N244(CCFL)

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** **Queen's Bench Division** **Commercial Court** **Financial List** **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 (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
Date	28 September 2020

You should provide this information for listing the application

Time estimate 2 (hours) 0 (mins)

Is this agreed by all parties? ☐ Yes ☑ 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 Sixth Defendent, being QBE UK Limited.

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]

An order that for the purposes of section 12(1) of the Administration of Justice Act 1969 ('the Act'), the relevant conditions in Section 12(3A) have been fulfilled and there is a sufficient case for an appeal to the Supreme Court under Part II of the Act to justify an application for leave to bring such an appeal.

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

because[3]

Please see attached document providing (i) the text to accompany this application notice and (ii) appendix 1 containing grounds of appeal.

The court office at the Admiralty and Commercial Registry, The Rolls Building, 7 Rolls Building, Fetter Lane, London, EC4A 1NL is open from 10am to 4.30pm Monday to Friday. When corresponding with the court please address forms or letters to the Clerk to the Commercial Court and quote the claim number.

Part B

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

~~the attached (witness statement)~~~~(affidavit)~~ ☐ ~~(the claimant)~~(the defendant)'s[1] statement of case ☐

evidence in Part C overleaf in support of this application ☑

Signed Richard Pryce Sep 28, 2020 4:47 PM CEST

(Applicant) (~~'s legal representative~~)

Position or office held (if signing on behalf of firm, company or corporation): Richard Pryce, Chief Executive Officer, QBE European Operations

4. If you are nc documents

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

		If applicable	
Toby Rogers Clyde & Co LLP 138 Houndsditch		Tel. no.	+44 7595 214 953
		Fax no.	
		DX no.	
Postcode	EC3A 7AR	e-mail	toby.rogers@clydeco.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:

Please see attached document providing (i) the text to accompany this application notice and (ii) appendix 1 containing grounds of appeal.

A draft order is also attached.

Statement of Truth

*(I believe)(~~The applicant believes~~) that the facts stated in this application notice are true. I understand that proceedings made 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.

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

Full name...Richard Vaughan Pryce .....

Name of*(Applicant)(~~'s litigation friend~~)('s legal representative).....Tobias Paul Rogers, Clyde & Co LLP.....

.....

Signed Richard Pryce Sep 28, 2020 4:47 PM CEST

*(Applicant)(~~'s legal representative~~)

Position or office held (if signing on behalf of firm, company or corporation) Chief Executive Officer, QBE European Operations

Date 28 September 2020

**delete as appropriate*

Text to accompany application notice:

1. The Sixth Defendant, QBE Limited ("**QBE**"), intends to apply for permission to appeal against the declarations to be made consequential upon the judgment of the Court dated 15 September 2020 (the "**Judgment**"). The proposed grounds of appeal on which QBE intends to rely are set out in Appendix 1 to this application.

2. QBE seeks a certificate pursuant to section 12(1) of the Administration of Justice Act 1969 (a "**Leapfrog Certificate**") certifying that the grounds of appeal set out in Appendix 1 hereto are suitable for an appeal directly to the Supreme Court. As explained below, QBE seeks a Leapfrog Certificate on the basis of the exceptional public importance and urgency of this test case.

3. The Framework Agreement concluded by the Claimant (the "**FCA**") and the eight Defendants, dated 31 May 2020, provides that the parties shall act at all times constructively and in good faith to promote the mutual objective (clause 6.1), namely "*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*" (recital I).

4. It was on the basis of that 'mutual objective' that the parties agreed that this test case should be expedited and heard under the Financial Markets Test Case Scheme (which, pursuant to Practice Direction 51M, applies to a claim in the Financial List that "*raises issues of general importance in relation to which immediately relevant authoritative English law guidance is needed*"). The Test Case Scheme permits the Court to sit at first instance, as it did in this case, with a Lord Justice of Appeal as well as a Judge of the Commercial Court. An order to that effect was made by Butcher J at the first Case Management Conference on 16 June 2020.

5. The Framework Agreement expressly provides that the FCA or any of the Defendants may appeal the decision of the Court subject to the normal procedural rules for doing so (clause 8.1), but that any party seeking to appeal "*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" (clause 8.2). Clause 8.3 of the Framework Agreement states as follows:

> "*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 Direction of the Supreme Court*."

6. The FCA put the Supreme Court on notice of this agreement and Herbert Smith Freehills told the defendants by email on 28 July 2020 that the Registrar of the Supreme Court had told them that:

> "*in principle the Supreme Court could accommodate a hearing on an expedited basis during Michaelmas term 2020, subject to the point that the final decision would be for the President, Lord Reed, at the time. The Registrar also noted that Lord Reed was already aware of this matter and that in appropriate urgent previous cases the Supreme Court has sat out of term time in September*."

7. The grounds of appeal set out in Appendix 1 satisfy the statutory conditions for a Leapfrog Certificate in section 12(3A) of the Administration of Justice Act 1969.

    a. Each of those grounds of appeal involves a point of law of general public importance. In particular, the decision that: (1) the insured peril includes the business interruption and/or interference meaning that proximate causation is only required as between the loss claimed and the interruption to and/or interference with the business; and (2) *Orient Express* was wrongly decided, will impact on many if not all types of business interruption insurance and not just the clauses under consideration in the Test Case; and

    b. Further:

        i. this test case "*entail[s] a decision relating to a matter of national importance or consideration of such a matter*" (s.12(3A)(a) of the 1969 Act);

ii. the result of this test case is "*so significant*", whether considered on its own or together with claims by policyholders that are likely to follow from it, "*that … a hearing by the Supreme Court is justified*" (s.12(3A)(b)); and/or

iii. "*the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal*" (s.12(3A)(c)).

8. This test case concerns 21 lead policy wordings and, as noted in paragraph 7 of the Judgment, may potentially affect around 700 types of policies across 60 different insurers and around 370,000 policyholders. Three QBE policy wordings (across seven policies) were selected by the FCA to represent a form of disease wording which will be relevant to large numbers of policyholders, including (but not only) several thousands of holders of those policies, who are mainly SMEs.

9. Ultimate legal certainty is required in circumstances where neither individual policyholders nor reinsurers are party to the test case or bound by its outcome as a matter of res judicata. It is common ground that very large numbers of policyholders have suffered significant losses as a result of the COVID-19 pandemic and the UK Government's response to it. The issues therefore need to be authoritatively determined as a matter of urgency as reflected in the terms of the Framework Agreement.

10. The witness statement of Matthew Brewis (the Director of General Insurance and Conduct Specialists at the FCA), dated 9 June 2020, included the following:

> "*The matter [i.e. the test case] 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 …*" (paragraph 8).
>
> "*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*" (paragraph 70).

"*… 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*" (paragraph 72).

11. The grounds of appeal set out in Appendix 1 concern the extent to which policyholders' losses fall within the scope of four of the QBE policies (described collectively during the test case as 'QBE1'). The proposed grounds of appeal have a realistic prospect of success.

12. 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 application has been made within 14 days of the Judgment, i.e. the period specified by section 12(4) of the 1969 Act, and prior to the deadline stated in paragraph 4 of the order made by Flaux LJ and Butcher J dated 15 September 2020. If the Court grants a Leapfrog Certificate as requested, QBE will promptly apply to the Supreme Court for permission to appeal pursuant to section 13(1) of the 1969 Act.

Appendix 1:

Grounds of appeal

The material words of the QBE1 policy wording are:

> "*We shall indemnify you in respect of interruption of or interference with the business arising from [or caused by]… any human infectious or human contagious disease… an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it…*" ("**the QBE1 Disease Clause**").

1. The Court erred in law by wrongly identifying the "*the relevant insured peril*" in the QBE1 Disease Clause as "*interruption or interference with the business arising from: (a) any notifiable human infectious or contagious disease manifested by any person whilst in the premises or within a 25 mile radius of it…*" [225]. On the true construction of the QBE1 Disease Clause the relevant insured peril is "*any human infectious or human contagious disease… an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it…*". The business interruption or interference is the loss or damage to the insured's interest for which indemnity is given, if and only if, it is proximately caused by an insured peril.

2. The Court further erred in law by holding, at [226], that *"the required causal link ("arising from") is between the interruption or interference with the business on the one hand and the notifiable disease on the other, provided it has been "manifested" by a person within 25 mile radius"* and that the QBE1 Disease Clause should not be construed as saying *"the interference has to result from the particular case(s) in which the disease is manifested within the 25 mile radius."* On a proper construction of the QBE1 Disease Clause:

    (a) the requirement that the disease is manifested within a 25 mile radius is not merely *"an adjectival clause limiting the class of notifiable diseases which, if they interfere with the business, will lead to coverage*" or a proviso;

(b) the requirement that the disease is manifested within a 25 mile radius is a substantive part of the insured peril which delineates the scope of cover under the QBE1 Disease Clause, so that cover is provided in respect of interruption and/or interference with the insured's business which is proximately caused by the particular 'local' manifestation of the relevant disease either at the insured premises or within 25 miles of those premises;

(c) the language of the QBE1 Disease Clause indicated that what was being insured was a matter occurring at a particular time, in a particular place, and in a particular way because:

i. the clause required the notifiable disease to be: (1) *"manifested by any person"* which the Court correctly held, at [224], meant that the relevant person had been diagnosed with COVID-19 and/or was symptomatic; and (2) manifested *"at the premises or within a twenty five (25) mile radius of it"*;

ii. the other circumstances which are covered by the extension of which the QBE1 Disease Clause forms a part (e.g. "*murder, suicide or sexual assault at the premises*", "*vermin or pests in the premises*", "*the closing of the whole or part of the premises by order of a competent public authority consequent upon defects in the drains or other sanitary arrangements at the premises*", etc.) are all properly understood as matters occurring at a particular time, in a particular place, and in a particular way.

3. The Court erred in holding, at [228], that there would be an "*anomaly of... no effective cover*" where "*a notifiable disease manifested itself both within and outside the 25 mile radius" and "there would be such governmental / public responses to the disease outbreak, rather than to specific cases of the disease, either those within or outside the radius*". On a proper construction of the QBE1 Disease Clause, there would be effective cover in such a case where the case(s) within the 25 mile radius were the proximate cause of relevant interruption to or interference with the insured's business, for example as the result of a governmental and/or public response. Where the case(s) within the 25 mile radius were not the proximate cause of such interruption or interference, there will be no cover under the QBE1 Disease Clause. There is no

anomaly in this outcome. It is the obvious and proper consequence of the limited cover provided pursuant to the QBE1 Disease Clause.

4. The Court further erred in law and/or fact by holding, at [229], that "*insurers clearly cannot… contend that the occurrence of the disease elsewhere, or the reaction to it, are to be regarded as separate causes*":

   (a) Different local occurrences, or outbreaks, of a notifiable disease can (and have been) the cause of different forms and types of interruption to and/or interference with an insured business.

   (b) If and insofar as the Court based this determination on its view, expressed elsewhere (e.g. at [165]), that "*the occurrence of the disease within the area was a part of an indivisible cause, constituted by COVID-19*", then:

      i. There is no concept known in law of a "*part of an indivisible cause*", nor any authority or principled basis in support of it. One event either is or is not a proximate (or effective, as held by the Court) cause of another;

      ii. The test of causation is not satisfied by characterising the relevant event (e.g. the manifestation of a particular disease at the insured premises or within 25 miles of the premises) as being "*part of*" a wider event or concept ("*COVID-19*");

      iii. Such an approach is plainly wrong, because every event is part of wider circumstances and it would be impossible for the parties or the Court to determine the right scope of the wider circumstances which would count as the proximate cause in any given eventuality;

      iv. Even on the Court's findings on the present case, the width of the supposed "*indivisible cause*", "*COVID-19*", is so vague as to be unworkable.

5. The Court erred in law and/or fact in concluding, at [229], that there "*is to be regarded as sufficient causation of the business interference if the disease which has manifested itself in the radius is an effective cause of that business interference*." No single manifestation of COVID-19 is, or was, an effective or proximate cause of all the consequences of the COVID-19 crisis in the UK.

6. The Court was wrong in its approach to the 'trends' clause. The Court wrongly held that the decision in *Orient-Express Hotels Ltd v Assucurazioni Generali SA* [2010] Lloyd's Rep IR 531 was distinguishable from the present case and/or should not be followed and that the 'trends' clause should operate as if the whole COVID-19 pandemic and all of its consequences was part of the peril insured against. *Orient Express* was correctly decided and was not distinguishable from the present case. Accordingly the court ought to have held that the trends clause should operate so that the only event which is not to be considered when quantifying the required indemnity is the insured peril itself.