

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

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

DEFENCE AND COUNTERCLAIM
OF THE FIRST DEFENDANT

DEFENCE

1. Unless otherwise stated:

- 1.1. references to paragraph numbers in this Defence and Counterclaim are references to paragraph numbers in the Particulars of Claim; and

- 1.2. where the First Defendant ("**Arch**") adopts headings or abbreviations in the Particulars of Claim, this is for convenience only and no admissions are made thereby.
2. Save insofar as this Defence and Counterclaim consists of admissions of matters expressly alleged in the Particulars of Claim and save insofar as is expressly admitted below, Arch joins issue with the Particulars of Claim.

Section A: Introduction and Summary

3. Arch is an underwriter authorised by the Prudential Regulation Authority and regulated by the Claimant (the "**FCA**") (FCA Register Number 229887).
4. Pursuant to the Framework Agreement dated 31 May 2020, Arch has consented to participate in this test case commenced by the FCA. The test case concerns the construction of and other issues of legal principle relating to certain policy extensions which respond to business interruption losses occurring in the absence of damage to the insured's property and the application of such extensions to certain assumed facts involving COVID-19 business interruption claims (the "**Assumed Facts**"). In the premises, paragraphs 1 and 2 of the Particulars of Claim are admitted.
5. The policy wording written by Arch under consideration in this test case is found in three Arch Policies: (1) the Arch OGI Commercial Combined Policy; (2) the OGI Retailers Policy; and (3) the Powerplace (Offices & Surgeries) Policy (collectively, the "**Arch Policies**"). The relevant provisions of the Arch Policies are materially the same and are referred to by the FCA as the "**Arch1**" wording. Extracts from Arch1 are set out at Schedule 1 of the Particulars of Claim. They comprise, in summary, the Government or Local Authority Action extension (the "**Government or Local Authority Action Clause**") and two provisions which refer to other trends and circumstances being taken into account when calculating the value of the indemnity (the "**Trends Language**").
6. In this Defence, Arch only responds to the pleaded case of the FCA so far as it concerns the Arch1 wording. However, Arch should not be treated as having admitted those

parts of the Particulars of Claim which address the construction of, and other issues of legal principle relating to, other wordings and to which Arch has not responded. Arch reserves the right to make submissions at trial on the construction of, and other issues of legal principle relating to, any of the other wordings (including RSA Type 3 in relation to which Arch has a particular interest).

7. By way of summary of Arch's position in relation to the Arch1 wording and in response to Paragraph 4:

7.1. The Government or Local Authority Action Clause indemnifies policyholders in respect of an interruption or interference with the Business (as identified in the applicable Policy Schedule):

- caused by ("resulting from") a prevention of access to the Premises (as identified in the applicable Policy Schedule);
- which prevention of access is caused by ("due to") actions or advice of a government or local authority;
- which actions or advice are in turn caused by ("due to") "an emergency which is likely to endanger life or property".

7.2. It is admitted that the COVID-19 pandemic was "an emergency likely to endanger life" from 3 March 2020. Contrary to the implication and effect of the FCA's case on Arch1, however, it is denied that the Government or Local Authority Action Clause provides an indemnity for all of the policyholders' business interruption losses caused by the emergency.

7.3. "Prevention of access" is not a term defined in the Policy. It therefore bears its ordinary meaning (in accordance with Policy Condition (9)).

7.4. Access to the Premises is only "prevented" due to actions or advice of a government or local authority if the government or local authority action or advice is that the Premises are to be closed.

- 7.5. As to paragraph 4.1, the response to COVID-19 was not a "single body of public authority intervention", as alleged by the FCA. As outlined further below, the true position is that a number of separate, individual actions were taken and advice given by different bodies, with different aims and different effects on different businesses and sectors of the UK economy.
- 7.6. It is only official governmental or local authority actions or advice preventing access to insured Premises which are relevant to the Government or Local Authority Action Clause.
- 7.7. Access to the Premises is not "prevented" if the government or local authority action or advice does not require the closure of the Premises, even if such action or advice (a) requires the policyholder to close part only of the Premises or (b) requires the policyholder not to carry on certain business activities at the Premises.
- 7.8. It is admitted that there was a "prevention of access to the Premises" within the meaning of the Government or Local Authority Action Clause for those policyholders which were required to close insured Premises by the Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (the "**21 March Regulations**") and/or the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the "**26 March Regulations**").
- 7.9. To the extent any further action or advice from government or local authority prevented access to the Premises for the purposes of carrying on the Business, there was also a "prevention of access" to those Premises within the meaning of the Government or Local Authority Action Clause. Accordingly, the Government's advice on 20 March 2020 and 23 March 2020 to the effect that certain premises should be closed (the "**20 March Advice**" and the "**23 March Advice**") qualifies for these purposes.
- 7.10. None of the other official orders or advice pleaded by the FCA and adopted in response to the COVID-19 pandemic prevented access to insured Premises. In

particular, actions or advice on social distancing, working from home, lockdown, etc. did not prevent access to insured Premises, even if they resulted in less use (or, in some cases, no use) being made of insured Premises.

- 7.11. Paragraph 4.2 is admitted so far as concerns Arch1 but is immaterial.
- 7.12. Paragraph 4.3 is denied. The burden of proving the right to an indemnity is on the policyholder. On the proper construction of Arch1 and on established principles of causation, where a policyholder has shown that the Government or Local Authority Action Clause has been triggered by reason of a qualifying prevention of access, the policyholder must then establish on the balance of probabilities that the prevention of access (the insured peril) has caused business interruption loss. Such loss is to be calculated in accordance with the terms of Arch1 and the ordinary principles of indemnity. As a minimum, the policyholder must show that the prevention of access to the Premises is a “but for” cause of the loss.
- 7.13. For these purposes, the appropriate counterfactual scenario is where there was no insured peril, ie no government or local authority action or advice preventing access to the Premises, but where all other factors remain unchanged. Those factors include but are not limited to the following:
- (1) COVID-19 existed and was prevalent in all or most parts of the United Kingdom;
 - (2) the various other official control measures remained in force, including the UK Government regulations and advice on social distancing, the “lockdown” and the requirement of self-isolation;
 - (3) COVID-19 and the control measures affected levels of employment, consumer behaviour, economic activity and confidence, both generally and in the particular sector in which the policyholder operates.

- 7.14. The significant majority of the official orders and advice in response to the COVID-19 pandemic do not give rise to, or even relate to, a prevention of access to insured Premises.
- 7.15. It is denied that the appropriate counterfactual is a “world in which there was no COVID-19 and no Government intervention related to COVID-19”. The Government or Local Authority Action Clause does not insure against the financial consequences of COVID-19 nor of the Government intervention in response to COVID-19.
- 7.16. Further or alternatively, even if the government actions and advice were a “single body of intervention”, which is denied, the appropriate counterfactual would be that there was no such official intervention but the following factors would have operated on the business in any event:
- (1) COVID-19 existed and was prevalent in all or most parts of the United Kingdom;
 - (2) COVID-19 affected levels of employment, consumer behaviour, economic activity and confidence, both generally and in the particular sector in which the policyholder operates.
- 7.17. The Trends Language reflects and gives effect to ordinary principles of indemnity as well as the requirement of factual causation. The Trends Language requires the calculation of any losses to take account of any trends or circumstances which affect the business before or after the prevention of access to the insured Premises or which would have affected the business had the prevention of access to the insured Premises not occurred.
- 7.18. The application of the Trends Language may result in the amount of the indemnity being higher or lower in comparison with the previous year's trading experience.

7.19. In the present circumstances, the Trends Language requires the Rate of Gross Profit and/or Standard Turnover (as defined) to be adjusted to reflect the situation where Government and local authority advice, guidance and restrictions (save for actions or advice leading to the closure of The Premises) exist alongside the public fear in response to COVID-19, in order that the figures represent as near as possible the true loss had the prevention of access to The Premises not occurred.

7.20. This would also be the proper basis for calculating the indemnity even if the Trends Language did not apply to a claim under the Government and Local Authority Action clause.

8. Save as aforesaid, paragraphs 3 and 4 are denied.

9. Paragraphs 5 to 10 are admitted.

Section B: The Arch Policies

10. The three Arch Policies which are the subject of this test case are as follows:

10.1. The Retailers OGI Policy, which is designed for Premises used for retail purposes;

10.2. The Offices & Surgeries (Powerplace) Policy, which is designed for Premises used as offices and surgeries; and

10.3. The Commercial Combined (OGI) Policy, the wording of which has been deemed by the FCA as the lead wording for the Arch1 wording type.

11. Paragraphs 11 and 12 are admitted. The Government or Local Authority Action Clause contained in the Arch1 wording at Schedule 1 to the Particulars of Claim provides:

“We will also indemnify You in respect of reduction in Turnover and increase in cost of working as insured under this Section resulting from...”

Government or Local Authority Action

Prevention of access to The Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property.

We will not indemnify You in respect of

- (1) any incident lasting less than 12 hours*
- (2) any period other than the actual period when the access to The Premises was prevented*
- (3) a Notifiable Human Infectious or Contagious Disease as defined in the current relevant legislation occurring at The Premises*

The maximum We will pay under this Clause is £25,000, or the Business Interruption Sum Insured or limit shown in the Schedule, whichever is the lower, in respect of the total of all losses occurring during the Period of Insurance."

12. The same provision appears at clause 7 in the Commercial Combined (OGI) Policy and clause 8 in the Retailers OGI Policy and the Offices & Surgeries (Powerplace) Policy.
13. The Arch1 wording also contains Trends Language. The Trends Language from the Commercial Combined (OGI) Policy clause provides as follows:

"Rate of Gross Profit and Standard Turnover may be adjusted to reflect any trends or circumstances which

(i) affect The Business before or after the Damage

(ii) would have affected The Business had the Damage not occurred.

The adjusted figures will represent, as near as possible, the results which would have been achieved during the same period had the Damage not occurred."

14. The Trends Language from the Retailers OGI and the Offices & Surgeries (Powerplace) Policies provides:

“The figures adjusted will represent as near as possible, the figures which would have been obtained at the date of the Damage had the Damage not occurred.”

15. Paragraphs 13 to 15 are noted.
16. The first sentence of paragraph 16 is admitted. Pursuant to the Choice of Law clauses in the Arch Policies, English law governs the Policies if:
 - 16.1. The policyholder normally lives in England or (if applicable) the first named Policyholder lives in England, or;
 - 16.2. In the case of a business, the business has its principal place of interest in England, or;
 - 16.3. The policyholder does not normally live in or the business does have its principal place of business in any part of the UK, Channel Islands or the Isle of Man.
17. The second sentence of paragraph 16 is noted.

Section C: COVID-19 and the public authority response to it

18. As to paragraph 17, the presence of SARS-CoV-2 and COVID-19 in England and Wales since early 2020 is admitted. It is also admitted that the various steps taken by UK public authorities including the Government have interrupted and interfered with many businesses and their activities. In particular, it is admitted that the activities of those businesses which were obliged to close by reason of the governmental regulations cited at paragraph 7.8 and/or the governmental advice at paragraph 7.9 above suffered from interference.
19. Paragraph 18 is admitted as a chronology of key events, save:
 - 19.1. It is denied insofar as alleged that any statements made by members of the Government as to how the Government considered insurers ought to respond are relevant to the construction or application of the Arch1 wording; Arch was not invited to the meeting on 17 March 2020 referred to in Paragraph 18.11, it did

not attend that meeting and was not represented by those that did, and it did not agree anything with the Government either in the course of any meeting or otherwise. The point is academic anyway so far as concerns Arch1 because (as Arch admits at Paragraph 7.9 above) Government advice to close premises (such as the 20 March Advice and the 23 March Advice) qualifies as “the actions or advice of government or local authority” for the purposes of the Government or Local Authority Action Clause;

19.2. the reference in footnote 2 of the Particulars of Claim to “paragraphs 18.21 to 18.23” is presumed to read “paragraphs 18.11 to 18.13” (as the paragraphs to which the footnote relates); and

19.3. no admissions are made insofar as any are alleged or implied about the relationship between COVID-19, the statements made as to the risk posed by COVID-19, and the different pieces of advice, guidance, recommendations, regulations, and primary legislation;

19.4. it is denied that the material presented in paragraph 18 amounted to a “single body of public authority intervention” (as alleged at paragraph 4.1) or an “indivisible and interlinked strategy and package of national measures which it is impossible ... to divorce” (as alleged at paragraph 56).

20. As to paragraph 19, it is admitted that the categories of businesses therein were subject to different prohibitions.

Section D: Arch’s response to claims from its Arch1 policyholders

21. As to paragraph 20, it is admitted that Arch has declined some of the claims which it has received under the Government or Local Authority Action Clause.

22. Arch’s position is that “prevention of access” is to be construed as set out in in the Summary above. Arch is therefore entitled to refuse coverage where the government or local authority action or advice has not required the closure of the Premises.

23. Subject to the above, paragraphs 20.1 and 20.6 are admitted as broad summaries of the main grounds of refusal by Arch in its declinatures. For reasons set out herein, both grounds are correct as a matter of law.

Section E: Prevalence of COVID-19 in the UK

24. Arch does not plead to paragraphs 21 to 28 of the Particulars of Claim which it does not understand to be relevant to the FCA's pleaded case on Arch1, save that:

24.1. Arch has accepted that COVID-19 was an emergency which is likely to endanger life within the UK since 3 March 2020; and

24.2. The FCA is not entitled to the declarations sought in paragraph 28 against Arch since the Arch1 wording would not respond to the claims in issue even if all the matters alleged were true.

Section F: Assumed facts

25. As to paragraph 29, the Assumed Facts at Annexe 2 of the Particulars of Claim are of limited relevance to FCA's pleaded case on Arch1 and accordingly Arch does not plead to them.

26. For the purpose of construing Arch's Policies, the Assumed Facts are relevant to only the following issues:

26.1. Whether there is a "prevention of access" to The Premises;

26.2. Whether a prevention of access to The Premises is due to the action or advice of a government or local authority;

26.3. Whether the action or advice in question was due to an emergency likely to endanger life;

26.4. Whether a policyholder must establish on the balance of probabilities that the prevention of access to The Premises was a "but for" cause of its claimed business interruption losses (calculated in accordance with the policy provisions

and the ordinary principles of indemnity) and that such losses were proximately caused by the prevention of access to The Premises.

27. Paragraph 30 is noted.

Section G: Policy Intention

28. Paragraph 31 is admitted.

29. As to Paragraph 32, it is admitted that many of the Arch Policies were issued to small and medium enterprises. The Arch Policies were sold only on an online portal which was available only to authorised insurance intermediaries. If (which is denied) it is relevant to its proper construction that Arch1 is a standard form and that many of the policyholders were small or medium enterprises, it is also relevant that such policyholders acted through (and had the benefit of access to the advice of) authorised insurance intermediaries.

30. No admissions are made in relation to paragraphs 33 and 34 and to the extent these are said to be relevant to Arch1 (which they are not) the FCA is put to strict proof.

31. As to paragraph 35, any such rule (if indeed it exists) is relevant only to the application of policy exclusions. Arch has not relied on any policy exclusions to refuse COVID-19 related business interruption claims under the Arch1 wording type.

Section H: The disease trigger

32. Arch does not plead to paragraphs 36 to 40 which are not stated by the FCA to be relevant to the application of the Arch1 wording.

Section I: Presence of the disease within a certain distance from the premises

33. Paragraph 41 does not relate to the application of the Arch1 wording and Arch does not plead thereto.

34. As for Paragraph 42, the advice, instructions and regulations referred to in Paragraph 18 of the Particulars of Claim were not imposed in England and Wales at the same

time. The advice, instructions and regulations were imposed at different times from March 2020 to May 2020. It is admitted that the advice, instructions and regulations referred to in Paragraph 18 applied nationally although it is noted that material differences applied between England and Wales.

35. Further, any implication in the first sentence of paragraph 42 that the advice, instructions and regulations were applied as one single body of rules is denied. They were in fact applied (1) through different instruments; (2) by different government departments and bodies; (3) at different times over a three-month period; (4) in response to concerns arising at different stages of the COVID-19 outbreak; and (5) on different businesses in different ways.
36. Insofar as it relates to Arch1, paragraph 43.1 is admitted. Since 3 March 2020, COVID-19 has been a nationwide emergency which satisfies the requirement in the Arch1 Government or Local Authority Action Clause of “an emergency likely to endanger life.”

Section J: Public authority advice and regulations

37. Paragraph 44.1 is admitted, save that it is denied insofar as it is alleged that the following matters pleaded at paragraph 18 were actions or advice of the Government or a local authority for the purposes of Arch1:
 - 37.1. Paragraph 18.1 is a risk assessment and did not form advice, instructions and/or regulations.
 - 37.2. Paragraphs 18.2 and 18.8 were actions of the World Health Organisation, which is not a body of the Government nor a local authority;
 - 37.3. Paragraph 18.3, 18.5 and the first sentence of 18.7 refer to confirmations of deaths and did not constitute advice, instructions or regulations.
 - 37.4. Paragraphs 18.11 - 18.13 involve statements made by Mr Sunak alleging that the Government had informed insurers how it considered they ought to respond. Those statements by Mr Sunak do not amount to action or advice.

- 37.5. Paragraph 18.25 involves neither action nor advice, but merely an explanation by Mr Hancock of the logic behind the Government's lockdown measures.
38. Arch admits that the other instances of advice, instructions and regulations listed in paragraph 18 (including the 21 March Regulations and 26 March Regulations and the 20 March Advice and the 23 March Advice) were actions or advice of the Government.
39. The second sentence of Paragraph 44.5 is not understood.
40. Arch does not plead to Paragraph 45 which does not apply to Arch1.

Section K: Prevention of access

41. None of the matters alleged in Paragraph 46 amount to or involve governmental or local authority action or advice preventing access to insured Premises for the purposes of Arch1. Advice, instructions and/or announcements as to social distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working given on 16 March 2020 and subsequently do not amount to or result in a "prevention of access" to insured Premises for the purposes of Arch1.
42. Paragraph 46 is therefore denied.
43. Paragraph 47 is denied, save for businesses in Category 2. Access to the Premises of businesses identified in Categories 1, 4, 6 and 7 was only "prevented" by governmental or local authority action or advice if and to the extent that the Premises were required to be closed by such action or advice. Paragraphs 7.8 and 7.9 above are repeated.

Section L: Exclusions

44. Arch does not plead to paragraphs 50 to 52 which are not alleged to be relevant to Arch1.

Section M: Causation

45. To the extent that Paragraphs 53 to 58 contain legal submissions, not particulars of the FCA's claim, Arch will respond in full as appropriate in its written opening for trial.

46. Paragraph 53 is denied. Paragraphs 7.12 to 7.16 above are repeated. Further, the Trends Language also requires proof of “but for” causation.
47. The first sentence of Paragraph 54 is admitted. The balance of Paragraph 54 does not concern Arch1 and Arch does not plead to it.
48. As to Paragraph 55, it is admitted that the relevant clause in Arch1 requires that the relevant government or local authority action or advice preventing access to The Premises is the result of an emergency which is likely to endanger life or property. The second sentence is denied. There is no such absurdity. Arch1 does not purport to provide an indemnity against all business interruption losses caused by such an emergency.
49. Paragraph 56 is denied. There were multiple national and local responses to COVID-19 which were from different bodies and of different natures and legal effects, and some of which resulted from the public response to COVID-19 irrespective of Government or local authority action or advice. These included (but are not limited to) the following:
 - 49.1. Instructions on social distancing, including the guidance and advice regarding social distancing published by Public Health England on social distancing on 4 March 2020, 16 March 2020, and on 23 March 2020; the instruction of the Prime Minister on 22 March 2020 to the nation to stay 2 metres apart and to follow the social distancing advice; Regulation 6 of the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 which came into force on 26 March 2020 which required *inter alia* that persons responsible for carrying on a business, or providing a service, must take all reasonable measures to ensure a 2m distance is maintained between persons on the business premises; the Government’s advertising campaign regarding “the 2m rule”; and repeated statements of the Prime Minister (e.g. on 10 May 2020) and other politicians and public health officials that social distancing must be maintained.

- 49.2. The requirement for “quarantining”, including that individuals who returned from infected areas quarantine for 14 days (see the Health Protection (Coronavirus) Regulations 2020, which came into force on 10 February 2020);
- 49.3. The requirement for isolation for individuals with confirmed or possible COVID-19 infections, including the guidance published by Public Health England on 12 March 2020; as well as the statement made by the Prime Minister on 16 March 2020 that the public must isolate for 14 days if anyone in the household has symptoms.
- 49.4. Instructions and advice to avoid non-essential travel such as the government advertising campaign of “stay home, stay safe, save lives”; and many statements made by politicians and public health officials that non-essential and public transport should be avoided.
- 49.5. Government advice or restrictions on movement, such as the statement made by Boris Johnson to the nation on 23 March 2020 that members of the public will only be allowed to leave their home for shopping for basic necessities, one form of exercise a day, any medical need, to provide care or help a vulnerable person, and travelling to and from work but only where absolutely necessary and work cannot be done from home. Also Regulation 6 of the 26 March Regulations which prohibited individuals from leaving the place where they are living without reasonable excuse (defined in regulation 6(2)).
- 49.6. The general public fear and loss of economic confidence arising out of knowledge and experience of COVID-19 generally, irrespective of any Governmental orders or regulations, and by reason inter alia of statements as to the seriousness of COVID-19, including (i) statements made by the UK Department of Health and Social Care and Public Health England as to the risk level in the UK on 22 January 2020, 30 January 2020 and 12 March 2020, and (ii) the designation of COVID-19 on 5 March 2020 as a notifiable disease in England and Wales; (iii) the World Health Organisation’s designation of the outbreak of COVID-19 as a Public Health Emergency of International Concern on 30

January 2020; and (iv) the World Health Organisation's designation of COVID-19 as a pandemic on 11 March 2020.

- 49.7. General guidance such as that published by the Department of Health and Social Care on 3 March 2020; and guidance and advice frequently published and updated by NHS England.
- 49.8. Restrictions on mass gatherings such as the statement made by Boris Johnson to the nation on 23 March 2020 that the all gatherings of more than two people in public, excluding members of the same household, will be stopped, including all social events save for funerals. Also, Regulation 7 of the 26 March Regulations which enacted the prohibition on gatherings of more than two people except where the persons are members of the same household, where the gathering is necessary for work purposes, to attend a funeral, or where reasonably necessary as defined in regulation 7(d).
- 49.9. The closure of schools from 20 March 2020 by the Department for Education;
- 49.10. The closure of Category 2 businesses, announced in a statement by the Prime Minister on 20 March 2020 and enacted into law by the 21 March Regulations and the 26 March Regulations;
- 49.11. Advice in relation to other categories of business, e.g. in respect of accommodation providers: (i) the guidance published on 24 March 2020 by the Department for Digital, Culture, Media & Sport and the Department of Health and Social Care that businesses providing holiday accommodation should henceforth provide holiday accommodation only for specific identified categories of individuals; (ii) regulation 5 of the 26 March Regulations which enacted the above guidance into law; (iii) regulation 5 of the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 which came into force on 26 March 2020 which enacted the above guidance into law.

50. Paragraphs 57 and 58 are denied. On established principles of causation, if the Government or Local Authority Action clause has been triggered in principle during the policy period, a policyholder must establish on the balance of probabilities that the insured peril (the prevention of access to The Premises) was a “but for” cause of its claimed business interruption losses (calculated in accordance with the policy provisions and the ordinary principles of indemnity) and that such losses were proximately caused by the prevention of access to The Premises (even if there are other causes of those losses). The policyholder is therefore obliged to prove on the balance of probabilities inter alia that, but for the prevention of access to The Premises, the claimed business interruption losses would not have been incurred. Further, the Trends Language requires proof of “but for” causation. The proper counterfactual is that there was no government or local authority action or advice requiring The Premises to be closed but all other factors operating on the business should be taken into account. Those factors include the following:

- (1) COVID-19 existed and was prevalent in all or most parts of the United Kingdom;
- (2) the various other official control measures remained in force, including the UK Government regulations and advice on social distancing, the “lockdown” and the requirement of self-isolation;
- (3) COVID-19 and the control measures affected levels of employment, consumer behaviour, economic activity and confidence, both generally and in the particular sector in which the policyholder operates.

51. Paragraph 59 is denied. The phrases “resulting from” and “due to” when used in the preface to, and in, the Government or Local Authority Action clause have the ordinary insurance meaning of “proximately caused by”.

52. Arch does not plead to paragraphs 60 and 62 as these do not relate to the Arch1 wording.

53. As to Paragraphs 63 and 64, Paragraphs 7.3 to 7.10 and 41 to 43 above are repeated.

54. Arch does not plead to paragraphs 65 to 70 as these do not relate to the Arch1 wording.

55. Paragraph 71 is denied. Paragraph 52 above is repeated.

56. Arch does not plead to Paragraphs 72 and 73 which do not relate to the Arch1 wording.

The 'but for' test and the Trends Language

57. Paragraph 74 is denied. As a matter of law, and on the proper construction of the Arch Policies, the "but for" test is a necessary condition for establishing causation in fact and the right to an indemnity. While there may be rare cases in the law in which fairness and reasonableness may require that "but for" causation should not be a necessary condition, to the extent it is asserted that the present circumstances constitute such a case, the same is denied. It is further denied that the appropriate counterfactuals (as set out above) are unrealistic or artificial or otherworldly or that they involve interdependent or interlinked matters.

58. Paragraph 75.4 is denied and Paragraph 75.5 is admitted. The Trends Language in Arch 1 (Retailers and Powerplace) is not upward only. The Trends Language in Arch1 (all 3 forms) applies to non-damage cover, as the FCA admits at least as regards Arch1 (Commercial Combined). In any event, the purpose of Trends Language is to make express provision for that which is impliedly required in any event, namely that the policyholder is to be indemnified in respect of the losses caused by the insured damage, not more and not less. Accordingly, the applicability or otherwise of the Trends Language to a claim under the Government and Local Authority Action Clause is ultimately immaterial.

59. Paragraph 76 is denied. The relevant peril is not the health emergency. As a matter of construction, the Arch1 Trends Language requires account to be taken of any and all trends and circumstances which would have affected the Business save for the prevention of access to The Premises. No restrictions are imposed on the type or nature of the trends or circumstances which are to be taken into account.

60. Paragraphs 77 and 78 are denied. Paragraphs 7.12 to 7.16 above are repeated. Further, as to Paragraph 78, the issue does not concern the reduction of the valuation of loss as such but the causation of the losses.

61. Arch does not plead to paragraph 79 as it is not alleged to apply to Arch1.

Section N: Cover

62. Paragraph 80 is denied. Insofar as relevant to the Arch1 wording:

62.1. Where insured Premises were required to be closed by the 21 March Regulations or the 26 March Regulations or by the 20 March Advice or the 23 March Advice, Arch admits that there was a prevention of access to The Premises due to government action or advice which was due to an emergency likely to endanger life for the purposes of Arch1.

62.2. None of the other assumed facts satisfy the requirements of Arch1.

62.3. Arch1 does not cover business interruption losses which were not proximately caused by the prevention of access.

62.4. Arch1 does not cover business interruption losses which would have occurred anyway but for the prevention of access.

62.5. Paragraph 80.2 is denied.

62.6. Paragraph 80.3 is denied. The reasons given for the denial are correct in law.

62.7. As to Paragraph 80.4, Arch relies on the general coverage arguments set out above in relation to COVID-19 losses claimed under Arch1.

62.8. Paragraph 80.5 is noted.

Section O: The declarations sought in the Prayer

63. As to Declaration 8, Arch admits that there was an emergency likely to endanger life (for the purposes of Arch1) as from 3 March 2020.

64. Insofar as they relate to Arch1, for the reasons set out herein it is denied that the FCA is entitled to any of Declarations 9, 11(a), 12(a) or 15 to 18.

65. The remaining declarations do not relate to Arch1 and Arch does not plead thereto.

Section P: The particular declarations sought against Arch in Schedule 1

66. Particular declarations (1) and (2) are much too broad and imprecise. Particular declaration (3) is wrong in law. The FCA is not entitled to any of the particular declarations sought against Arch.

COUNTERCLAIM

67. Paragraphs 1 to 66 above are repeated.

68. In the premises, Arch seeks the following declarations in relation to Covid-19 business interruption claims under Arch1:

- (1) Where insured Premises were required to close by reason of the 21 March Regulations and/or the 26 March Regulations or the 20 March Advice and/or the 23 March Advice, there was a prevention of access to the Premises due to government action or advice which was due to an emergency likely to endanger life for the purposes of Arch1. None of the other Assumed Facts satisfy the requirements of the Government and Local Authority Action Clause in Arch1.

- (2) Where insured Premises were required to close by reason of the 21 March Regulations and/or the 26 March Regulations or the 20 March Advice and/or the 23 March Advice and did close, the policyholder is obliged to prove on the balance of probabilities that, but for the prevention of access to The Premises, the claimed business interruption losses would not have been incurred. The appropriate counterfactual is that there was no governmental or local authority action or advice preventing access to the Premises but all other factors remain unchanged.

(3) The Arch1 Trends Language also requires the calculation of any losses to take into account any trends or circumstances which would have affected the Business save for the prevention of access to The Premises.

JOHN LOCKEY QC

JEREMY BRIER

23 June 2020

Statement of Truth

The First Defendant believes that the facts stated in this Defence and Counterclaim 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.

I am duly authorised by the First Defendant to sign this statement.

N. Beresford

NEIL BERESFORD

PARTNER, CLYDE & CO LLP

23 June 2020

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