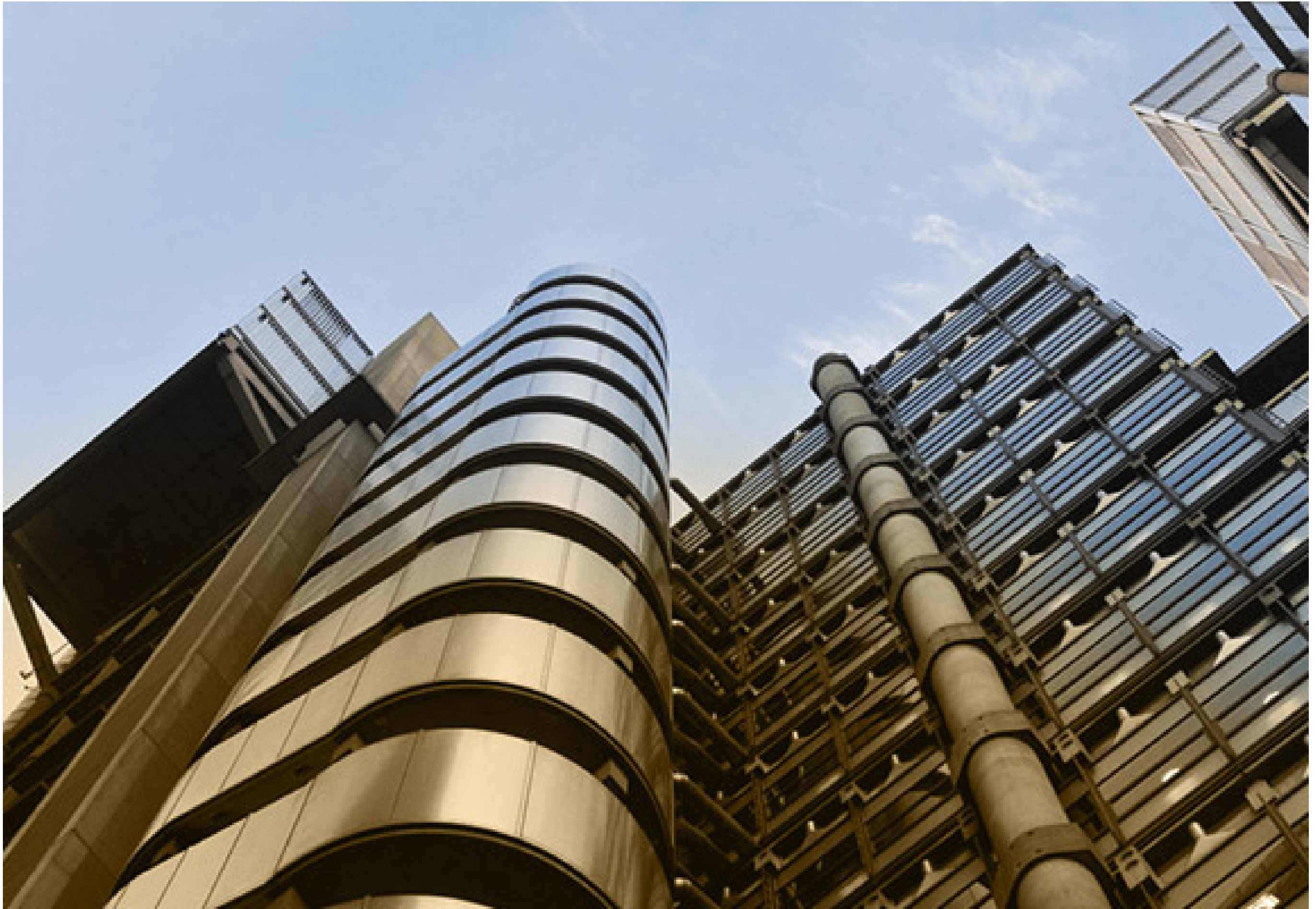
39 Essex CHAMBERS

Covid-19 Insurance Insights

June 2020



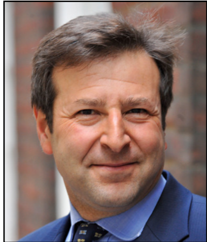
As we approach week 11 of lockdown and with businesses and professional practices continuing to be affected by the Covid-19 outbreak, 39 Essex Chambers provides its second instalment of our Insurance Insights Newsletter where we outline some additional topical insurance issues and the services that we are able to provide to both insurers and to businesses and professional practices.

This newsletter follows our successful webinar 'Business Interruption Insurance in the time of corona – the devil is in the policy wording'. If you would like to view a recording of this webinar then please follow **this link**.

If you have any Covid-19 or other related enquiries then please do not hesitate to contact the clerks whose details can be found below.

Contents

1. INTRODUCTION
2. BUSINESS INTERRUPTION INSURANCE CLAIMS AND THE "BUT FOR" CAUSATION TEST:
   Neil Block QC
3. BUSINESS INTERRUPTION
   Jonathan Bellamy
5. NOTIFIABLE DISEASE EXTENSIONS
   Edmund Townsend
6. COVID-19 AND LATE PAYMENT OF INSURANCE CLAIMS
   Ruth Keating
8. QUARANTINE QUERIES?



BUSINESS INTERRUPTION INSURANCE CLAIMS AND THE "BUT FOR" CAUSATION TEST:

Neil Block QC

Consider the position when a business suffers a loss by reason of the presence of an infectious disease at its premises or within the defined location, but would in any event have been unable to trade by reason of the lockdown regulations. Is the loss resulting from the presence of infectious disease at the premises recoverable?

Business Interruption policies in the UK ordinarily provide for recovery of loss caused by physical damage to property at the insured premises, subject to adjustment to reflect other factors that would have occurred in any event.

The leading authority is *Orient-Express Hotels v Assicurazioni Generali S.p.A* [2010] EWHC 1186 (Comm). This claim arose in the aftermath of Hurricanes Katrina and Rita in New Orleans in 2005. The Claimant Hotel had the benefit of an insurance policy which covered business interruption "directly arising from damage"; damage was defined as "direct physical loss, destruction or damage to the hotel". There was a trends clause that provided for variations or special circumstances that would have affected the hotel business had the hotel not been damaged to be taken into account – "so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Damage would have been obtained during [the indemnity period]". The policy was governed by English law.

The hotel had suffered significant damage in the hurricane and it was agreed that this had caused interruption to the business of running a hotel – it had closed for a period of about 2 months. The surrounding area was devastated by the hurricanes with the entire city shut down for several weeks following a declaration of emergency, the imposition of a curfew and mandatory evacuation. There was an issue as to whether that interruption of business by reason of the damage to the hotel was the cause of the hotel's loss of income within the meaning of the policy. The insurer contended that the policy only covered loss that the insured could prove would not have arisen "but for" the interruption of its business due to the damage to the hotel premises and that since damage to the city in which the hotel was located was a concurrent and major causal factor there could be no indemnity under the business interruption section of the policy. In other words, the loss would have been suffered by the hotel as a result of the damage to the surrounding area even if the hotel itself had not been damaged. The arbitrators accepted the insurer's argument. No award was made under the Business Interruption section of the policy, and limited awards were made under the Loss of Attraction and Prevention of Access extensions to the policy. The hotel appealed to the Commercial Court.

The appeal was assigned to Hamlin J. The question for determination was whether it was appropriate to use the "but for" test in relation to causation where there are two concurrent and independent causes, one of which fell within the policy cover and one of which was specifically excluded. A distinction was drawn between interdependent concurrent causes and independent concurrent causes. In the former the "but for" test would be satisfied and in the latter it would not.

The hotel argued that the decisions in *Miss Jay Jay* [1985] 1 Lloyd's 264 and *IF P & C Insurance Silversea Cruises* [2004] Lloyd's Rep IR 696 should apply – that where there are two proximate causes of a loss, the policyholder can recover if one of the causes comes within the cover, provided the other cause is not excluded. The hotel also relied upon the relaxation of the "but for" test in *Kuwait Airways Corporation v Iraqi Airways Co.* [2002] UKHL 19 in which two joint tortfeasors were liable notwithstanding that the Claimant could not prove which of them had caused the loss.

This was an appeal and the judge concluded that the terms of the insurance contract were express and clear and fairness and reasonableness did not require him to set aside the arbitrators finding. There had been no error of law. Hamlin J accepted that the above authorities were distinguishable in that they involved interdependent causes as opposed to independent causes. He did accept that there may be cases in which the "but for" test should not apply. He gave permission to appeal to the Court of Appeal, but the parties compromised the appeal.

Orient-Express has been criticised by various academic and practitioner commentators who argue that it deprives the policyholder of the cover intended to be afforded under the policy and gives a windfall to insurers. They argue that the policy should respond up to the level of loss that would have flowed from the damage to the insured's premises, notwithstanding the wide area damage. It is perhaps surprising that this issue has still not been considered by the Court of Appeal.

Pending such an appeal, which of course may not reach a different decision than that reached in *Orient Express*, policyholders may wish to instruct their brokers to seek cover including a trends clause that provides for the policyholder to be placed in the position it would have been but for the event causing the damage (as opposed to but for the damage to the insured's premises).

It is interesting to note that the Orient-Express approach was not adopted by the London Market when dealing with the claims involving large areas of damage in the Thailand flood of 2011 and the Cumbrian flood of 2009. This may be because the insurers accepted that the true intention was to provi8de cover in respect of losses flowing from damage to the insured's premises notwithstanding the wide area damage.

There is also much to commend seeking adequate limits of cover under the Loss of Attraction and Prevention of Access clauses which tend to have modest limits.

BUSINESS INTERRUPTION

Jonathan Bellamy

In our first *Covid-19 Insurance Insights* publication last month, we drew attention to the importance to businesses of business interruption insurance policy claims in the current public healthcare crisis. In this month's publication we update and dive deeper into this topic.

The importance of this form of cover is clear from the ABI's written response to the Treasury Select Sub-Committee on 25 April 2020. The ABI's working estimate at that time was that its members would likely pay out £900 million under commercial insurance policies for business interruption claims, this being 75% of the estimate of all members' liabilities in insurance claims arising from coronavirus. To give some alternative context, the business interruption figure is about four times more than was paid out in 2019 for losses arising from storms Ciara and Dennis.

The significance of business interruption cover for SMEs has been recognized by the FCA's approach and intervention since our last publication. On 15 April 2020 the FCA issued an open *"Dear CEO letter"* to insurance companies writing this line of business in the UK. It commented that, whilst the majority of policies provide cover for business interruption as a consequence of physical damage, a number of policies also provide cover from other causes, including infectious or notifiable diseases, non-damage denial of access and public authority closures and restrictions. On 1 May 2020 the FCA issued a public statement saying *"it is clear that decisive action is appropriate given the severity of the potential consequences for customers in the current coronavirus emergency."* The FCA stated that clarity was necessary for policyholders where there were the same or similar forms of disputed wording. The plan is to bring a number of cases to court as soon as possible for *"an authoritative declaratory judgment"* on the meaning and effect of some policy wording where *"there remains unresolved uncertainty"*. At the current time, the

FCA is considering the appropriate sample of cases to capture all of the most frequently used policy wordings that are giving rise to uncertainty. The plan is for these policy wordings to be considered by the High Court on an urgent basis and for authoritative interpretative rulings to be issued, using agreed statements of facts.

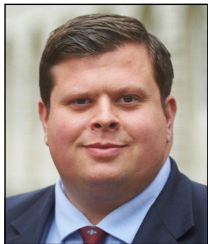
Interestingly, the FCA statement refers to the prospect that there has been an expectation gap between the extent of the business interruption cover policyholders thought they were purchasing and the cover they purchased, saying expressly that *"Some customers may believe they have been mis-sold their BI policy by their insurer or intermediary."* The prospect of broker and intermediary claims was discussed in our last publication and this observation will only heighten prospective litigants' interest.

On the question of physical damage, there is little prospect of a court finding that premises infected with coronavirus have suffered physical loss. The same goes for any geographical area specified in the policy; e.g. the 25-mile radius used in Hong Kong SARS policies to cover the island and of the type considered by the Hong Kong SAR Court of Final Appeal in *New World Harbourview Hotel Co Ltd & ors v ACE Insurance Ltd & ors* [2012] HKCFA 21. The reported cases, some of which concern first party property insurance and others which concern third-party liability insurance, do not all speak with precisely the same voice on the point. However, what is likely required is some level of permanent physical change to the property or premises in question. At the other end of the debate, it is clear that the perception that property may be damaged – or stigma – is not enough.

The several reported cases on contamination of land by radioactive material provide an interesting analogy. In *Merlin v British Nuclear Fuels plc* [1990] 2 QB 557 the High Court dismissed a claim for compensation, being diminution in value of the premises, brought against BNFL under Nuclear Installation Act 1965 ("the 1965 Act") arising from radioactive contamination of residential premises by emissions from Sellafield. S7 of the 1965 Act required *"damage to property"* as a pre-condition of a right of action for compensation. The court found that the mere presence within the claimant's property of alpha emitting radionuclides emanating from waste discharged, which caused no physical damage to the fabric of the property, could not on its own constitute such damage and any diminution in the value of the property caused by their presence was accordingly irrecoverable pure economic loss. The subsequent decision of the Court of Appeal in *Blue Circle Industries plc v Ministry of Defence* [1999] Ch 289, also concerned a claim for compensation under the 1965 Act and therefore the requirement of *"damage to property"*. On that occasion, water containing radioactive material escaped from the Aldermaston Atomic Weapons Research Establishment and contaminated marshland on the claimant's estate. The level of contamination was such that the topsoil had to be removed. The Court held that the statutory requirement was not intended to limit physical damage to particular types of damage. What was required was some change in the physical characteristics of the property rendering it less useful or valuable, and clearly such a change had occurred on the facts of that case. The consequences were economic but the damage itself was physical, and the authorities on pure economic loss did not apply. The claimant was therefore entitled to be compensated for all consequential loss, subject to the principles of reasonable foreseeability and remoteness, including reduction in the value of the land as well as the cost of reinstatement of the contaminated area.

Finally, by way of update on the importance of event cancellation insurance, tennis fans may be pleased to have read recently that the All England Club ("AELTC") is reported to have recovered around £114m arising from the cancellation of the 2020 Wimbledon tennis championships. Reports in the insurance trade press indicate that the insurers and re-insurers included various well-known syndicates at Lloyd's, AIG, Chubb, Hannover Re, Tokio Marine HCC, Munich Re and

Swiss Re. AELTC is reported to have taken out the responsive infectious/notifiable disease extension each year after the SARS epidemic and paid a total sum of around £25m in premiums since that time. It appears that AELTC is the only organiser of the Grand Slam tennis championships to have this cover. Whether that cover will be available next year, and if so at what price, is a more difficult question.



NOTIFIABLE DISEASE EXTENSIONS

Edmund Townsend

Notifiable disease extensions are a non-damage extension to cover that is fairly common in commercial combined policies of insurance in the hospitality and leisure sectors.

Policy wordings are not homogeneous. Insuring clauses may offer cover dependent upon an “occurrence of a Notifiable Disease at the Premises” or they may offer cover in circumstances where a potentially causative agent is discovered at the premises (for example, “the discovery of an organism at the premises which is likely to give rise to the occurrence of a notifiable disease”). This form of wording is unlikely to be of much benefit to policyholders in the context of the COVID-19 pandemic. Since it will be difficult to establish that there has been an occurrence of coronavirus at the insured premises (and that anybody who developed the disease did not contract SARS-CoV-2 elsewhere) or that SARS-CoV-2 was at the insured premises. Further or alternatively, that there was a defined loss to the business proximately caused by any occurrence or SARS-CoV-2 that is proven.

Another form of wording that is likely to be of more interest to policyholders is one where cover is triggered by “any occurrence of a Notifiable Disease within a radius of x miles from the premises”. The geographical restriction may vary from policy to policy. It is often 1 mile or 25 miles.

What is a notifiable disease?

Policies will typically define a notifiable disease for the purposes of the extension. This will usually have the format of a list of diseases and/or conditions. It is unlikely that COVID-19 or SARS-CoV-2 will feature on any lists since they were first identified on 11 February 2020. There may, however, be scope for argument where the list contains a more generalised description of a class of disease(s) and/or condition(s) or where it refers to a mutant variation of a disease or condition. In order to address these issues there is a need for scientific and/or medical evidence.

Some policies will not define notifiable disease. There is caselaw from the Hong Kong Court of Final Appeal (*New World Harbourview Hotel v Ace Insurance* [2012] Ll Rep IP 537) which provides some guidance. That case arose out of the SARS outbreak. In that case the extension covered, *inter alia*, “notifiable human infectious or contagious disease occurring within 25 miles of the Premises”. The Government had requested that hospitals notify any instances of SARS from 11 February 2003. However, SARS was not added to First Schedule of Quarantine and Prevention of Disease Ordinance until 27 March 2003. Sir Anthony Mason delivered the Judgment of the Court, which found that a “notifiable human infectious or contagious disease” was a disease that was required by law to be notified to an authority. SARS was not, therefore, an insured peril until 27 March 2003.

It will be important to identify the dates upon which COVID-19 and SARS-CoV-2 became notifiable within the relevant jurisdiction. Within the United Kingdom this took place on different dates. For convenience, the details are:

Scotland:

Framework: The Public Health (Scotland) Act 2008 amended by The Public Health etc. (Scotland) Act 2008 (Notifiable Diseases and Notifiable Organisms) Amendment Regulations 2020 (SI 2020/51)

Notifiable: **22 February 2020** (Reg 1(2) SI 2020/51)

Northern Ireland:
Framework: The Public Health (Northern Ireland) Act 1967 amended by Public Health Notifiable Diseases Order(Northern Ireland) 2020

Notifiable: **29 February 2020** (Rule 1(1) SR 2020/23)

England:
Framework: The Public Health (Control of Disease) Act 1984 (as amended by the Health and Social Care Act 2008) + The Health Protection (Notification) Regulations 2010 (SI 2010/659), amended by The Health Protection (Notification) (Amendment) Regulations 2020 (SI 2020/237)

Notifiable: **5 March 2020** (Reg 1(2) SI 2020/237)

Wales:
Framework: The Public Health (Control of Disease) Act 1984 (as amended by the Health and Social Care Act 2008) + Health Protection (Notification) (Wales) Regulations 2010, amended by The Health Protection (Notification) (Wales) (Amendment) Regulations 2020 (SI 2020/232)

Notifiable: **6 March 2020** (Reg 1, SI 2020/232)

It is often the intention that this sort of extension will provide cover where there is a particular, localised, occurrence of a notifiable disease. Exclusions which seek to target diseases that could lead to a pandemic are therefore common. Exclusions may be found which exclude "any pandemic Influenza or strain identified by the World Health Organisation" or "any pandemic coronavirus or strain identified by the World Health Organisation".

As with all business interruption insurance claims arising out of coronavirus, there will be causation arguments. Neil Block QC discusses the causation arguments in his piece for this issue of our insurance insights newsletter.

COVID-19 AND LATE PAYMENT OF INSURANCE CLAIMS

Ruth Keating

The impact of the pandemic has meant widespread disruption to supply chains, travel, and business activities. Consequently insurers are facing a deluge of insurance claims as a result of the Covid-19 pandemic.

The difficulties which are created for the insurance industry are clear. One such difficulty arises where there is a huge volume of claims, beyond the number usually handled at any one time. This situation is only exacerbated by other factors, such as the disruption to the insurer's own work force. Taken together, this may result in late payments of claims.

Section 13A of the Insurance Act 2015 implies a term requiring payment of sums in a reasonable time into all contracts of insurance after 4 May 2017. If the insurer breaches this obligation a policy holder may claim damages according to the usual rules of contract law.

Section 13A provides that:

1) It is an implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time ("the implied term").
2) A reasonable time includes a reasonable time to investigate and assess the claim.
3) What is reasonable will depend on all the relevant circumstances, but the following are examples of things which may need to be taken into account: (a) the type of insurance; (b) the size and complexity of the claim; (c) compliance with any relevant statutory or regulatory rules or guidance; and (d) factors outside the insurer's control.
4) If the insurer shows that there were reasonable grounds for disputing the claim (whether as to the amount or as to whether anything

is payable at all) the insurer will not have breached the implied term merely by failing to pay the claim (or the affected part of it) while the dispute is continuing. The conduct of the insurer in handling the claim may be a relevant factor in deciding whether that term was breached.

5) Remedies available for breach of this implied term are in addition to and distinct from any right to enforce payment of the sums due, and any right to interest on those sums (whether under the contract, under another enactment, at the court's discretion or otherwise).

A number of important points arise under section 13A which should be at the forefront of insurer's minds as they deal with payments.

- What is considered a "reasonable time" will depend on several factors. As stated above, this includes factors outside the insurer's control. This is helpful to insurers; however it should not be interpreted as a carte blanche in the context of Covid-19 and should be used with some caution.
- Evidently, the more complex and significant a claim, the longer the period which is likely to be regarded as a "reasonable time".
- Section 13A cannot be derogated from in consumer contracts but can be derogated from in non-consumer contracts (outside of deliberate or reckless breaches).
- If the insurer shows that there were reasonable grounds for disputing the claim the insurer will not breach the implied term merely by failing to pay the claim. Insurers would therefore be well advised to, as always, consider the underlying basis of the claim carefully.
- Claims should be dealt with in a timely manner and detailed records should be kept as the claim is being progressed. Where delays arise, which either delay or prevent payment, details should be recorded as to why. All of these steps protect the insurer's position, evidencing that a claim was dealt with in a reasonable amount of time in the circumstances.
- Insurers should also consider commercial decisions to protect their position such as making a partial or interim payment on elements of a claim which are not in dispute, along with reserving the insurer's rights in respect of the disputed element of the claim.
- As always, communicating with the insured so they are aware of the progress of their claim is of great importance.

The Insurance Act 2015 is still relatively new and so, perhaps unsurprisingly, there has of yet been no successful claims for late payment damages. However, the pressure that Covid-19 puts on insurers is evident and may change this.

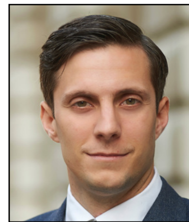
QUARANTINE QUERIES?

39 Essex Chambers Quarantine Query service continues with great success so please do not hesitate to contact chambers if you or your colleagues would like to use this service. For those who are unaware of the service that we are offering during the lockdown period, we have established a team of silks and juniors who will be available for up to half an hour – free of charge – to talk through the kind of issues that you would previously have mulled over with a colleague at the coffee machine. The discussion will be on a "no liability" and "no names" basis; however, you will be asked to provide some brief details of the query to our clerks so that they can make a barrister available.

Should you have any cases or legal issues you wish to discuss, COVID-19 Business Interruption Insurance related or otherwise, but do not have your colleague to ask at the coffee machine then please do not hesitate to contact one of our clerks to book a slot with one of our experts.

CLERKS

Ben Sundborg
Senior Practice Manager
Call: +44 (0)20 7832 1179
Mobile: +44 (0)7921 880 668
ben.sundborg@39essex.com



Tom Gibbons
Senior Practice Manager
Call: +44 (0)20 7634 9080
Mobile: +44 (0)7711 016 602
tom.gibbons@39essex.com

Niki Merison
Senior Practice Manager
Call: +44 (0)20 7634 9011
Mobile: +44 (0)7872 178 645
niki.merison@39essex.com

Hannah Milne
Practice Manager
Call: +44 (0)20 7832 1182
Mobile: +44 (0)7540 333 2263
hannah.milne@39essex.com

Chief Executive and Director of Clerking: Lindsay Scott
Senior Clerks: Alastair Davidson and Michael Kaplan

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
28 Maxwell Road #04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6320 9272

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia
Tel: +(60)32 271 1085

39 Essex Chambers is an equal opportunities employer.

39 Essex Chambers LLP is a governance and holding entity and a limited liability partnership registered in England and Wales (registered number 0C360005) with its registered office at 81 Chancery Lane, London WC2A 1DD.

39 Essex Chambers' members provide legal and advocacy services as independent, self-employed barristers and no entity connected with 39 Essex Chambers provides any legal services. 39 Essex Chambers (Services) Limited manages the administrative, operational and support functions of Chambers and is a company incorporated in England and Wales (company number 7385894) with its registered office at 81 Chancery Lane, London WC2A 1DD.