TEXT TO ACCOMPANY FORM 1:

Permission to Appeal to the Supreme Court

filed on behalf of MS Amlin Underwriting Limited

A. Introduction

1. This application for permission to appeal to the Supreme Court is filed on behalf of MS Amlin Underwriting Limited ("**MS Amlin**").

2. This is a leapfrog application brought pursuant to section 13(1) of the AJA 1969. A leapfrog certificate was granted by the trial judges, Flaux LJ and Butcher J (sitting as a Divisional Court) ("**the Court**"), on 2 October 2020.

3. The first three matters listed on page 5 of Form 1 (namely, narrative of the facts, statutory framework and chronology of proceedings) are addressed in a joint document produced on behalf of all appellant Insurers. The request for expedition (see page 7 of Form 1) is also addressed in the joint document. This document addresses the remaining five matters on page 5 of Form 1, and, where appropriate, utilises the same definitions as set out in the joint document.

B. Issues before the Court appealed from

4. The Court considered issues of coverage and causation arising under three 'lead' MS Amlin policy wordings – referred to in the Judgment as MSA 1, MSA 2 and MSA 3. The relevant insuring clauses under those wordings, which the FCA claimed responded to COVID-19 BI losses, fell into the categories of 'disease clauses' and 'prevention of access' wordings (see description of the categories of insuring clauses at Judgment, [8]).

5. MS Amlin's appeal is only concerned with the disease clauses. The Court held that the prevention of access wordings did not respond to COVID-19 BI losses (see declarations 21-23 made by the Court in the Order dated 2 October 2020).[1]

6. The relevant disease clauses are contained in the MSA 1 and MSA 2 lead wordings and

[1] The FCA has, however, sought permission to appeal to the Supreme Court in relation to certain issues arising under the MSA prevention of access wordings.

are set out in the Judgment at [178]-[180], [183]-[184] ("**the MSA disease clauses**"). They are materially identical. For present purposes, reference is made to the disease clause in MSA 1 which provides, in relevant part, as follows:

> "*We will pay you for:*
>
> *…*
>
> ***6. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide***
>
> ***Consequential loss*** *as a result of interruption of or interference with the* ***business*** *carried on by* ***you*** *at the* ***premises*** *following:*
>
> *…*
>
> *a)…(iii) any* ***notifiable disease*** *within a radius of twenty five miles of the* ***premises****…*"

7. Consequential loss is defined in the MSA 1 wording as:

> "*Loss resulting from interruption of or interference with the* ***business*** *carried on by* ***you*** *at the* ***premises*** *in consequence of* ***damage*** *to property used by* ***you*** *at the* ***premises*** *for the purpose of the* ***business.***"[2]

8. Notifiable disease is defined in the MSA 1 wording (in so far as relevant) as:

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

9. The key issue that arose for determination by the Court in relation to the disease clauses

[2] As recorded in [186] of the Judgment, "*The FCA accepts that the definition of "consequential loss", which itself refers to "damage" must be manipulated in order to apply to the "Notifiable disease" covers in MSA 1 and 2, for otherwise there could be no recovery in respect of those non-damage perils.*"

generally (including those in MSA 1 and 2) is described in the Judgment as follows at [81]: "*whether there is cover in respect of a pandemic where it cannot be said that the key matters which led to business interruption, and in particular the governmental measures, would not have happened even without the occurrence of COVID-19 within the specified radius, as a result of its occurrence or feared occurrence elsewhere.*"

10. In so far as the MSA disease clauses are concerned, the principal issues of dispute before the Court were:

10.1 Whether (as MS Amlin argued) the cover provided under the MSA disease clauses is for the BI consequences of a person or persons within the 25 mile radius of the insured premises sustaining illness resulting from COVID-19, or, whether (as the FCA argued) the cover is for all the BI consequences 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. (See Judgment, [185], [187], [189]-[190]; see also [91]-[92], [101], [108][3]).

10.2 The meaning of "*following*" in the MSA disease clauses and specifically:

(a) whether "*following*", when construed in its contractual context, imported a proximate cause requirement and therefore, at a minimum, a factual ("but for") causation requirement (as MS Amlin argued) or a looser causal connection which, notwithstanding therefore a causal element, did not import "but for" causation (as the FCA argued);

(b) whether even on the FCA's case that "*following*" imported a causal connection looser than that of proximate cause, it nevertheless required at a minimum the application of a factual ("but for") causation test (as MS Amlin argued), or, whether (as the FCA argued) that causal connection was satisfied on the basis that any occurrences of notifiable disease within the 25 mile radius were an effective cause of the subsequent government action

[3] References are made to paragraphs in the Judgment addressing the RSA 3 disease clause because the Court has held that its conclusions in relation to that disease clause apply to the MSA disease clauses: see Judgment, [189], [191].

causing interference with the insured's business either (i) because there was one indivisible cause, i.e. COVID-19, of which all the individual occurrences formed part, or (ii) because there were many different concurrent effective causes, of which any occurrence of notifiable disease within the 25 mile radius was one, and none of which was excluded. (See Judgment, [187], [193]-[194]; see also [99]).

10.3 Whether (as MS Amlin argued) the basis of settlement provisions, including the so-called trends clauses, applied to the MSA disease clauses, or, whether (as the FCA argued) their application was confined to property-damage based BI cover, and did not extend to the non-damage BI additions to cover. (See Judgment, [186], [188]).

10.4 Whether the correct counterfactual when calculating an indemnity (whether under the applicable trends clauses or otherwise) is to assume (i) that, once cover under the policy is triggered, there were no person(s) within the 25 mile radius of the insured premises who had sustained illness resulting from COVID-19 but COVID-19 remained everywhere else (as MS Amlin argued), or (ii) that there was no COVID-19 anywhere in the UK and no public and public authority response thereto (as the FCA argued). (Judgment, [92], [187]).

C. <u>Treatment of issues by the Court appealed from</u>

11. These issues are addressed by the Court at [93]-[113], [121]-[122], [189]-[199], [532]-[533] of the Judgment. A number of these paragraphs concern the disease clause in the RSA 3 policy. The Court held that the issues raised in relation to both wordings were, in essence, the same, and that its conclusions in relation to the RSA 3 disease clause applied in relation to the MSA disease clauses: see [189], [191] of the Judgment.

12. The Court concluded that there was cover under the MSA disease clauses for all COVID-19 BI losses from the date that the insured can prove that there were cases of COVID-19 within the specified 25 mile radius (see, for e.g., Judgment, [113]). More specifically, the Court held as follows:

12.1 There is cover for all the BI losses at or in connection with an insured's premises in consequence of COVID-19 anywhere in the UK (both within and outside the 25 mile radius) provided that, and after the date when, there had been at least one instance of COVID-19 within the 25 mile radius (Judgment, [102]-[109], [113], [122], [196], [532]).

12.2 The insured peril was a composite one of "*interruption of or interference with the **business** carried on by **you** at the **premises** following any **notifiable disease** within a radius of twenty five miles of the **premises***" (Judgment, [94]).

12.3 "*following*" does not import a proximate cause requirement, but rather a looser causal connection that does not require the application of any factual ("but for") causation test (Judgment, [95], [193]-[195]).

12.4 The causal requirement "*following*" is "*clearly satisfied*" by the occurrence of a case of COVID-19 within the 25 mile radius if that occurrence was part of a wider picture which dictated the response of the authorities and the public which itself led to the business interruption or interference (Judgment, [111]).

12.5 Even if "*following*" imports a proximate cause requirement, that 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*", or alternatively, "*each of the individual occurrences was a separate but effective cause*" of the government action and the loss caused to insureds (Judgment, [111]-[112], [532]-[533]).

12.6 If, properly construed, there is cover for the effects of a disease which may occur both within and outside the specified radius, and which may trigger a response of the authorities and the public to the outbreak as a whole, then it would be inconsistent with the nature of the cover to regard the occurrence of the disease outside the radius, or the response of the authorities or the public to that occurrence of the disease, as being alternative, uncovered, causes of the business interruption (Judgment, [110]).

12.7 The basis of settlement provisions, including the trends clauses, in MSA 1 and MSA 2 are applicable to the non-damage covers, including the MSA disease clauses (Judgment, [198]).

12.8 Where the policyholder has *prima facie* established a loss caused by an insured peril, it would be contrary to principle, unless the policy wording so requires, for that loss to be limited by the inclusion in the counterfactual of any part of the composite insured peril in the assessment of what the position would have been if the insured peril had not occurred (Judgment, [121], [199]).

12.9 As the trends clause is intended simply to put the insured in the same position as it would have been had the insured peril not occurred, and given the Court's construction of the ambit of the insured peril in the disease clauses, the correct counterfactual is to assume that there was no business interruption referable to COVID-19 including via the authorities' and/or the public's response thereto (Judgment, [122], [199]).

12.10 There is no cover for any business interruption or interference related to COVID-19 before the first occurrence of notifiable disease (as defined) within the 25 mile radius (Judgment, [122]).

D. Relevant orders made in the Court below

13. The declarations made by the Court are embodied in an order dated 2 October 2020.

14. The declarations which are concerned with the MSA disease clauses are as follows: declarations 1, 6, 8, 10, 11.1, 11.2(a), 11.3, 11.4, 13, 20.2 and 20.3.

15. Of these, it is only **declarations 10, 11.1, 11.2(a), 11.4, 20.2** which are the subject of this appeal.

E. Proposed Grounds of Appeal

16. MS Amlin's proposed grounds of appeal are attached as Appendix 1.

F. Reasons why permission to appeal should be granted

17. The test for the granting of permission to appeal to the Supreme Court is that the application raises "*an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time, bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal.*" (UKSC, Practice Direction 3, paragraph 3.3.3). Given that this is an application for permission to leapfrog to the Supreme Court, the decision of the Court has not hitherto been reviewed on appeal.

18. This test is, in MS Amlin's respectful submission, met in relation to each of the three grounds of appeal in Appendix 1.

<u>Reasons applicable to the application generally</u>

19. Before turning to each of the grounds of appeal, a number of generally applicable points amply demonstrate the satisfaction of the test for granting permission to appeal to the Supreme Court:

    19.1 **First**, the Court granted a leapfrog certificate on the basis, *inter alia*, that a point of law of general public importance is involved in its decision, including in relation to the disease clauses. It also granted permission to appeal to the Court of Appeal, on a contingent basis (should permission to appeal to the Supreme Court not be granted), recognising that such an appeal would have a real prospect of success (CPR 52.6).

    19.2 **Secondly**, the parties to these proceedings did not before the Court object to the other parties' applications for permission to appeal to the Court of Appeal, or for a leapfrog certificate. This reflects a mutual acceptance that the points of law raised in these proceedings (including on appeal) are ones of general public importance.[4]

    19.3 **Thirdly**, this is unsurprising given the exceptional nature of these proceedings. They have been driven by the extraordinary circumstances faced by many

[4] This also reflects the parties' agreement, recorded in the Framework Agreement at Recitals E, G and K, that the issues raised in these proceedings are of general public importance.

businesses during the COVID-19 pandemic, and the need urgently to obtain the maximum clarity possible for the maximum number of policyholders and their insurers as to the availability of BI cover for COVID-19 losses.[5] This drove the FCA - as the conduct regulator of insurers in the UK – to take the unprecedented step of commencing proceedings against selected insurers under selected wordings to advance arguments which the FCA considered should properly be raised by policyholders.

19.4 **Fourthly**, this was the first case 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.

19.5 **Fifthly**, this is not a 'one-off' case concerned with a private dispute between private parties regarding 'one-off' contractual provisions. As the FCA records in its Amended Particulars of Claim, the policies of the Insurers (including MSA 1 and MSA 2) are in standard form and "*a large number of policyholders*" have such policies (Amended Particulars of Claim, paragraph 32).

19.6 **Sixthly**, the issues of law which arise in this test case are of interest not only to the insurers who are party to this litigation, and their 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. The policy wordings in this test case were selected by the FCA for inclusion specifically because they are representative of many other policy wordings in the market.[6] Indeed, the FCA estimates that, in addition to the particular policies chosen for the test case, **some 700 types of policies across over 60 different insurers and**

[5] This is reflected in the Framework Agreement, and particularly Recitals A, B and I.

[6] This is expressly recorded in the Framework Agreement at Recitals G and K.

370,000 policyholders could potentially be affected by the test case (Judgment, [7]). The outcome of this test case, including any appeal, is also of importance to reinsurers.

19.7 **Seventhly**, there is an urgent need for finality and certainty in the immediate future as to the state of law in relation to the issues raised by these proceedings. There are a very large number of policyholders who have suffered (and continue to suffer) significant losses as a result of the COVID-19 pandemic and are awaiting a final decision as to coverage under their BI policies. Further, there are (or likely will be) many other sets of proceedings which are impacted by the outcome of this test case (and any appeal). An urgent authoritative statement of the law would avoid the real possibility of inconsistent decisions on materially similar issues, with the consequent negative impact that would have on policyholders.

19.8 **Eighthly**, 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.

Reasons specific to the grounds of appeal

Grounds 1 and 2

20. The first two grounds of appeal identified in Appendix 1 are, in essence, concerned with the following question of law:

> *Is there cover for COVID-19 BI losses under the MSA disease clauses in circumstances where it is common ground that:*
>
> (a) *the connector "following" requires, at least, some causal connection; and*
>
> (b) *the government action relating to the COVID-19 pandemic was not caused by any particular occurrences of COVID-19 within the specified radius of any insured's premises in that the absence of any particular local occurrence would not have made any difference to the government*

action, and therefore, to the insured's losses (see the FCA's Reply, paragraph 52; Judgment, [81]).

21. This question of law is one of general public importance which ought to be considered by the Supreme Court.

21.1 It is concerned with the proper construction of coverage clauses which are included in a number of MS Amlin's standard form policies, and which are materially identical or similar to other clauses in the market (see paragraph 19.6 above). There has never before been a reported case in England and Wales on disease clause extensions to standard BI cover in spite of the fact that insurers have for decades been offering cover for notifiable disease in a similar form. Clarity on the proper construction of such clauses would be of importance to the insurance market and to English law on business interruption insurance.

21.2 Significantly, by finding cover in spite of the matters which were common ground, as set out at paragraph 20 above, the Court has adopted a concept of causation unknown to the law of contract generally, including to the law of insurance. It has effectively held that an event (i.e. instances of COVID-19 within the 25 mile radius of an insured's premises) can be a cause of an insured's loss even though that event could not satisfy the "but for" test and was not, therefore, a factual cause of the insured's loss. It has done so without invoking any of the recognised, very limited, exceptions to the "but for" test (indeed, the FCA eschewed reliance on any such exceptions during the trial). This question of law therefore raises an issue fundamental to causation principles under insurance law and is worthy of consideration by the Supreme Court.

22. MS Amlin's grounds of appeal on grounds 1 and 2 are, at the very least, arguable. Indeed, as accepted by the Court in relation to the application for permission to appeal to the Court of Appeal, they have real prospects of success. At this stage, MS Amlin confines itself to the following fundamental points.

23. **Ground 1:** MS Amlin contends that, on a true construction of the MSA disease clauses, cover is provided for the BI consequences of a person or persons within the 25 mile

radius of the insured premises sustaining illness resulting from COVID-19. In other words, the MSA disease clauses only insure the BI effects of proven cases of COVID-19 within the 25 mile radius, not the effects of COVID-19 everywhere or anywhere else in the UK and not the effects of government action in response to COVID-19, or to the threat of COVID-19, everywhere in the UK. The Court's conclusions on this issue are plainly wrong (see Judgment, [102]-[110], [113], [196], [532]).

23.1 The Court's construction of the MSA disease clauses reduces the 25 mile radius requirement to a mere arbitrary trigger or proviso: provided the insured can prove at least one case of illness from COVID-19 within the radial perimeter on any date, the insured can recover any and all subsequent BI losses attributable to the entire government action and public reaction in response to the entire epidemic.

23.2 This means that the insured is recovering for all losses due to COVID-19 (or the threat of COVID-19) anywhere and everywhere in the UK, both within and outside the 25 mile radius, and indeed for all the BI effects of the entire epidemic (see [113], [532] of the Judgment), from the moment when that one case of illness occurred.

23.3 There is no linguistic support in the MSA disease clauses for that construction. Not only does the Court's construction turn the clause into cover for disease without radial restriction but it actually turns the clause into cover for government action on a national scale so long as there is a single case of disease within a stated area. The Court recognised that the argument that the effect of its construction was to transform the 25 mile radius requirement into a mere trigger or proviso was "*undoubtedly a significant argument*" ([102]) but failed to give an adequate answer to it.

23.4 The Court did not give sensible effect to the requirement in the MSA disease clauses that the notifiable disease, as defined, had to be "*within a radius of twenty five miles of the premises*" (emphasis added). These are words of restriction and definition as to what MS Amlin was prepared to insure. It is inconsistent with the use of the word "*within*" for the MSA disease clauses to be construed as providing

cover not only for the effects of COVID-19 within the 25 mile radius, but also outside of it (Judgment, [110], [532]). There is simply no textual justification for such a reading of the MSA disease clauses.

23.5 The MSA disease clauses also contain an important, narrowly circumscribed definition of notifiable disease (see paragraph 8 above). This definition in the MSA disease clauses was not accorded any adequate weight by the Court.

23.6 Notifiable disease, as defined, is emphatically not just "*any human infectious or contagious disease… an outbreak of which the competent local authority has stipulated will be notified to them*". The definition also requires that there be "*illness sustained by any person resulting from*" COVID-19. The effect of this definition is that the clause operates with reference only to specific cases of specific illnesses sustained by specific persons. When it comes to an epidemic, the language of the clause nevertheless only has regard to specific cases of the specific illness sustained by specific persons from the epidemic notifiable disease, and not the epidemic *per se*.

23.7 When due consideration is given to the definition of "*notifiable disease*" it is apparent that the clauses provide that MS Amlin will pay for business interruption following (and/or in consequence of) illness sustained by a person or persons within the 25 mile radius of the insured premises resulting from COVID-19. This is a narrow, localised form of cover specifically relating to the business interruption effects of proven cases of COVID-19 within the 25 mile radius of the insured premises. It is akin to the cover provided under the diseases clauses in QBE 2 and 3 in relation to which the Court held that "*insureds would only be able to recover if they could show that the case(s) within the radius, as opposed to any elsewhere, were the cause of the business interruption*" (Judgment, [235]; see also [230]-[237]).

23.8 As for the Court's reliance on various matters which it regarded as being within the reasonable contemplation of the parties at the time the MSA 1 and MSA 2

policies were concluded (see [103]-[104]), the fundamental problem with the Court's analysis is that it assumes that whatever matters *may* have been in the parties' contemplation must also be insured perils. This, however, ignores the specific words of definition and restriction used in the MSA disease clauses (and which were incorporated therein).

24. **Ground 2**: MS Amlin contends that regardless of whether "*following*" imports a proximate cause test[7] or a looser form of causal connection,[8] it requires, at a minimum, the application of a factual (i.e. "but for") causation test. The Court was wrong to hold otherwise (see Judgment, [111]-[112], [194]).

24.1 The Court's conclusion that interruption of or interference with the insured business could be "caused" by (*viz. "following"*) proved cases of COVID-19 within a 25 mile radius of the insured premises, despite the fact that the proved cases of COVID-19 within the relevant area cannot satisfy the "but for" test, entails a fundamental and heterodox change to causation under insurance (and contract) law.

24.2 Something which cannot satisfy the "but for" test is not a "cause" at all. On fundamental principles, if the interruption or interference with the insured business would have been suffered regardless of the proved cases of COVID-19 within the relevant area, those proved cases were not a factual cause of the interruption/interference, let alone the proximate (or dominant or effective) cause, of loss.

24.3 Given that it was common ground between the FCA and MS Amlin (and other insurers) that the government action, and therefore the interruption of or interference with the insured's business, was likely to have been the same in the absence of any particular local occurrences of COVID-19, the Court ought to have concluded that there was no cover for COVID-19 losses under the MSA disease

7 As MS Amlin submits.

8 As the FCA submits, and as was accepted by the Court.

clauses. This is what it held in relation to the "prevention of access" wordings in MSA 1 and MSA 2 (see Judgment, [418], [436]-[437], [439]); the same conclusion ought to have followed for the disease clauses in the same policies.

24.4 The concept of causation espoused by the Court at [111]-[112] (and set out at paragraphs 12.4 and 12.5 above) is unknown to the law, and has no basis in the wording of the MSA 1 and 2 policies. It cannot have been the parties' intention to adopt an unarticulated and unknown concept of causation under the guise of contractual language which, as is common ground, established a causal connection between the business interruption or interference and the proved cases of disease within the relevant area.

24.5 Moreover, in holding that the causal requirement "*following*" is satisfied in a case in which there is a national response to a widespread disease because the cause of the business interruption is the notifiable disease of which the individual outbreaks form indivisible parts, the Court failed to give any effect to the definition of notifiable disease and specifically the requirement that the insured prove "*illness sustained by any person resulting from*" COVID-19 within 25 miles of the insured premises. The Court ought to have recognised that illness sustained by any one person is not indivisible from illness sustained by another person – even where it is the same disease in both cases. Therefore, as a matter of policy construction, instances of "*notifiable disease*", as defined in MSA 1 and MSA 2, within 25 miles of the insured premises could not be regarded as indivisible from the outbreak as a whole.

Ground 3

25. Ground 3 is concerned with the correct counterfactual to be applied, as a matter of law, in assessing the insured's indemnity under the MSA disease clauses, whether under the trends clauses in the MSA 1 and 2 policies or otherwise. The Court correctly held that that the trends clauses in MSA 1 and 2 applied to the disease clauses in those policies, and that the object of the trends clauses was to put the insured in the position it would

have been if the insured peril had not occurred (i.e. "but for" the insured peril) (Judgment, [121]-[122], [198]-[199]). However, it went on to hold that in the counterfactual applicable under the trends clauses *all* business interruption referable to COVID-19 anywhere and everywhere in the UK including via the authorities' and/or the public's response thereto had to be stripped out (Judgment, [122]). This was an error of law.

26. This is a point of law of general public importance for the same reasons set out above. There are large numbers of policyholders, and their insurers, to whom the question of the correct counterfactual to be applied on a proper construction of the MSA 1 and 2 policies is of considerable importance in the context of the COVID-19 outbreak.

27. Further, this ground of appeal squarely raises the correctness of the Court's conclusions in relation to the decision in ***Orient-Express Hotels Ltd v Assicurazioni Generali*** [2010] Lloyd's Rep IR 531 – a case concerned with the extent of BI losses recoverable by a New Orleans hotel damaged by Hurricanes Katrina and Rita. The essential issue was how the policy would respond where the hurricanes had not only damaged the hotel but had also devastated the wider area surrounding the hotel.

28. Hamblen J (as he then was) upheld the award of a distinguished arbitral tribunal which included Sir Gordon Langley and George Leggatt QC (as he then was). He concluded that the tribunal had not erred in law in adopting the "but for" approach to causation in assessing the insured's losses under the relevant property-damage based BI insuring clause, and that the correct counterfactual to be applied under the trends clause involved stripping out only the physical damage to the hotel, but leaving intact the other effects of the hurricanes. Hamblen J's decision is summarised at [504]-[522] of the Judgment.

29. The Court held that ***Orient-Express*** was distinguishable as a matter of principle, but that, if necessary, they would have held that it was wrongly decided (see Judgment, [523]-[529]). ***Orient-Express*** is a decision which had hitherto not been overruled or ever not followed (or even judicially doubted). Although subject to academic criticism, it has

been the leading authority in relation to the principles of causation applicable in the assessment of BI loss, and the operation of "trends clauses". It is also of significant importance in the insurance market, particularly given the potential for wide area damage to affect a whole range of BI coverage clauses and extensions (both damage and non-damage). The Court's decision has, however, created much uncertainty in this area. The opportunity authoritatively to determine the correctness of ***Orient-Express*** is an additional reason why ground 3 raises a point of law of general public importance which ought to be considered by the Supreme Court.

30. As with grounds 1 and 2, MS Amlin's third ground of appeal is, in the very least, arguable, and, indeed, was accepted by the Court to have real prospects of success. The following points demonstrate, in brief, the fallacy of the Court's conclusions at [122] and [532] as to the correct counterfactual applicable under the MSA disease clauses.

30.1 The Court's error of law in relation to the correct counterfactual stems from its mischaracterisation and improper construction of the insured peril. For the reasons explained above, on a proper construction of the MSA disease clauses, the insured peril is any notifiable disease (as defined) within a radius of 25 miles of the insured premises. Cover is, on that basis, only provided in respect of a person or persons within the 25 mile radius of the insured premises sustaining illness resulting from COVID-19. It follows – on the (accepted) basis that the counterfactual reverses that which is covered (see Judgment, [121]-[122]) – that only those instances of illness resulting from COVID-19 that trigger cover under the MSA disease clauses are to be removed in the counterfactual. Contrary to what the Court held at [122], all other instances of COVID-19 (and their effects) are to remain.

30.2 The facts and matters which have occurred in the context of the COVID-19 pandemic which fall outside the contractual definition of the insured peril cannot be conflated or combined with the insured peril, and reversed in the counterfactual, in such a way as to expand the scope of the insured peril (and the cover provided under MSA 1 and 2). This would impermissibly rewrite the contract of insurance after the event by reference to what actually occurred. This

is, however, exactly what the Court has done.

30.3 The drawing of a distinction between the individual cases of COVID-19 within the 25 mile radius of the insured premises, and the COVID-19 pandemic more generally, gives effect to the intention of the parties as expressed in the policy wording. The MSA disease clauses require such a distinction to be drawn by defining and delimiting the insured peril in the way that they do.

30.4 This is consistent with Hamblen J's decision in ***Orient-Express*** and the distinction he drew between physical damage to the hotel and the other effects of the hurricanes. Contrary to what was held by the Court at [523]-[529], ***Orient-Express*** cannot properly be distinguished and was correctly decided:

(a) The decision in ***Orient-Express*** was concerned with: (a) the proper construction of trends clauses in very similar terms to those in MSA 1 and MSA 2 (see [12] of Hamblen J's judgment), and (b) their application in circumstances where an insured (or non-excluded) event, the hurricanes, had caused damage to the insured hotel (which was insured under the property damage section of the policy and the BI consequences of which were insured under the BI section of the policy) while simultaneously having other effects on New Orleans (which were uninsured). His conclusions are, therefore, plainly of relevance when construing the trends clauses in MSA 1 and 2 and applying them in circumstances where the COVID-19 pandemic not only caused cases of COVID-19 within a specified radius of the insured premises (the BI consequences of which are insured under the BI section of the policy), but also caused cases of COVID-19 everywhere else as well (the BI consequences of which are uninsured).

(b) Contrary to what is said at [523]-[527] of the Judgment, Hamblen J was entirely right that the insured peril under the main insuring clause of the BI part of the policy was damage to the hotel, and not the cause of that damage, i.e. the hurricanes (see Hamblen J's judgment at [46]-[47], [52], [57]). The policy at issue in ***Orient-Express***, like most policies that provide

BI cover, had a property damage section and a BI section. The insured perils under each of those sections is not the same – that is unsurprising as they cover different risks. While the insured peril under the property damage section was the fortuitous, non-excluded cause,[9] i.e. on the facts of that case, the hurricane, the insured peril under the BI section was physical damage to insured property. The non-excluded fortuitous cause, i.e. the hurricanes, identified and defined what physical damage was insured under the BI section, but it was not itself the peril.

(c) To suggest that the hurricanes were the peril or "*an integral part of the insured peril*" such that they were to be stripped out in their entirety in the counterfactual applicable under the trends clause (see Judgment, [527]) is to rewrite the contract. So construed, the insurers in ***Orient-Express*** would have been providing insurance against *all* BI consequences of the hurricane so long as there was some property damage (no matter how insignificant). That would have been inconsistent with the parties' bargain and would have vastly expanded the scope of cover that insurers agreed to undertake.

(d) Similarly in this case: to suggest that the COVID-19 pandemic was an integral part of the peril such that it is to be stripped out in its entirety (together with the blanket governmental responses to it) in the counterfactual applicable under the trends clause is to rewrite the contract. So construed, MS Amlin would have been providing insurance against *all* BI consequences of the COVID-19 pandemic so long as there was one case of COVID-19 within the 25 mile radius (no matter how insignificant). That is inconsistent with the parties' bargain and vastly expands the scope of cover that MS Amlin agreed to undertake. It is to transform the insured peril into disease everywhere in the UK provided that one case of illness from the disease can be proved to have been sustained within the 25 mile radius. That is not the insured peril: MS Amlin never agreed to insure against the

[9] Reflecting the all-risks nature of the policy at issue in ***Orient-Express***.

risk of disease everywhere in the UK; only against BI losses in consequence of disease within a 25 mile radius of insured premises.

G. Conclusion

31. For the reasons set out above, MS Amlin respectfully requests that permission be granted to appeal to the Supreme Court in accordance with section 13 of the AJA 1969.

Gavin Kealey Q.C.

Andrew Wales Q.C.

Sushma Ananda

Henry Moore

19 October 2020

7 King's Bench Walk

Temple

EC4Y 7DS

Appendix 1: MS Amlin's Grounds of Appeal

Ground 1: Proper construction of the phrase "… *any* ***notifiable disease*** *within a radius of twenty five miles of the* ***Premises***"

1. The Court erred in law in its conclusion as to the meaning and effect of the words "*any* ***notifiable disease*** *within a radius of twenty five miles of the* ***Premises***", including the definitions imported by those words. The Court ought to have concluded that the MSA disease clauses only provided cover in respect of an insured's premises for the business interruption consequences of a person or persons within the 25 mile radius of those premises sustaining illness resulting from COVID-19.

2. Without prejudice to the generality of the foregoing:

   2.1 The Court wrongly construed the MSA disease clauses as providing indemnity in respect of an insured's premises against all the business interruption consequences of COVID-19 anywhere and everywhere in the UK (both within and outside the 25 mile radius) provided merely that the insured could prove one instance of COVID-19 within the 25 mile radius (Judgment, [102][10]-[110], [113], [532]).

   2.2 On its true construction, the requirement of **notifiable disease** (as defined) within the 25 mile radius was not a mere trigger or proviso. It was an inherent and express restriction on the scope of the disease cover being provided, such that (contrary to the Court's conclusion) the MSA disease clauses were confined to the business interruption consequences only of the cases of COVID-19 proved to have been sustained within the 25 mile radius.

[10] 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].

2.3 Further, the Court erred by failing to give effect to the specific words used in the definition of **notifiable disease**, namely "*illness sustained by any person resulting from*" COVID-19. As a result:

(a) The Court wrongly concluded that the absence of any reference to an "occurrence" (or "manifestation") in the MSA disease clauses made 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]).

(b) The Court ought to have concluded that the presence of the definition of **notifiable disease** precluded this conclusion: the effect of the definition is that the indemnity operates with reference only to the business interruption consequences of specific cases of specific illness sustained by specific persons.

(c) The Court wrongly concluded that individual cases or individual outbreaks within the relevant area formed indivisible parts of a broader picture or of **notifiable disease** generally (Judgment, [111]): this conclusion was not open upon a correct interpretation and application of the definition of **notifiable disease**.

(d) The Court failed to recognise that the requirement imported by the definition for the insured to prove "*illness sustained by any person resulting from*" COVID-19 within the 25 mile radius of the insured premises was of the essence of the insured peril: the cover was (only) for business interruption loss following those proved cases of illness within the 25 mile radius of the insured premises.

2.4 Further, the Court wrongly failed to conclude (i) that 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 "*event*", (ii) consistently with its approach to 'event' language in QBE 2 and 3, that 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]-[237] of the Judgment), and, therefore (iii) that cover was only provided in respect of an insured's premises for the business interruption consequences of a person or persons within the 25 mile radius of those premises sustaining illness resulting from COVID-19.

Ground 2: the meaning and effect of "following" and the causal connection it required

3. The Court erred in law in its conclusion as to (i) the meaning of the word "*following*" in the MSA disease clauses; and/or as to (ii) its causal effect between (on the one hand) interruption of or interference with the insured business at the insured premises and (on the other hand) "*any **notifiable disease** within a radius of twenty five miles of the **premises***."

4. The Court ought to have concluded:

   4.1 As to its meaning, that the word "*following*" (being, as was common ground, a causal connector) imported at the very least a requirement of "but for" causation. Therefore, the MSA disease clauses only provided cover for the business interruption loss (if any) which the insured would not have suffered but for the proved cases of a person or persons within the 25 mile radius of the insured premises sustaining illness resulting from COVID-19; and/or

   4.2 As to its effect, that the MSA disease clauses did not provide cover where (as the FCA accepted) the business interruption loss would have been suffered in any event even if the proved cases of persons sustaining illness resulting from COVID-19 within a 25 mile radius of any given insured premises had not occurred or were assumed not to have occurred.

5. Without prejudice to the generality of the foregoing:

   5.1 The Court was wrong in law to conclude that the required causal connection between the business interruption loss (on the one hand) and the proved cases of COVID-19 within the 25 mile radius (on the other hand) was established

notwithstanding (as the FCA admitted) that the business interruption loss would still have been suffered but for (i.e. completely irrespective of) the proved cases of COVID-19 within the 25 mile radius. This conclusion was wrong whether "*following*" imported a "*looser causal connection than proximate cause*" (Judgment, [95], [111], [194]) or imported a proximate cause requirement (as to which, see paragraph 7 below).

5.2 In reaching this conclusion, the Court erred in law:

(a) By construing "*following"* as importing some supposed concept of causal connection which did not involve the fundamental test of factual (i.e. "but for") causation (Judgment, [194]) and which, therefore, is a concept unknown to the law and without basis in the wording of the MS Amlin policies;

(b) By concluding that the required causal connection was established (i) by "*the occurrence of a case of the disease within the radius if that occurrence was part of a wider picture which dictated the response of the authorities and the public which itself led to the business interruption or interference*"; or (if "*following*" imports proximate causation) (ii) on the basis that "*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 (iii) regardless of any "but for" test (Judgment, [194]).

(c) By concluding, in the alternative, 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]).

(d) In so holding, the Court erred by

(i) failing to give effect to the definition of **notifiable disease** which 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).

5.3 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 the interruption of and/or interference with the insured's business.

6. For the avoidance of doubt, the Court erred in law in the foregoing ways whether "*following*" imports a proximate cause requirement or a causal connection looser than proximate cause: whichever test is applied, the parties' agreement in the MSA disease clauses required, at the least, that proved cases of COVID-19 sustained by persons within the 25 mile radius were a factual (i.e. "but for") cause of any claimed business interruption loss.

7. Without prejudice to the foregoing, and to the extent necessary, MS Amlin contends that the Court further erred in law:

7.1 By failing to hold that, on a proper construction of the MSA disease clauses, the word "*following*" 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]).

7.2 In holding that the interruption of or interference with the business was the essence of or was part of the insured peril which the court described as 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]). Properly construed:

(a) The insured peril was any **notifiable disease** (as defined) within a 25 mile radius of the insured premises.

(b) "*interruption of or interference with the business*" is the damage to the insured's interest in the insured business at the insured premises for which indemnity is given.

(c) Contrary to [95] of the Judgment, "*following*" was the causal link between the insured peril and the indemnifiable loss (i.e. the quantification of the damage to the insured's interest) and was intended to import the established test of proximate causation.

Ground 3: trends clauses and counterfactuals

8. The Court further erred in law in its approach to the so-called "trends clauses" and/or the correct counterfactual to be applied when calculating an indemnity under the MSA disease clauses. While (rightly) accepting that the "trends clauses" in MSA 1 and MSA 2 applied to the non-damage coverage extensions including the MSA disease clauses (Judgment, [198]), the Court was wrong to hold:

8.1 that the correct counterfactual when calculating an indemnity, whether on an application of the trends clauses to the MSA disease clauses or otherwise, is to strip out "*the business interruption referable to COVID-19 including via the authorities' and/or the public's response thereto*" (Judgment, [122]; see also [199], [532]); and/or

8.2 that the insured's indemnifiable losses do not fall to be reduced to the extent necessary to remove from the amount of any indemnity the losses the insured would still have been suffered but for the insured peril under the MSA disease clauses as a result of any matters outside the scope of the insured peril, including COVID-19 outside the specified 25 mile radius and/or any consequences of the national action/reaction to COVID-19 (including that of the authorities and/or the public); and/or

8.3 that the continuation of a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered, which could in principle be taken into account in the counterfactual as a trend or circumstances (under a trends clause or similar) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative, had to be at no more than the level at which it had previously occurred.

9. 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 (Judgment, [523]-[529]).