

**BUSINESS INTERRUPTION INSURANCE TEST CASE
FRAMEWORK AGREEMENT
[CONFORMED COPY]**

This Agreement is made on 31 May 2020

BETWEEN

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

AND

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

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

BACKGROUND

- A. Covid-19 and the Government controls imposed as a result of it are causing a substantial level of loss and distress to businesses, in particular (although not solely) SMEs. A large number of claims are being made to insurers under the terms of insurance policies providing cover for (among other matters) property damage and business interruption insurance losses. Several businesses and groups of businesses have indicated their intention to challenge the rejection of their claims.
- B. The *FCA*, as the conduct regulator of insurers in the United Kingdom, has been considering many of the policies in the market and is concerned that there are a significant number of policies where there is uncertainty created by differences of opinion expressed by interested parties as to whether the terms of policies require that claims in respect of some or all business interruption losses are paid.
- C. The *FCA* has an interest in the resolution of this uncertainty through the *test case*, acting in a way that is compatible with its strategic objective to ensure the relevant markets function well and to advance its operational objectives to ensure appropriate protection for consumers and to ensure market integrity. This is in order to facilitate the *FCA*'s: (1) assessment of whether insurers are complying with their regulatory obligations in relation to the handling of claims and associated complaints;¹ (2) determination of its policy and principles

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

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

- D. The *Insurers* have confirmed to the *FCA* their views that certain policies which they underwrite (the ***policies***) and which provide cover in principle for business interruption losses without the need for physical/property damage may not cover losses resulting from the Covid-19 pandemic (the ***coverage issue***). The *Insurers* (or some of them) further dispute whether as a matter of law and fact and in the light of the *policies* the necessary causal link to any loss suffered by customers which is the subject of claims under the *policies* can be established, including the impact, if any, of any trends clauses or similar/equivalent provisions (the ***causation issue***).
- E. The *Insurers* acknowledge that there is a dispute between them and certain policyholders in respect of the *coverage issue* and the *causation issue* (the ***disputed issues***) and the correct interpretation and effect of the terms within the *policies* relevant to those issues (the ***relevant terms***). For the purposes of this Agreement, the term policyholders is being used as a general term to refer to customers and/or policyholders and/or beneficiaries under the *policies*. The *FCA* considers that there is uncertainty (as identified at Recital B), that the fulfilment of its regulatory objectives requires that uncertainty to be resolved (as identified at Recital C), and that the dispute raises issues of general market importance. The *Insurers* and the *FCA* agree that these issues are suitable to be determined by the courts through proceedings for declaratory relief brought by the *FCA* in which the opposing arguments on the *disputed issues* are fully and properly advanced.
- F. The *Insurers* acknowledge that the proper advancement of the arguments on the *disputed issues* would be managed constructively and expeditiously by the *FCA* presenting to the Court, in the best way it considers appropriate, all arguments that the *FCA* considers should properly be raised by policyholders.
- G. The *Insurers* and the *FCA* believe that, consistently with CPR Part 1 (the overriding objective), taking into account the potential impacts of the Covid-19 pandemic on customers of the *policies* and customers with similar policies, the *disputed issues* need to be determined expeditiously and, in light of the complexity and importance of the issues, in a fair and orderly way. The potential scale of customer proceedings against insurers is likely to cause increased expense for all parties, as well (where litigation, not arbitration or other avenues, is contemplated) as the courts, and may present significant administrative problems for the courts in handling such cases. There is also a significant risk that different courts and tribunals will reach inconsistent decisions on materially similar issues, leading to further cost and uncertainty for insurers and policyholders. The resolution of the *disputed issues* in proceedings between the *Insurers* and the *FCA*

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

- H. Accordingly, to ensure that the *disputed issues* are brought before the Courts in accordance with CPR Part 1, in an efficient, expeditious, and orderly way, the *FCA* and the *Insurers* have agreed that the *FCA* should commence proceedings for a declaratory judgment against the *Insurers* in the High Court of England and Wales in accordance with the terms of this Agreement as soon as possible. Both the *Insurers* and the *FCA* believe that the *disputed issues* are capable of determination in this way, and seek an outcome as soon as reasonably practicable.
- I. The ***mutual objective*** is to achieve the maximum clarity possible for the maximum number of policyholders (especially, although not solely SMEs) and their insurers consistent with the need for expedition and proportionality. It is recognised that not all issues that may arise between individual policyholders and insurers can be resolved if the objective of resolving the *disputed issues* (at least at first instance court level) is to be achieved as soon as possible and having regard to the target timetable set out in this Agreement. In particular, the *Parties* acknowledge that:
- (a) Some policyholders may raise issues of law and/or fact which are not raised by the *FCA* and will therefore not be resolved in the proceedings, and in response to which Insurers may wish and should be entitled to raise defences of law and/or fact in addition to those dealt with in the proceedings.
- (b) Other issues flowing from the determination of the *disputed issues* (such as aggregation, additional causation issues specific to loss of rent and similar claims under a property owners policy and the specific quantum of any particular claims) will not form part of the *disputed issues* but will be determined according to the claims process of each *Insurer*, taking into account in particular any policy terms setting limits to claims amounts or indemnity periods.

Such issues in (a) and (b) will not form part of the *disputed issues*.

- J. It is recognised that the *FCA* and its advisors will engage as it deems appropriate, consistent with the need for expedition, with policyholders on the various matters, issues and documents referred to in this Agreement and this Agreement (including in draft form) so as to meet the *mutual objective*.
- K. The *FCA* considers that the *relevant terms* and the *Insurers* are a representative sample of a wider set of policy wordings and insurers, where such wider insurers are advancing the same or similar contentions to those as set out in Recital D. The *Parties* believe that

the proceedings will set a legal precedent which will be helpful to resolve to a substantial degree the legal uncertainties relating to this wider set so as to meet the *mutual objective*.

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

1. ISSUES TO BE DETERMINED

- 1.1 The *Parties* agree that, in light of the *disputed issues*, the matters to be determined in these proceedings are the correct interpretation and application (by reference to each *policy* as a whole) of *relevant terms* in a sample of the *policies* appropriately representative of the *disputed issues* (the **representative sample of terms**) and their application in relation to a set of **agreed facts** and **assumed facts** including:
 - (a) whether on the *agreed facts* and *assumed facts* the *policies* provide cover in principle; and
 - (b) whether on the *agreed facts* and *assumed facts* the policyholders of the *policies* can establish the necessary causal link (as a matter of the application of the law and the wording of the *policies*) between the assumed losses sustained by policyholders and any relevant peril, event or circumstance that is covered by *relevant terms* in the *policies*, including to take into account the relevance (if any) of a trends clause or similar/equivalent provision (if any).
- 1.2 The *agreed facts* will be facts necessary to resolve the *disputed issues*, such as (by way of example only) the date and nature of steps taken by the UK Government or any other relevant public authority in relation to Covid-19.
- 1.3 The *assumed facts* will be an appropriate set of illustrative factual assumptions such as (by way of example only) the nature of the affected business(es), how the business(es) were affected, whether the affected business(es) closed entirely or partially (and why), whether that was before or after the steps referred to in paragraph 1.2 of this Agreement, and the possible impact of other measures by the UK Government or any other relevant public authority in relation to Covid-19. It is recognised that the *assumed facts* are a menu of potential fact patterns which will be drawn upon by the Court and the *Parties* to assist resolution of the issues in the *test case*. For the avoidance of doubt, it is not intended that all *assumed facts* will be applied to all of the *representative sample of terms* in resolving the *disputed issues*.
- 1.4 The *Parties* agree that the *disputed issues* can be most expeditiously determined by asking the Court to consider the *representative sample of terms*, the *agreed facts*, the *assumed facts* and specified

questions for determination. A **matrix** setting out *disputed issues* which arise in relation to *the representative sample of terms* will also be prepared. The declaratory relief pleaded will reflect the clarity sought from the Court in respect of the *questions for determination*.

2. PROCESS FOR AGREEING THE AGREED FACTS ETC.

- 2.1 The *agreed facts* will be agreed between the *Parties* as soon as practicable. Should full agreement not be possible with all *Insurers* on all *agreed facts*, the *FCA* will present all the *agreed facts* that have been agreed with all *Insurers* and, for the remaining *agreed facts*, the *agreed facts* in relation to the majority of *Insurers* so as to further the *mutual objective*. The *FCA* will identify which *agreed facts* are agreed by all *Insurers* and which by the majority of *Insurers*. Whilst it is not anticipated that there will be any significant disagreement, if and insofar as any relevant facts do not constitute *agreed facts*, this paragraph does not prevent the *FCA* and/or *Insurers* from advancing facts that are not agreed as part of their respective cases and the Court may determine and/or take such facts into account as it thinks fit in relation to deciding the *questions for determination*.
- 2.2 The *FCA* has provided the *representative sample of terms*, and has proposed the *matrix*, the *assumed facts* and the *questions for determination* by the Court that will enable the *disputed issues* to be determined expeditiously. The *Insurers* will by no later than 5pm on **3 June 2020** comment on the contents of the *FCA*'s proposal for the *assumed facts*, *questions for determination* and *matrix* without prejudice to their right to propose additions, deletions or amendments under paragraph 2.3. The *FCA* will take the *Insurers'* comments into account in finalising its proposed *assumed facts*, *questions for determination* and *matrix* which will be included in the Particulars of Claim. The Particulars of Claim will be based on the generic reasons given by the *Insurers* for refusing indemnity under their policies including the requirements for establishing causation of loss.
- 2.3 After the Particulars of Claim have been served then each *Insurer* agrees that, prior to applying to the Court to propose any additions, deletions or amendments to the *assumed facts*, *questions for determination*, and *matrix* it shall: (i) discuss such additions, deletions or amendments with the *FCA* and the other *Insurers*; (ii) take into account any reasonable comments or objections expressed by the *FCA* or another *Insurer*; and (iii) have regard to the *overriding objective (under CPR Part 1)* and the terms of this Agreement, including paragraph 6.1. Any such application will be made at the first Case Management Conference or (if later) by **15 June 2020**.
- 2.4 The *Insurers* recognise that they will not have the population of information which was available to the *FCA* in relation to the selection of the *Insurers* or the *representative sample of terms* and

the *FCA* should decide as Claimant the *representative sample of terms* given the *mutual objective*. However each *Insurer* will as soon as possible and by 5pm on **2 June 2020** comment if it considers that the *representative sample of terms* is inaccurate or incomplete so far as its own wording and *relevant terms* are concerned. The *FCA* will take the *Insurers'* comments into account in determining if any changes need to be made to the *representative sample of terms* for accuracy and completeness. In addition, the *FCA* will accept a request from an *Insurer* to add a limited number of additional wordings written by that *Insurer* subject to the *mutual objective*. If any dispute arises in relation to either of these matters between *Insurers* and the *FCA* and cannot be resolved then this will be determined in like manner to paragraph 2.3.

- 2.5 It is acknowledged and agreed that, prior to providing the documents referred to in paragraph 2.2 to the *Insurers*, the *FCA* may also engage or have engaged as it deems appropriate with policyholders, other insurers and the Association of British Insurers in relation to these matters, including the content of the *assumed facts*, *questions for determination* and *matrix*. It is recognised that the *FCA* and policyholders may wish to share their own privileged information on a confidential (and/or common-interest basis) and the *Insurers* agree not to challenge the application of such privilege. It is recognised that the *Insurers* may wish to share privileged information with each other (and with other insurers and reinsurers) on a confidential (and/or common-interest) basis and the *FCA* agrees not to challenge the application of such privilege.
- 2.6 The *Insurers* agree that the *FCA* may disclose to policyholders, other insurers and the Association of British Insurers and publish on its website after this Agreement comes into force this Agreement, the identity of the *Insurers*, the *assumed facts*, *representative sample of terms*, *relevant terms*, *questions for determination* and *matrix* and other documents prepared for the purpose of the *test case*. The *FCA* may similarly disclose or publish the *policies* after this Agreement comes into force, with any appropriate redactions agreed in consultation with the *Insurers*.
- 2.7 Each *Insurer* will confirm by the date of serving their defence whether the *questions for determination* are the only issues of general legal principle (subject to Recital I) that each *Insurer* believes need to be determined in order to resolve the *disputed issues* in so far as they relate to whether and how each *Insurer's* terms within the *representative sample of terms* will in principle respond to a business interruption claim resulting from claims received to date made in respect of the Covid-19 pandemic by policyholders on the basis of the *agreed facts* and *assumed facts*. In so far as such positive confirmation cannot be provided each *Insurer* will, no later than the date of serving their Defence, confirm all further *questions for determination* that it considers need to be determined in order to do so together with a supporting explanation.

The *Insurers* shall immediately inform the *FCA* if, at any time after service of their defence, any amendment to or deletion from the *questions for determination* mean that the confirmations in this paragraph are no longer correct. Any dispute concerning the *questions for determination* that should be included in the *test case* shall be resolved by the Court and nothing in this clause shall prevent an *Insurer* from applying to the Court to seek permission to amend its Defence in any way it sees fit.

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

3. COMMENCEMENT OF PROCEEDINGS

- 3.1 Nothing in this Agreement shall prevent any *Party* from seeking further or other case management directions or substantive relief insofar as such request is consistent with and and/or promotes the *mutual objective*. Subject to the approval of the Court, the *Parties* are free to agree changes to the timetable and the terms of this Agreement that further the *mutual objective*.
- 3.2 The *FCA* will, by **9 June 2020**, file and serve a Claim Form in the Commercial Court (the ***test case***) for a declaration in respect of the issues agreed to be determined in accordance with this Agreement. The current intention is to file a Part 7 Claim in the Commercial Court, Financial List with the intention of it being admitted to and conducted under the Financial Markets Test Case Scheme.
- 3.3 The *Insurers* will be cited in the *FCA's* Claim Form as Defendants to the *test case* and will support the *FCA's* standing to bring the *test case* and support the suitability of the Financial Markets Test Case Scheme for the *test case*.
- 3.4 The *FCA* and the *Insurers* will use all reasonable endeavours to present, by **9 June 2020**, a joint application to the Court for expedition of the *test case* and its admission to the Test Case Scheme. The application will propose the timetable materially set out in paragraph 5 of this Agreement.

- 3.5 If the *FCA* and the *Insurers* are unable to agree a joint application for admission to the Test Case Scheme and for expedition, the *FCA* will make an application that it considers to be reasonable, taking into account any comments or objections raised by the *Insurers*, and the *Insurers* shall have regard to their obligations under paragraph 6.1 in deciding how to respond to such application.

4. AGREED EVIDENCE

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

5. PROPOSED TIMETABLE

- 5.1 The *Parties* agree on the following target timetable (subject always to paragraph 3.1 and the supervision of the Court), which the *FCA* and the *Insurers* will invite the Court to endorse in the application for expedition:
1. The *FCA* will, by **9 June 2020**, file and serve a Claim Form in the Commercial Court;
 2. Each *Insurer* to file and serve an Acknowledgement of Service as soon as practicable after service of the *FCA*'s Claim Form and in any event within 7 days;
 3. The *FCA* to serve one composite set of Particulars of Claim relating to the *disputed issues* and the *policies* of each *Insurer*, and an application for expedition by **9 June 2020**;
 4. A Case Management Conference to be held no later than the first available date after service of the Particulars of Claim to address (at least), use of the Financial Test Case Scheme, expedition, immediate directions, designation of judge(s) on the Financial List and/or a Lord or Lady Justice of Appeal, and listing of trial.
 5. The *Insurers* to serve their Defences by **23 June 2020**. Each *Insurer* will plead separately to the part of the composite Particulars of Claim which concern it and will, so far as practicable, avoid unnecessary duplication in responding to aspects of the Particulars of Claim which are common to all *Insurers*;

6. A further Case Management Conference to be as soon as possible after **25 June 2020**.
7. The *FCA* to serve a Reply by **3 July 2020**;
8. Directions to be sought at the earliest opportunity to include (in addition to those above):
 - a. Filing and service of evidence, if any;
 - b. Settling the list of issues for trial (having regard to the *questions for determination*);
 - c. Timing and sequencing of the exchange of skeleton arguments;
 - d. Listing of trial, including time estimate, with the *Parties* seeking a trial as soon as reasonably practicable, the current intention being that such trial concludes (with the exception of any judgment) during July 2020;
 - e. If applicable, intervention or otherwise by any representatives of policyholders or any other person desiring to join the *test case*, and the form any such interventions should take (including whether any interventions should be limited to written submissions or include oral submissions).
 - f. Timetable for trial, to include time limits for oral submissions.
- 5.2 As soon as reasonably practicable, and prior to issuing the *test case* the *FCA* shall, in conjunction with the *Insurers*, liaise with the Commercial Court (such communications having commenced) to make enquiries concerning the feasibility of the target timetable and specifically in respect of the timing of:
 - (a) the hearings referred to in paragraphs 5.1.4 and 5.1.6 above; and
 - (b) the trial in paragraph 5.1.8(d).
- 5.3 Upon signing this Agreement and prior to the *test case* being issued the *Parties* will comply with CPR 39.8 as though the *test case* had been issued and the *Parties* were parties to the *test case*.

6. MUTUAL OBJECTIVE, EXPEDITION, RELATED PROCEEDINGS

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

- 6.2 Subject always to the *overriding* objective, each *Party* agrees to cooperate with other *Parties* and to use reasonable endeavours to ensure that final resolution of the *test case* is achieved expeditiously and so far as reasonably practicable in accordance with the above target timetable. This will include in relation to matters such as electronic service of documents.
- 6.3 Subject always to any applicable legal duties and obligations and any applicable legal privilege, the *Insurers* must regularly keep the *FCA* updated about the progress of other court or arbitration proceedings to which it is a party and which is relevant to the questions to be determined in the *test case* and provide such information as the *FCA* requests in relation to them, but for the avoidance of doubt the *FCA* will not seek to prevent such proceedings from progressing.

7. SETTLEMENT AND EFFECT ON THE TEST CASE

- 7.1 Where an *Insurer* (the ***Settling Insurer***) settles any claim in respect of a *relevant term* in the *representative sample of terms* and the settlement has the effect that there is no longer any dispute or potential dispute between the *Settling Insurer* and its policyholders in respect of the *coverage issue* and the *causation issue* without prejudice to any other issues that may arise in resolving such claims, the *Settling Insurer* agrees to notify all other *Parties* in writing as soon as possible.
- 7.2 This shall not automatically lead to that part of the *test case* ceasing but, if the *FCA* considers that a replacement *relevant term* is required to resolve the same or similar questions that were to be determined in respect of the original *relevant terms* concerned, the *Parties* will endeavour to agree a replacement *relevant term* in a *policy* issued by an *Insurer* so that the *questions to be determined* can be properly considered by the Court.
- 7.3 Where it is not possible to identify a replacement *relevant term* in a *policy* issued by an existing *Insurer*, the *Parties* will endeavour to agree a replacement *relevant term* issued by a non-*Party* insurer that is willing to join the *test case*. Following agreement, that insurer will be invited to apply to be joined as a defendant in the *test case* and to agree to become a *Party* to this Agreement (and thereby become an *Insurer* as defined in this Agreement) and the *FCA* and the existing *Insurers* will support that application and agreement.
- 7.4 The *FCA* and the *Insurers* agree not to object to any application to amend statements of case that may be required as a result of such replacement.
- 7.5 The *FCA* and the *Insurers* agree that in the event of any amendments to the *test case* being required as a result of such replacement, they will take all reasonable steps to minimise any delay to the resolution of the *test case*.

- 7.6 If the *Parties* are unable to identify a suitable replacement *relevant term*, the *Settling Insurer* agrees to continue the *test case* to resolve the questions to be determined in respect of the original *relevant term*.
- 7.7 For the avoidance of doubt, but subject to the *Insurers'* legal obligations including under the *FCA's* rules, the *FCA* confirms (in respect of its own functions) that full and final settlements entered into between *Insurers* and policyholders before any judgment is handed down in the *test case* will not be affected by such judgment (in itself), and that such judgment (in itself) will not give rise to any regulatory obligation to revisit such settlements.

8. APPEALS

- 8.1 The *FCA* or any *Insurer* may appeal the decision of the Court determining the issues in the *test case* subject to the normal procedural rules for seeking permission for, and making appeals.
- 8.2 Where the *FCA* or any *Insurer* seeks to appeal the decision of the Court, whether to the Court of Appeal or beyond, that *Party* will seek to have their appeal heard on an expedited basis, and undertakes to take all reasonable steps to ensure that the appeal is conducted and determined on an expedited basis as soon as is reasonably practicable.
- 8.3 In particular, and without prejudice to their obligations to seek expedition above, the *Parties* agree to explore the possibility and appropriateness of seeking a leapfrog appeal to the Supreme Court under PD 1.2.17 and 3.6 of the Practice Directions of the Supreme Court.

9. CO-ORDINATION OF LEGAL REPRESENTATION

- 9.1 The *Parties* agree that, taking into account the need for the *test case* to be resolved expeditiously (including therefore the need to resolve the issues within a practical trial length) and at proportionate cost, the *Parties* should use their best endeavours to co-operate.
- 9.2 The *Insurers* agree, so far as reasonably practicable and efficient in the time available, to coordinate their correspondence with the *FCA's* solicitors relating to the *test case* and their written and oral submissions to the Court so as to minimise duplication, albeit that:
- (a) each *Insurer* and the *FCA* recognises that each *Party* has separate independent legal representation and each of the *Insurers* has written different *policies* and *relevant terms*; and
 - (b) accordingly, each *Insurer* remains entitled to communicate and make submissions separately.

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

10. COSTS

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

11. PUBLICITY

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

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

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

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

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

12. THIRD PARTY RIGHTS

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

13. COMPETITION

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

14. GENERAL

- 14.1 Words and phrases in italics have the meanings given to them where they appear in bold italic text.
- 14.2 No *Insurer* may contend that any documents or information sought by the *FCA* in the exercise of its regulatory functions are not to be produced because of the existence of the *test case* (subject to the usual constraints attaching to the exercise of the *FCA's* powers). For the avoidance of doubt, paragraph 2.4 addresses the sharing of privileged information between *Insurers* and reinsurers.
- 14.3 This Agreement may be executed in any number of counterparts, but is effective as between each *Insurer* and the *FCA* when executed by both of them.
- 14.4 A copy of the signature page to this Agreement that is sent electronically shall constitute adequate proof of the execution of this Agreement by the relevant *Party*.
- 14.5 This Agreement and any dispute or claim (including non-contractual disputes or claims) arising out of or in connection with it or its subject matter or formation shall be governed by and construed in accordance with the law of England and Wales. The English courts shall have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement and the *Parties* submit to the exclusive jurisdiction of the English courts.
- 14.6 This Agreement will come into force at 7am on 1 June 2020.

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

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

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

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

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

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

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

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

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

Schedule
Insurer parties

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