>

60. This has largely been addressed above, but I emphasise the following points.

    a. The number and value of claims potentially affected is believed to be very large (see paragraph 57).

    b. The legal uncertainty risks causing substantial financial distress and, in the FCA's view, also risks eroding confidence in insurers and in the insurance market.

    c. Legal certainty is necessary to assist the FCA to discharge its statutory functions in the furtherance of its statutory strategic objective to ensure that the relevant markets (including the insurance market) function well, and of its statutory operational objectives

of securing an appropriate degree of protection for consumers and protecting and enhancing the integrity of the UK financial systems.

d. I understand from the FCA's lawyers that the construction of non-damage business interruption covers where claims arise in the context of a pandemic and national government advice and action raises some novel and important legal issues, including as to the application of a previous decision reached in the context of property damage, *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm), [2010] Lloyd's Rep IR 531.

For these reasons, the matter is urgent (see further section 8 below).

Why this claim is suitable as a test case

61. There are some policy wordings in the market on which many claims rely because hundreds or thousands of policyholders take out policies on the same or substantially the same wording.

62. Further, there is a significant degree of convergence of the kinds of issues that arise in relation to non-damage business interruption clauses, which make them susceptible to being tested on agreed or assumed facts. Put simply, the same or similar issues arise time and again.

63. I refer to Section 6 of my statement which explains how the approach adopted towards selecting policies for these proceedings was designed to achieve the maximum clarity possible for the FCA and the maximum number of policyholders (especially, although not solely, SMEs) and their insurers that is consistent with the need for expedition and proportionality. It is the FCA's intention that all proper arguments on the issues in question will be before the court.

64. The clarity afforded by a decision on coverage on the selected wordings would, the FCA expects, result in all market participants being in a much-improved position to determine in a timely way the extent to which losses are covered and, in the case of the FCA, what if any further regulatory action should be taken to ensure that business interruption claims are handled promptly and fairly.

**(8) Urgency**

65. The urgency will be apparent from what I have already said. I provide the following additional information as context to the FCA's belief that the matter is both important and urgent.

66. Since all non-essential businesses were ordered to close on 23 March 2020, businesses and in particular SMEs have been under immense financial strain to stay afloat. According to media reports, research conducted by the Association of Practising Accountants reported in late April found that about 60% of owner-managed businesses in the UK had less than 12 weeks' cash in the bank, whilst 40% had less than eight weeks' **[MB1/145-146]**. It has been reported that insolvency experts Begbies Traynor have said that half a million UK firms are at risk of collapse **[MB1/159-167]**. It may take some time before the actual position becomes clearer from official data on company dissolutions.

67. As is well known, the Government has taken various measures to help businesses deal with the consequences of the public health controls (such as the furlough scheme and deferral of VAT). Clearly for those SMEs struggling with cashflow problems timely payment of an indemnity under a policy which provides cover for business interruption losses could prove invaluable. The potential relevance of such policies to the financial position of businesses is indicated, for example, by the fact that it was reported that in late April 2020 only 1% of hospitality firms had seen claims for business interruption caused by the COVID-19 pandemic approved by insurers according to the trade body UK Hospitality **[MB1/134-136]** and in early May 2020 it was reported that the British Institute of Innkeepers found that just 3% of pubs had been successful in their claims for business interruption losses **[MB1/187-188]**. A report by Aston Business School in mid-May 2020 showed that the denial of business interruption claims may lead to the closure of 127,000 firms and the loss of more than 635,000 jobs over the following month with 11% of those surveyed believing that they would close within a month if they could not successfully claim on their insurance policy for business interruption losses **[MB1/202-204]**.

68. The media has reported on numerous examples of individual businesses which have been put under significant financial pressure. These reflect the position that emerges from the correspondence received from MPs and policyholders that I have summarised in paragraphs 28a-l above. For example, according to media reports:

    a. Reel Cinemas, a cinema chain with 14 branches, has been left "*with almost no income and forced to furlough 196 of its 235 employees*". It is said that Reel Cinemas has "denial of access" cover, pays an annual premium of £250,000 and that Axa "*has failed to pay out on a claim of up to £7m over losses caused by the coronavirus lockdown*" **[MB1/147-148]**.

b. Ms English runs the Lansdown Arms pub in Lewis: *"We have no Premier League games and maybe a 20% to 30% hit on trade. I have been paying into the policy for almost 20 years, it is compulsory for us to have it [under her tenancy] and it is going to let us down just when we need it. We're going to take a real hit and I already know I can't pay my VAT bill. We are now paying VAT [due from] December when it was Christmas and everything was fab. We are now thinking if it is better to close down for a few months and pick up then?"* **[MB1/18-19]**.

c. Mr Fox, the managing director of Craft Local which runs three pubs in North London: *"We still have overheads to pay, landlords are still issuing us invoices for rent, yet our sales have been reduced to zero… We have a responsibility to our 56 employees and our communities to make it through this crisis. Removing some of the financial stress and liabilities that we thought were covered by our insurance would be a good starting point"* **[MB1/152-158]**.

69. The impact of COVID-19 on SMEs in turn has a significant impact on the UK economy. According to statistics published by the UK Government, there were 5.9 million SMEs in the UK in 2019, which comprised over 99% of all businesses in that year. Those businesses accounted for 60% of employment and 52% of turnover in the UK, being approximately £2,168 billion **[MB1/1-17]**. Insurers have suggested their exposure for all business interruption claims could be very substantial (see paragraph 52 above).

70. It is the FCA's view that it is therefore a matter of compelling public interest to provide urgent legal certainty for the benefit of the FCA, policyholders, the defendant insurers and the wider insurance market.

71. The court's judgment in this claim would need to be applied to many affected policies and claims. Issues of quantum would still need to be determined.

72. On the assumption that many policyholders will be able to operate their businesses from around June 2020 onwards, in accordance with the recent announcement by the Government dated 25 May 2020 **[MB1/229-231]**, it is hoped that an early judgment following a trial in July 2020 would allow policyholders' cover, if and where cover is found to exist, to be confirmed as quickly as possible to facilitate the continuation of their businesses (to the extent they have survived in the meantime). This would be subject to the impact of any appeal. I note also that business interruption losses arising from the COVID-19 pandemic may still be

incurred by an operating business (for example, due to social distancing requirements), although the extent of any cover will depend on the policy terms. Resolution of the issues in this claim therefore remains urgent even where businesses are entitled to resume operations from June 2020.

**Statement of Truth**

I believe that the facts stated in this witness statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Signed.....M. Brewis.....

**MATTHEW BREWIS**

Dated:..9...June...2020.....

**Claim Form**
**(CPR PART 7)**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**
**SHORTER TRIALS SCHEME**

19 Jun 2020

CL-2020-000380

**Claim No.**

**Issue date: 19 June 2020**

**Claimant:** K7 Holdings Limited, 24 Castilian Street, Northampton NN1 1JX

**Defendant:** New India Assurance Company Limited, 36 Leadenhall Street, London EC3A 1AT

For the purpose of CPR 3.12(1)(b) this claim is valued at less than £10 million.

| **Defendant's name and address** |
|---|
| As above. |

| | **£** |
|---|---|
| **Amount claimed:-** | In excess of £390,000 |
| **Court fee:-** | £10,000 |
| **Legal Representatives Costs** | To Be Assessed |
| **Total amount:-** | Unspecified |

| **Claim No.** | |
|---|---|

**Brief details of claim**

The Claimant asserts a breach of contract claim against the Defendant, which is based on an insurance policy purchased by the Claimant from the Defendant ("**Contract**"). In breach of the Contract, the Defendant has denied that the Claimant's insurance claim falls within the terms of the Policy and that it is liable to indemnify the Claimant. This in turn has occasioned loss to the Claimant of at least £390,000. Accordingly, the Claimant seeks (i) a declaration that it is entitled to be indemnified under the terms of the Contract (ii) an indemnity under the Contract in respect of the loss sustained or, alternatively, damages amounting to such an indemnity and (iii) interest.

Does, or will, your claim include any issues under the Human Rights Act 1998? [ ] Yes [x] No

Particulars of Claim are attached.

**STATEMENT OF TRUTH**

The Claimant believes that the facts stated in this claim form are true.
I am duly authorised by the claimant to sign this statement.

The Claimant understands that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

Full name: Richard Leedham
Name of claimant's legal representative's firm: Mishcon de Reya LLP of Africa House, 70 Kingsway, London WC2B 6AH

Signed Position or office held Partner
Claimant's legal representative

Dated:- 19 June 2020

| | |
|---|---|
| Mishcon de Reya LLP of Africa House, 70 Kingsway, London WC2B 6AH<br>DX 37954 KINGSWAY<br>Tel: 020 3321 7000<br>Ref: RL/CN/62353.1 | Claimant's legal representative's address to which documents or payments should be sent |


**Claim No.**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**
**SHORTER TRIALS SCHEME**

**B E T W E E N:-**

**K7 HOLDINGS LIMITED**

**Claimant**

**-and-**

**NEW INDIA ASSURANCE COMPANY LIMITED**

**Defendant**

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**CLAIM FORM**
**(CPR PART 7)**

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Mishcon de Reya LLP
Africa House
70 Kingsway
London
WC2B 6AH

Tel: 020 3321 7000

Ref: RL/CN/62353.1

**Legal representative for the Claimant**

**Claim No. xxxxx**

**IN THE HIGH COURT OF JUSTICE**

**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**
**SHORTER TRIALS SCHEME**

**BETWEEN**

**K7 HOLDINGS LIMITED** **Claimant**

**and**

**NEW INDIA ASSURANCE COMPANY LIMITED** **Defendant**

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## PARTICULARS OF CLAIM

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### Parties

1. The Claimant owns and operates four bars and restaurants in Northampton, England: Aperta Bars Limited T/A Brooklyn Social; AZDC Limited T/A Sazerac Bar; Aperta Bars Limited T/A The Old House; and LHBR Limited T/A The Lighthouse (together the "**Premises**").

2. The Premises are insured by the Claimant under a Hotels, Guest & Public Houses insurance policy number HPGIP1401069 dated 25 February 2020 (the "**Policy**") purchased from the Defendant.

### The Policy

3. The Policy provides as follows at Section 3 – Loss of Income:

> ***Cover***
>
> *The Insurer will indemnify the Insured for*
>
> *1 (a) loss of Income*
>
> *(b) additional expenditure*
>
> *resulting from*


*...*

*(ii) ...*

*(c) any occurrence of a Notifiable Disease within a radius of 25 miles of the Premises*

*occurring during the Period of Insurance and the amount payable as Indemnity shall be*

*(a) the shortfall between the Income received during the Indemnity Period and the Income which would have been received but for the Damage*

*(b) the additional expenditure necessarily and reasonably incurred to avoid such a shortfall but only to the extent of the shortfall thereby avoided*

*less any sum saved during the Indemnity Period on business expenses or charges which cease or reduce as a result of the Damage*

***Definitions***

*Income*

*The money paid or payable to the Insured for goods sold and delivered (less the net purchase price of such goods) and for services rendered in the course of the Business at the Premises.*

*Notifiable Disease*

*Illness sustained by any person resulting from…*

*(b) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them.*

*Indemnity Period*

*...*

*(b) in respect of 1(ii), (iii), (iv) and (v) of Cover*

*The period beginning with the occurrence or discovery of the incident or the date from which the restrictions on the Premises are applied and lasting no longer than three months thereafter during*

*which the results of the Business shall be affected as a result of the incident or restriction.*

4. The schedule to the main policy document (the "**Schedule**") defines the Business as "*Bar and Restaurant with residential accommodation above*."

5. The Schedule further provides that each of the four Premises is insured for Loss of Income with a limit of £600,000 for Aperta Bars Limited T/A Brooklyn Social; AZDC Limited T/A Sazerac Bar; and LHBR Limited T/A The Lighthouse and a limit of £800,000 for Aperta Bars Limited T/A The Old House.

6. The Claimant will rely on the Policy at trial for its full terms and effects. The relevant policy documents are appended to these Particulars of Claim.

7. Further, by Section 13A of the Insurance Act 2015, a term was implied into the contract that, if the Claimant made a claim under the contract of insurance, the Defendant would pay any sums due within a reasonable time.

**Closure of the Premises**

8. At 6.15pm on 5 March 2020, a statutory instrument was made into law that added COVID-19 to the list of notifiable diseases and SARS-COV-2 to the list of notifiable causative agents. This change was made by adding them to the Health Protection (Notification) Regulations 2010. The effect of this was that Registered Medical Practitioners have a statutory duty to notify the 'proper officer' at their local council or local health protection team of suspected cases of Covid 19.

9. Accordingly, from 5 March 2020 Covid-19 was a Notifiable Disease (as defined above).

10. Due to the inherent difficulties with identifying the location and timing of each case of Covid-19, the Claimant is not presently able to calculate the precise number of cases of Covid-19 within a 25 mile radius of each of the Premises at any particular date. However, as of 16 March 2020, and at least up until the date of these Particulars of Claim, it is averred that there were a very substantial number of cases within a 25 mile radius of each of the Premises. In particular:

10.1. A 25 mile radius of Northampton includes the following towns (in addition to Northampton itself) Corby, Market Harborough, Kettering, Bedford, Rugby, Milton Keynes, and Banbury (see the map annexed hereto).

10.2. On 3 March 2020, the Department of Health confirmed the first case of Covid-19 within Northamptonshire.

10.3. The first recorded death of a person with Covid-19 (a "**Covid-19 Death**") in the Northampton Local Tier Lower Authority ("**Northampton LTLA**") occurred on 18 March 2020. All four of the Premises are located within Northampton LTLA which itself is only 6 to 7 miles in diameter. Accordingly, each occurrence of Covid-19 within Northampton LTLA was within 25 miles of each of the Premises.

10.4. In the week beginning 16 March 2020 there was a further Covid-19 Death in Northampton LTLA and in the week beginning 23 March 2020 there were four further Covid-19 Deaths.

10.5. As at 11 May 2020, Northampton LTLA had 392 laboratory confirmed cases of Covid-19 and as at 1 June 2020 Northampton LTLA had 500 laboratory confirmed cases of Covid-19.

10.6. Further, in relation to the UK more broadly, as at 16 March 2020 there were 3,225 laboratory confirmed cases of Covid-19 in the United Kingdom. That figure represents a substantial underestimate of the actual number of Covid-19 cases within the UK as at that date since the confirmed cases rely on a test for Covid-19 having been carried out. This is demonstrated by the fact that, at a press conference on 12 March 2020, the Chief Scientific Adviser, Sir Patrick Vallance stated that, at that date, about 590 cases had been identified, but it was likely that the real figure was much higher, up to 10,000.

10.7. In fact, a study by Imperial College and Oxford University referred to in the Sunday Times of 22 May 2020 ("*22 days: How three weeks of dither and delay at No 10 cost thousands of British lives")* indicates that the true numbers of Covid 19 cases in the UK far exceeded the numbers set out in the official figures. The study estimates that the UK had 320,000 infections on March 16, 2020, and

that the number of infections were increasing by 300,000 per day so that there was estimated 1.5 million infections by 23 March 2020.

10.8. Still further, for the same reason as given in the sub-paragraph above, the figures relating to confirmed cases of Covid-19 within Northampton LTLA and Northamptonshire at paragraphs 9.2 and 9.5 above also substantially underestimate the actual number of cases of Covid-19 within both those areas.

10.9. Accordingly, as at 16 March 2020 and 23 March 2020, it is estimated that there were very substantial numbers of cases of Covid 19 within a 25 mile radius of the insured Premises as set out in paragraph 9.1 above.

11. On 16 March 2020 the UK government issued advice stating that UK citizens should not visit restaurants and bars due to the considerable danger of the transmission of Covid 19 by people congregating in such premises leading to death or serious illness.

12. Following the advice, on 16 March 2020 at 6pm, the Claimant closed each of its Premises. The closure was caused by the presence of Covid-19 (a Notifiable Disease) within 25 miles of each of the Premises.

13. The Premises have remained closed as a result of the presence of Covid-19 within 25 miles of each of the Premises throughout the Indemnity Period as defined above.

14. As a result of the closure of the premises, the Claimant has suffered loss of income throughout the Indemnity Period (less sums saved during the Indemnity Period as a result of the closure of the Premises) amounting to at least £390,000. Full particulars will be supplied in due course.

15. Further, as a result of the closure of the Premises and the Defendant's failure to settle the Claimant's claims once notified (as set out further below), the Claimant suffered cash-flow difficulties. The Claimant incurred additional expenditure in order to mitigate these difficulties. In particular, the Claimant entered into a loan agreement for £500,000 paying an arrangement fee of £50,000 as well as interest of 12% per annum for two years.

16. The Claimant is entitled to be indemnified by the Defendant under the Policy in respect of all such loss of income and additional expenditure.

**Notification of the Claims**

17. In accordance with the Policy, the Claimant notified the Defendant of its loss on 16 March 2020. The Claimant made a separate claim for each of the four Premises.

18. On 19 March 2020, Mr Newbound of PSC UK Central Services ("**PSC**") (who the Claimant understands was the claims handler on behalf of the Defendant) contacted the Claimant's insurance broker Oncover Insurance Services ("**Oncover**") acknowledging notification of the Claimant's four claims. Mr Newbound provided a claim reference code for the claim in respect of the Brooklyn Social Premises (the "**Brooklyn Social Claim**") but no reference code was provided for the remaining claims. Mr Newbound further stated:

> *Due to the high number of claims the insurer is receiving they have made the decision to appoint a loss adjuster who will work through what documents are required with the insured. If you could confirm the best contact or if to come through you first.*
>
> *The process will be a slow one but New India are doing everything they can to keep matters moving.*

19. Oncover then sent a number of follow-up emails to advise PSC of the absence of a reference code for the remaining claims. PSC responded on 26 March 2020 providing New India reference numbers for the remaining three premises and stating:

> *The insurer is allocating loss adjusters to the various claims and will be in contact with the insured party soon. This will be by phone or e-mail. As you can appreciate at this stage this process will be a slow one but the insurer is doing all it can to move things along.*

20. On 1 April 2020, Sedgwick International UK ("**Sedgwick**"), the Defendant's loss adjuster, contacted the Claimant by email (in relation to the Brooklyn Social Claim only) requesting various information and stating:

> *We have been appointed by New India to make contact with you in order to investigate the circumstances of the claim and to review certain financial data that we will specifically request from you…*
>
> *You are aware that at this stage, New India are unable to confirm whether your claim as notified is actually within the scope of the policy cover nor whether such claim is therefore to be indemnified. None of our requests or actions should be taken as an indication that the claim is accepted. If there is an acceptance of policy liability*

*and an offer of indemnity, this will only be expressly communicated to you by New India in writing.*

21. This was the first point at which the Defendant (or any party acting on its behalf) had stated that there was any doubt as to whether there was coverage under the Policy in respect of the Brooklyn Social Claim or otherwise. No explanation was provided by the Defendant at that time (or at any other point until 28 May 2020, following the letter before action sent by the Claimant to the Defendant on 14 May 2020) as to why there was (on the Defendant's case) any such uncertainty.

22. On 1 April 2020, the Claimant supplied the requested information to Sedgwick. As noted above, Sedgwick had only requested information in relation to the Brooklyn Social Claim. On 2 April 2020 the Claimant nonetheless supplied the equivalent information in relation to each of the other three Premises for which claims had been notified together with the Brooklyn Social Claim on 16 March 2020.

23. On 2 April 2020, Sedgwick requested further information in respect of the Brooklyn Social Claim. This information was provided the next day.

24. By 7 April 2020, no further communication had been received from Sedgwick or the Defendant. On that date, in an email to Sedgwick, the Claimant requested authorisation for an interim payment due to cash flow issues. Sedgwick replied on the same date stating that no interim payment would be made unless and until the Defendant confirmed the Brooklyn Social Claim was covered under the Policy. Sedgwick also confirmed they had received notification of the claims in relation to the three other Premises that morning. Later on 7 April 2020 the Claimant sought confirmation via email from Sedgwick as to when the Brooklyn Social Claim would be assessed and / or confirmed. Sedgwick did not reply to this email.

25. On 14 April 2020, the Claimant again sought confirmation via email from Sedgwick as to when its claims would be assessed and / or confirmed. Sedgwick did not reply to this email.

26. On 21 April 2020, the Claimant repeated its request for confirmation as to when its claims would be assessed and / or confirmed. Sedgwick responded on the same date stating it was unable to give any update as to the timeframe for assessment / confirmation since it had not been given that information by the Defendant. By 27 April

2020, Sedgwick still had not provided any response to the Claimant's repeated requests for confirmation as to the timeframe for the processing of its claims.

27. On 27 April 2020, Oncover contacted the Defendant via telephone and was informed that Sedgwick had not provided the Defendant with any information regarding the Claimant's four claims. The Claimant understands that Sedgwick provided its reports for each of the claims to the Defendant on 29 April 2020.

28. Accordingly, by 2 April 2020 the Defendant had by its agent Sedgwick received all the information it required in order to investigate and assess the claim. In breach of the implied term of the Policy (set out above), the Defendant failed to pay the sums due in respect of the claims within a reasonable time of this date, which would have been on 16 April 2020 at the latest, alternatively 13 May 2020 (i.e. two weeks after Sedgwick provided the reports to the Defendant).

29. On 14 May 2020, Mishcon de Reya, acting on behalf of the Claimant sent a detailed letter before action to the Defendant.

30. On 28 May 2020, by an email sent by its General Manager, the Defendant unequivocally rejected liability for the Claimant's claim and stated that this was its final response to the claim.

31. Notwithstanding the above purported final response to the claim, in a further letter dated 16 June 2020, the Defendant repeated its rejection of the Claimant's claim albeit, at the same time, stating that it "*may*" at some undefined point in the future "*reassess our decision in respect of your claim*." For the avoidance of doubt, the Claimant avers that this amounts to a denial of liability under the Policy.

**Loss and Damage**

32. In breach of the Policy, the Defendant has denied that the Claimant's claims falls within the terms of the Policy and that it is liable to indemnify the Claimant.

33. Further, in breach of the implied term of the Policy, the Defendant failed to pay the sums due within a reasonable time and / or otherwise acted in breach of the implied term as a result of the conduct set out above.

34. By reason of the Defendant's failure to pay the sums due in respect of the claims within a reasonable time or at all, the Claimant has suffered loss and damage. Further particulars will be supplied in due course.

35. Further, the Claimant claims interest upon such sums as it may be awarded for such period and at such rate as the Court shall think just pursuant to S.35A of the Senior Courts Act 1981.

AND the Claimant claims:

(1) A declaration that the Claimant is entitled to be indemnified under the terms of the Policy in respect of the loss suffered.

(2) An indemnity under the Policy in respect of that loss alternatively damages amounting to such an indemnity.

(3) Interest as set out above, pursuant to S.35A of the Senior Courts Act 1981.

**JEFFREY GRUDER QC**

**FREDDIE ONSLOW**

**STATEMENT OF TRUTH**

The Claimant believes that the facts stated in these Particulars of Claim are true.
I am duly authorised by the Claimant to sign this Statement.

The Claimant understands that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

**Signed:** S Kooner.....

**Full name:** Sandeep Kooner

**Position:** Director

**Dated:** 19.6.2020