IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM

THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS, COMMERCIAL COURT (QBD), FINANCIAL LIST

Neutral Citation: [2020] EWHC 2448 (Comm)

BETWEEN:

(1) ARCH INSURANCE (UK) LIMITED

(2) ARGENTA SYNDICATE MANAGEMENT LIMITED

(3) HISCOX INSURANCE COMPANY LIMITED

(4) MS AMLIN UNDERWRITING LIMITED

(5) QBE UK LIMITED

(6) ROYAL & SUN ALLIANCE INSURANCE PLC

Appellants

- and -

THE FINANCIAL CONDUCT AUTHORITY

Respondent

- and -

HISCOX ACTION GROUP

Intervener

THE FIFTH APPELLANT'S WRITTEN CASE

A INTRODUCTION

1. Three types of QBE wordings were before the Court referred to individually as "QBE1" (four policies), "QBE2" (two policies) and "QBE3" (one policy) and collectively as the "QBE Wordings".

2. The insuring clauses in the QBE Wordings, which the FCA argued responded to loss caused by the COVID-19 pandemic, were one limb of cover provided in '*Murder, suicide or disease'* extensions in the QBE Wordings. These clauses formed part of the category of clauses referred to as "disease clauses". For ease of reference QBE adopts the same term herein, although it is important to note that in each of the policies in issue the QBE disease clause is one of a group of extensions providing cover for a range of specific perils, all of which focus on events occurring at or within a specified distance of the insured premises.

3. QBE appeals against the Court's findings in relation to the construction of the QBE1 disease clauses and its findings in respect of causation and the proper operation of the 'trends' clauses.

4. In brief summary, the Court erred by construing the QBE1 disease clauses in a way which removed any necessary causal connection between interference to the insured's business and the appearance or manifestation of notifiable disease at, or within the specified radius of, the insured premises (the insured peril).

5. The Court did this by characterising the manifestation of COVID-19 in anyone within the designated area as no more than an event which determines the timing of the commencement of cover, as distinct from an event which must cause the interference with the business. One consequence of the Court's approach is that cover will be triggered as and when a single case of COVID-19 becomes manifest in someone at, or within the specified radius of, the insured premises even in a case where the relevant interference to the business has previously occurred and is continuing as a result of a government response aimed at inhibiting the spread of the disease nationally. One doubts whether any of the relevant professionals engaged in this sort of business (brokers, underwriters and loss adjusters, etc.) could have anticipated that the cover would respond in this way.

6. As explained below, the Court's misinterpretation of the QBE1 disease clauses flowed from a misreading of the insured peril. This in turn led the Court to adopt a wrong approach to causation.

7. The disease clauses in QBE2 and QBE3 are the subject of the FCA's appeal which is resisted by QBE.

B GROUNDS 1 AND 2: THE PROPER CONSTRUCTION OF THE QBE1 DISEASE CLAUSES

B.1 Introduction

8. Grounds 1 and 2 of QBE's appeal concern the proper construction of the QBE1 disease clauses.

9. The applicable principles of contractual construction have been re-stated in several recent decisions of this Court and do not need detailed recitation.

10. It is well established that a clause in a contract, including in a policy of insurance, should be interpreted in the context of that contract as a whole and in light of the matters assumed to have been within the reasonable contemplation of the parties when the contract was entered into. The object is to decide what a reasonable person, in the position of the parties and equipped with the knowledge reasonably to be imputed to the parties at the time of contracting, would have understood the words in question to mean.

11. This means that QBE1 falls to be interpreted from the viewpoint of a reasonable person equipped with the knowledge reasonably available to the parties at the time the contract was entered into. The object is to ascertain the scope of cover intended by the parties when they or their professional agents agreed it, not to search for a construction which fits unprecedented circumstances that occur subsequently and lead to claims. When the meaning is unclear and more than one interpretation is available, it may be legitimate to opt for that which makes most sense commercially. But this is no justification for engineering contractual wording to accommodate unique circumstances which have occurred subsequently. When the meaning intended by the parties may be inferred from the words used in the contractual setting in which they are found, effect must be given to that meaning.

12. The most important aspect of the context for ascertaining the intended meaning of contractual wording (particularly in the case of a detailed professionally drawn agreement) is usually the contractual landscape in which the words in question are placed. The contractual setting of the QBE1 disease clauses is important in this case.

13. The relevant wording in the lead QBE1 policy provides as follows:[1]

> *"**We** will indemnify **you** for …*
>
> ***7.3.9 Murder, suicide or disease***
>
> *interruption of or interference with the business arising from:*
>
> *a) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the **premises** or within a twenty five (25) mile radius of it;*
>
> *b) actual or suspected murder, suicide or sexual assault at the **premises**;*
>
> *c) injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided in the **premises**;*
>
> *d) vermin or pests in the premises;*
>
> *e) the closing of the whole or part of the **premises** by order of a competent public authority consequent upon defect in the drains or other sanitary arrangements at the **premises**.*
>
> *The insurance by this clause shall only apply for the period beginning with the occurrence of the loss and ending not later than three (3) months thereafter during which the results of the **business** shall be affected in consequence of the damage."*

14. The extensions in the QBE1 (POFP040120 and POFF180120) Wordings are in the same terms but provide, at the beginning of the extension:[2]

> *"**We** shall indemnify **you** in respect of interruption of or interference with the **business** as insured by this **section** caused by…"*

15. The setting of these extensions in their contractual context is addressed in detail below, but it will be immediately apparent that the QBE1 disease clause is one of a number of extensions providing cover for events or for the harmful consequences of events which have occurred at the insured premises. The evident intention of the extensions of which the disease clause forms part, is to provide cover for interruption

[1] {C/12/745}.
[2] {C/22.2/1677}; {C/22.1/1594}.

of or interference with the insured business ("BI") arising from events (a) to (e) occurring in or within a designated distance of the insured premises.

16. In summary, QBE maintains that on a proper construction of the QBE1 disease clauses:

    16.1. the insured peril for which cover is provided is (1) the manifestation or appearance of; (2) a notifiable disease; (3) in any person at the insured premises or within 25 miles thereof;

    16.2. it is BI "*caused by*" or (synonymously) "*arising from*" the operation of this insured peril that is covered by the QBE1 disease clauses;

    16.3. accordingly, in order for cover to apply under the QBE1 disease clauses an insured has to prove that its BI loss was caused by the appearance or manifestation of a notifiable disease in the relevant policy area, i.e. at the insured premises or within 25 miles of those premises.

17. The risk to which these disease clauses is evidently directed is an outbreak within the area of the insured premises which causes a diminution in the insured's turnover. This may occur either through the unprompted reluctance of customers to patronise the insured's business in light of the outbreak, or through advice or action on the part of the authorities. In the case of an epidemic (or even a pandemic), these clauses will respond to a local outbreak if it is proved that cases appearing within the insured area have caused the BI. Thus, had the spread of COVID-19 in the UK followed more localised patterns leading to a series of 'local' restrictions and/or 'lockdowns' of the type seen in Leicester, this cover could, in principle, respond. This valuable, albeit deliberately circumscribed, cover can respond when there is a local outbreak of a notifiable disease and the business of the insured at the premises is interrupted as a result.

18. If the outbreak of disease within the designated area is shown to have caused the BI, the fact that there may be non-insured cases outside the insured area will not necessarily operate as a bar to cover: this will depend upon whether an outbreak within the insured area operates as a proximate or effective cause. Furthermore, as explained below, in a case where covered and non-covered causes operate concurrently, the notional impact on the business of the non-covered cases will have to be considered under the 'but for' causation approach applicable generally and stipulated specifically by the 'trends' clauses in the QBE Wordings. Each claim will be fact sensitive.

19. The policy will not respond, however, to BI caused by a national lockdown imposed to contain or control the transmission of a notifiable disease, when there is no evidence, or even suggestion, that the BI was the result of any local appearance of the disease.

20. The crucial significance of the radius limit from the point of view of insurers is that it establishes some rough brake on the potential for accumulation of losses across the insurers' book of BI business. As will become apparent, on the Court's view the radius limit may as well not exist: the potential for accumulation of loss across an insurer's BI book of business becomes enormous.

B.2 The Court's construction

21. The Court erred in law by finding that on a proper construction of the QBE1 disease clauses: (1) they provide cover for the consequences of BI losses arising from COVID-19 anywhere in the UK provided that there has been at least one manifestation of the disease within the 25 mile radius; and (2) there is, accordingly, no requirement that the appearance of the disease at, or within 25 miles of, the insured premises should have caused, or even contributed to, the BI loss.

22. The perverse consequences of this construction as regards causation are starkly illustrated by Declaration 24.3 in the Court's order of 2 October 2020.[3] In material part, this declaration stated as follows:

> *"If COVID-19 was manifested at or within a 25 mile radius of the insured business … there will be cover under the disease clause in QBE1 from the date COVID-19 was manifested in the 25 mile radius of the insured business for losses caused by interruption of or interference with the insured businesses caused by COVID-19 (including the governmental reaction…) For the avoidance of doubt: (i) it is not necessary for the interruption of or interference with the insured business to have been caused by the manifestation of COVID-19 within the 25 mile radius, as distinct from its manifestation outside the radius; and (ii) the correct counterfactual is as set out in Declaration 11."*

On this reading, the appearance of disease within the insured perimeter ceases to be relevant at all as a cause of loss. Cover will be established if and when any manifestation of notifiable disease by any person within the insured perimeter is shown

[3] {C/1/20}.

to have occurred, notwithstanding that by then the BI caused by governmental reaction might itself have already commenced and be continuing.

B.3 The proper construction of the QBE1 disease clauses

23. The peril insured by the QBE1 disease clauses is:

> *" … a human or contagious disease … an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it"*

24. Two clauses qualify the phrase "*any human infectious or contagious disease*":

    (i) The first compound clause describes the type of disease relevant for the purpose of cover, namely one, an outbreak of which, the local authority has stipulated must be notified to it.

    (ii) The second (relative) clause says how such a disease has to have acted or behaved – i.e. it must have been manifested by at least one person in or within 25 miles of the insured premises.

25. Although both clauses may be broadly described as "*adjectival*" in the sense that they refer to or qualify a noun, they perform very different roles. The first clause simply describes the sort of disease relevant for the purpose of cover – it is purely descriptive. The second clause, however, is intended to tell the reader how the disease must have behaved or operated for the purpose of constituting the insured peril – that is to say – it must have been manifested by any person whilst at, or within a 25 mile radius of, the insured premises.

26. "*Manifested*" is, of course, the past participle of the verb 'to manifest', meaning to demonstrate, show or make apparent. Had the present participle been used (as it was in RSA1 – judgment at paragraph 285[4]) then the phrase "*manifested by any person*" would be replaced by the reflexive "*manifesting itself in any person*". The tense is different, but the meaning is the same.

27. Accordingly, it takes one nowhere to describe the second qualifying clause as adjectival only (as the Court did in paragraph 226 of the judgment[5]) because *"manifested by any person whilst in the premises…"* identifies the event that

[4] {C/3/116}.
[5] {C/3/102}.

constitutes the crucial component of (and completes) the insured peril. Specifically, the words "*manifested by any person whilst in the premises or within a twenty five (25) mile radius of it"* do not supplement the description of a type of disease relevant for coverage purposes; they tell the reader what has happened in relation to a disease previously described – and in so doing these words identify a feature of the insured peril. It is axiomatic that it is the insured peril which must be a proximate or effective cause of loss.

28. Accordingly, the manifesting of a notifiable disease by anyone within the relevant area is the event which must operate as an effective or proximate cause of the BI.

29. The appearance or manifestation of the notifiable disease as described in the disease clauses is an "*event*" in the sense in which that word is commonly understood in insurance law – i.e. something which occurs at a particular place and time and in a particular manner and is not too remote from the loss. The requirement for a notifiable disease to be manifested involves the disease appearing and becoming evident: that requirement is not satisfied by the undetected presence of the disease. On a natural reading of the disease clauses therefore, even shorn of its immediate contractual context, the appearance of the disease in people within the designated perimeter is the event from which the BI must arise.

30. It is to be noted that the QBE1 disease clauses do not say that there will be cover for BI loss for a notifiable disease *"provided that"* the notifiable disease is *"manifested by any person whilst in the premises or within a twenty five (25) mile radius"*. Rather, the sense of these clauses is that the insurers will indemnify the insured for loss arising from / caused by a notifiable disease having been manifested by any person whilst at, or within a twenty five (25) mile radius of, the insured premises. Cover is therefore limited to BI loss which was proximately caused by a 'local' outbreak of the disease.

B.4 The contractual landscape

31. It is apparent that even when read in isolation, the QBE1 disease clauses most naturally bear the meaning explained above. When placed in their wider contractual setting that impression is strengthened.

32. QBE1 provides cover in respect of a wide range of insured events. The QBE1 disease clauses are in the section which provides cover in respect of BI loss.

33. The primary insuring clause in the BI section of the QBE1 wording provides cover for loss caused by interruption or interference with the insured's business resulting directly from damage to property used by the insured at the insured premises.

34. The cover provided by the primary insuring clause in the BI section is extended by 13 extensions including the "*Murder, suicide or disease*" extension which contains the QBE1 disease clauses.

35. There are essentially two types of extension to the BI cover in QBE1.

36. First, 'damage extensions' which extend cover to include BI loss caused by damage to property in locations other than the insured premises. See, by way of example:

    36.1. the 'customers and suppliers premises' extension which provides cover for BI loss resulting from damage to property at the premises of the insured's direct customers and suppliers (clause 7.3.3);[6]

    36.2. the 'denial of access' extension which provides cover for BI loss caused by damage to property "*within two hundred and fifty (250) metres of the perimeter of the premises*" which physically prevents or hinders the use of the insured premises or access thereto (clause 7.3.4);[7]

    36.3. the 'exhibitions' extension which provides cover for BI loss in consequence of damage to property used by the insured whilst "*at any exhibition anywhere within the European Economic Area*" (clause 7.3.6);[8] and

    36.4. the first limb of the 'utilities supply' extension which provides cover for BI loss caused by damage to generating or pumping stations and/or land-based premises of the insured's electricity, gas, water or telecommunication providers (clause 7.3.13(b)).[9]

[6] {C/12/744}.
[7] {C/12/744}.
[8] {C/12/744}.
[9] {C/12/746}.

37. Second, 'non-damage extensions' which extend the cover to include BI losses resulting from non-damage events which occur at or within a specified distance of the insured premises. See:

    37.1. the 'denial of access (non-damage)' extension which provides cover for BI loss caused by *"action by the Police Authority following danger or disturbance within two hundred and fifty (250) metres of the premises*" (clause 7.3.5);[10]

    37.2. the "*Murder, suicide or disease*" extension which includes the QBE1 disease clauses (clause 7.3.9).[11] Leaving aside the QBE1 disease clauses for present purposes, this extension can be seen to provide cover for loss caused by specific incidents or events at, in or arising from the insured premises, including, by way of example, actual or suspected murder, suicide or sexual assault at the premises and injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided within the premises; and

    37.3. the second limb of the 'utilities supply' extension which provides cover for BI loss caused by the failure of utilities equipment supplying the insured premises (clause 7.3.13(b)).[12]

38. The only extension to the QBE1 BI section which might be said (and indeed the FCA has said) does not fall neatly into the 'damage' or 'non-damage' categories of extension is the *"Lottery winners increased costs*" extension (clause 7.3.8).[13] This extension provides cover for certain types of BI loss caused "*where an employee or group of employees resign from his/her or their post(s) within the business as a direct consequence of their securing a win in either the UK National Lottery Prize Draws (including Scratch Cards), [etc.]*", subject to certain strict conditions and limits. However, whilst it is right that this non-damage cover does not relate to an event at or within a specific distance from the insured premises, it is an event which has a specific impact on an employee or group of employees of the insured's business.

39. Accordingly, the "*Murder, suicide or disease*" extension is one of 13 extensions to BI cover, all of which provide cover for the consequences of specific events or incidents. Moreover, those extensions are all either damage based (i.e. they extend the cover under the primary insuring clause to BI loss caused by damage which occurs away

[10] {C/12/744}.
[11] {C/12/745}.
[12] {C/12/746}.
[13] {C/12/744}.

from the insured premises), or non-damage based but premises related (i.e. they extend cover under the primary insuring clause to BI loss caused by events which do not involve damage but occur at or within a specified distance of the insured premises). None of the extensions remove (and cannot properly be construed as removing) both the damage and the proximity requirements of the primary insuring clause. To read the QBE1 disease clauses as doing so would transform them from an extension to the main BI clause into an entirely new form of BI cover.

40. The QBE1 disease clauses form just one of five limbs of cover provided by the 'non-damage' "*Murder, suicide or disease*" extension. The other four 'limbs' of the extension clearly provide insurance for BI loss caused by specific incidents or events at or arising from or traceable to the insured premises, namely:

    40.1. actual or suspected murder, suicide or sexual assault at the premises;

    40.2. injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided for in the premises;

    40.3. vermin or pests in the premises; and

    40.4. the closing of the whole or part of the premises by order of a competent public authority consequent upon a defect in the drains or other sanitary arrangements at the premises.

41. In order for cover to apply under the other limbs of the "*Murder, suicide or disease*" clause, the BI loss must arise from or be caused by:

    41.1. actual or suspected murder, suicide or sexual assault at the premises (limb (b)). There can be no doubt that it is only murder, suicide or sexual assault at the premises which cause BI loss which will give rise to cover.

    41.2. injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided in the premises (limb (c)). Again, there can be no doubt that cover will only be provided when a person has sustained injury and illness as a result of contaminated food or drink provided in the premises and that event has caused BI loss to the insured's business. It could not properly be suggested that there would be cover were the person to sustain injury or illness as a result of the same contaminated food or drink being provided to them by another business, just because the person happened to be on the insured premises while suffering from the resulting injury or illness. It is the particular food or drink provided at the insured

premises which must have caused the person to have sustained injury or illness, and that in turn must have caused BI loss to the insured.

41.3. vermin or pests in the premises (limb (d)). The same point applies. There will only be cover when the presence of the vermin or pests at the premises has caused BI loss to the business. Again, it could not properly be suggested that the insured would have cover in respect of losses it sustained as a result not only of vermin and pests at its premises but also vermin and the pests *of the same type* at its supplier's premises simply because an infestation happened at the same time at both premises. The premises-related requirement forms a substantive part of the insured peril; it is the particular vermin or pest(s) at the premises which must have caused the BI loss in question.

41.4. the closing of whole or part of the premises by order of a competent public authority consequent upon a defect in the drains or other sanitary arrangements at the premises. For there to be cover, there must be a closure of whole or part of the premises by the local authority consequent upon a defect in sanitary arrangements at the premises. Again, the premises-related requirement forms a substantive part of the insured peril.

42. There is no justification for construing the QBE1 disease clauses any differently from the other limbs of the "*Murder, suicide or disease*" clause, so as to make it provide cover for all the consequences of a notifiable disease *provided that* it has been manifested in or within 25 miles of the insured premises. The premises-centric focus of the QBE1 disease clauses can only properly be construed as circumscribing the insured peril, meaning that cover is only provided for BI loss which arises from / is caused by, the manifestation of notifiable disease at, or within 25 miles of, the insured premises.

43. Further, the Court's construction of the radius provision in the QBE1 disease clauses is inconsistent with the contractual scheme of the BI section of the QBE wording as a whole. For example:

43.1. the non-damage denial of access extension (clause 7.3.5(a))[14] provides cover for BI loss caused by Police Authority action "*following danger or disturbance within two hundred and fifty (250) metres of the premises*". This radius provision is plainly not intended merely to describe the 'class' of dangers or

[14] {C/12/744}.

disturbances which may be covered, so that cover might be available for loss caused by Police Action following a danger or disturbance, wherever it occurs, provided the *same type* of danger or disturbance has occurred locally. Rather, the territorial limit circumscribes the scope of the insured peril and shapes its meaning; the BI loss must have flowed from the particular local (or relatively local) danger or disturbance. This is confirmed by the Court's analysis of Zurich's Action of Competent Authorities extension at paragraphs 488 to 502 of the judgment.[15]

43.2. clause 7.3.7[16] provides cover for "*diminution of attraction to the premises following damage by any cause not excluded by this policy to property occurring at any other site within a one (1) mile radius of any of the premises*". "*Damage … occurring at any other site within a one (1) mile radius*" is plainly not a mere proviso to cover, so that there may be cover for damage caused to a site outside the one mile radius provided there is one such case of damage to a site within the radius. Rather, the one mile radius is a causally-relevant part of the cover provided; the loss must have resulted from damage caused at a particular site within a one mile radius of the insured premises.

44. QBE submits that it is highly anomalous in such a contractual context to read a single limb of one of the 13 extensions to the BI insuring clause as providing cover for BI loss which is caused neither by damage to property nor by an event or occurrence at, or within a specified radius of, the insured premises. When the huge potential for loss accumulation inherent in such a reading is taken into account, the QBE1 disease clauses - as interpreted by the Court - have the look of an aberration.

B.5 The Court's construction does not make *"good sense"*

45. Further, and contrary to the conclusion of the Court at paragraph 227 of the judgment,[17] the Court's construction of the QBE1 disease clauses does not make *"good sense".*

46. First, the Court's construction of the QBE1 disease clauses gives rise to the highly anomalous result that cover is dependent on happenstance. The Court's approach leads to a "postcode lottery", where cover is dependent upon whether (and when) the

[15] {C/3/167-169}.
[16] {C/12/744}.
[17] {C/3/102-103}.

insured has the 'good fortune' that at least one person with the same type of disease (as that which has actually caused BI loss to the insured, wherever in the UK the disease may have occurred) happened to come within 25 miles of their premises.

47. As an example of this type of 'lottery', one may consider two UK businesses which are identical in every fashion apart from their location. Both have purchased the same cover under QBE1. Both suffer identical BI loss due to the consequences of a notifiable disease as a result of the national lockdown. One of the businesses happens to be within 25 miles of a hospital known to be treating at least one patient with the particular notifiable disease; that business has cover from the date that patient was diagnosed (whether the business knew about the case then or not) for loss suffered as a result of the national lockdown. The other business is not so lucky and, not having any cases within 25 miles, is not covered for its BI loss, even though the effects on the two businesses are identical.

48. Second, the Court's construction of the QBE1 disease clauses leads to the highly unorthodox result that an insured could potentially use an 'after the event' statistical analysis[18] in order to prove its entitlement to cover for BI loss. By *ex post facto* statistical analysis performed long afterwards, the insured could establish cover on the basis of an event - which it did not even know had occurred at the time - when it says the event had operated to satisfy a "proviso" to cover.

49. In contrast, under the insurers' orthodox construction of the QBE1 disease clauses it is relatively easy to determine whether the insured peril (the local outbreak) caused the BI. This process does not call for any complex *ex post facto* statistical analysis; the insured simply needs to produce the usual type of proof of causation as required in any BI claim.

50. Furthermore, the anomalies inherent in the Court's approach are not examples of the inevitable arbitrary cases to be expected at the 'borderline' of a policy with fixed limits; rather, they reveal fundamental flaws in the Court's interpretation.

51. The Court said (in relation to the RSA3 disease clause, but the same presumably applies to the QBE1 disease clauses) at paragraph 105 of the judgment:[19]

> "*In light of these matters, if RSA is correct as to the meaning to be ascribed to the clause, the parties would have been agreeing to the production of highly*

[18] See Declaration 8.2 of the Order made on 2 October 2020 {C/1/3}.
[19] {C/3/68}. See also paragraph 162 of the judgment at {C/3/86}.

anomalous results. By way of example, if 20 people contracted a Notifiable Disease in a town 24 miles away from the premises and the authorities decided as a result to take "locking down" or other action which affected the insured's premises, there would on RSA's case… be cover, even though the aim of the public authorities was in large part to prevent the disease spreading elsewhere including outside the area of the 25 mile radius. On the other hand, if 20 people in a town 26 miles from the premises contracted the Notifiable Disease and the authorities decided to act by imposing a lockdown or other measures, there would be no effective cover for the resulting interruption or interference with the business, notwithstanding that some of those 20 people might have subsequently moved into, or infected people within, the 25 mile radius, and notwithstanding that a part of the motivation of the authorities in imposing the measures was to prevent or slow the spread of the disease within the 25 mile radius."

52. However, there is in fact nothing anomalous about this outcome; it is simply the clear effect of a geographical limit in the QBE1 disease clauses that provides cover only for matters occurring within 25 miles of the insured premises. Insurance habitually works by the setting of "bright line" limits; that is how the insured's interest in widening the scope of cover and the underwriter's interest in limiting the potential for accumulation of loss are balanced. The brokers and underwriters who negotiate cover in the insurance market understand this.

53. Moreover, applying the Court's interpretation of the QBE1 disease clauses to its own example produces what is, on any view, a *more* anomalous situation since there would be cover in the 24 mile situation but not in the 26 mile situation unless, by chance, one of the infected people 26 miles away *happened* to move within the 25 mile radius. At this point there would (on the FCA's case) suddenly be complete cover for all of the lockdown effects. In this respect, the difference between no cover and complete cover – for exactly the same events – would turn on whether one person happened to pass into the 25 mile radius, even if there is no causal link between that person's illness and the BI loss in question.

54. The Court supposedly identified a further anomaly in the insurers' approach at paragraph 106 of the judgment[20] as follows:

> "*Equally, and on a more general level, it is not difficult to conceive of a disease which spread rather more slowly than COVID-19, which triggered a series of local lockdowns or other public health measures, which ultimately covered all or large parts of the country. On RSA's case, if the local measures were caused by the occurrence of the disease within the 25 mile radius, then there would be cover for their effects. But if the disease developed and spread more quickly, so that the response was national, and simultaneous, then there would be no effective cover in any area, because the response was not taken specifically in relation to any particular area.*"

55. Again, if there is any anomaly here, it is to be found in the Court's interpretation of the disease clauses, since cover will depend on the happenstance of at least one infected person being within the 25 mile radius, regardless of whether there was a series of 'local lockdowns' or whether the entire country was locked down all at once.

56. By contrast, there is nothing anomalous about the insurers' approach, as it simply reflects the geographically limited cover that the insurer has priced and the policyholder has paid for. Quite simply, if local (or relatively local) cases of the disease lead to a 'local lockdown', the policy responds. The fixing of a territorial limit, by reference to a radius from the insured premises, operates as a rough, but important, check on the potential for accumulation of loss. The extent of the radius, and thus the territorial ambit of cover, is a matter of negotiation with the brokers.

57. Finally, the Court purported to identify an anomaly in relation to QBE1 itself at paragraph 228 of the judgment:[21]

> "*The [QBE1 disease] clause does not spell out, or seek to limit cover by reference to, the ways – or what might be called the "transmission mechanisms" – by which the notifiable disease may cause interruption or interference with the business. It is obvious that one such way for business interruption or interference to arise is as a result of the response of governmental or local authorities, and of the public, to the existence of the notifiable disease. Consistently with this, there is no exclusion in Clause 7.4.3 of loss caused by*

[20] {C/3/68}.
[21] {C/3/103}.

civil, government or military authority caused by or following disease. If a notifiable disease manifested itself both within and outside the 25 mile radius it would be likely that there would be such governmental / public responses to the disease outbreak, rather than to specific cases of the disease, either those within or outside the radius. The construction we favour of the terms of Clause 7.3.9 avoids the anomaly of there being no effective cover in such a case."

58. However, there is no such anomaly, certainly not on the correct interpretation of the QBE1 disease clauses, as set out above. There is no dispute that the QBE1 disease clauses may provide cover in respect of civil, government and/or military action; indeed, this is the most likely cause of BI loss as the result of the manifestation of a notifiable disease. The fact that such action *may* (in rare cases, such as during the COVID-19 pandemic) be taken in response to cases both within and outside the 25 mile radius, does not mean that there will be no effective cover under the QBE1 disease clauses. If the cases within the 25 mile radius have operated as a proximate cause of that action, then, in principle, there will be cover under QBE1. The resulting loss will then be subject to adjustment under the 'trends' clause.

B.6 The scope of the insured peril

59. The Court's conclusion (at paragraph 255 of the judgment[22]) that the relevant insured peril for the QBE1 disease clauses included the "*interruption or interference with the business"* was also wrong.

60. The phrase *"interruption to or interference with the business"* describes the loss in respect of which QBE has agreed to provide cover which is then subject to quantification and adjustment under the loss quantification machinery contained in the QBE Wordings. The BI is the loss or damage to the insured's interest for which indemnity is given, if and only if, it is proximately caused by an insured peril. It does not form part of the insured peril itself.

61. The approach adopted by the Court of including BI within the insured peril is inconsistent with the established meaning of the word peril and the structure and the wording of QBE1.

[22] {C/3/109}.

61.1. The Oxford English Dictionary defines a peril as *"a cause of danger, or something dangerous or harmful"*.[23] Perils for the purpose of material damage generally include earthquakes, flood, fire, theft, etc., i.e. events that cause damage to or loss of the insured's property. "*Maritime perils*" as defined in section 3 of the Marine Insurance Act 1906[24] include *"perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints and detainments of princes and peoples, jettisons, barratry"*, i.e. events that cause damage to or loss of the vessel.

61.2. BI is not a cause of danger and does not cause 'damage' to the insured but rather it is the consequence of the danger / it is the damage. It follows that just as 'property damage' does not form part of the insured peril in a material damage policy, and the damage to or loss of a vessel does not form part of a maritime peril in a marine insurance policy, the BI itself does not form part of the insured peril in a BI policy.

61.3. Insofar as the wording of QBE1 is concerned:

61.3.1. The primary insuring clauses of section 4, "*Property Section*"[25] and section 5, "*All risks – specified business equipment section*"[26] insure property and business equipment respectively against "*accidental damage"* provided that the cause is not excluded. "*Accidental*" is defined as *"a single and unexpected event, which occurs at an identifiable time and place"*[27] and *"damage"* is defined as *"loss of, destruction of or damage to tangible property"*. The insured peril is therefore a non-excluded cause of accidental damage.

61.3.2. Section 6, "*Computer breakdown coverage*" [28] insures against damage caused by the *"undernoted perils"*, which include breakdown or failure of the equipment, failure or fluctuation of the supply of electricity to the equipment.[29]

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23 Online version. {F/71/1379}.
24 {E/6/93}.
25 {C/12/724}.
26 {C/12/737}.
27 {C/12/804}.
28 {C/12/738}.
29 {C/12/738}.

61.3.3. The primary insuring clause in the BI section provides cover for *"loss caused by the interruption of or interference with the business resulting directly from damage to property"*. [30] The insured peril is damage to property. The BI is the loss.

61.3.4. The QBE1 disease clauses operate as an extension to the main BI insuring clause. They therefore provide an additional insured peril, namely the manifestation of a notifiable disease in or within 25 miles of the insured premises. The BI, consistent with the position under the main insuring clause, is the loss.

62. The reason why this issue arises is to be found in the wording of section 55 of the Marine Insurance Act 1906 which was intended to codify or reflect the common law and provides as follows:[31]

> "*Subject to the provisions of the Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against*."

63. In the Court below, the Hospitality Insurance Group Action argued that the BI was within the insured peril and that, accordingly, while it was necessary to demonstrate that the BI was the proximate cause of the loss, other causative links in the insured peril (i.e. between the local outbreak of the disease and the BI) could, notwithstanding the 'proximate cause language' used in the clause, be established by more dilute or remote causal relationships.

64. This argument is misconceived but was accepted by the Court in respect of Argenta 1 and RSA3.

65. As regards QBE1, however, it is not clear to what extent the Court's error in concluding that the BI formed part of the insured peril led it to go wrong in identifying the insured peril and addressing causation.

66. Whatever influence this may have had on the Court, it is clear that the sole causative link within the QBE1 disease clauses, whether it be constituted by the words "*caused by*" or "*arising from*", is interposed between the appearance or manifestation of the notifiable disease on the one hand and the BI on the other. These are words of

[30] {C/12/741}.
[31] {E/6/94-95}.

proximate cause and indicate unambiguously that the appearance of a notifiable disease in a person at, or within 25 miles of, the insured premises has to be the proximate or effective cause of the BI. The fact that these 'proximate cause wordings' are interposed between the insured peril and the loss puts the matter beyond doubt.

C GROUND 3: CAUSATION

67. Ground 3 of QBE's appeal concerns the correct approach to causation under the QBE1 disease clauses.

C.1 The mischaracterisation of the insured peril in QBE1 and causation

68. In relation to QBE1 the Court found (at paragraph 226 of the judgment[32]) that:

> *"…within the insured peril, the required causal link ("arising from") is between the interruption or interference with the business on the one hand and the notifiable disease on the other' provided it has been "manifested" by a person within the 25 mile radius."*

69. This conclusion followed the Court's earlier general conclusions on the nature of the insured peril under the disease clauses in issue. These conclusions were stated in the course of the Court's discussion on RSA3 but, other than as regards QBE2 and QBE3, were given general application. Thus, at paragraph 102 of the judgment the Court held:[33]

> *"Instead, the clause can and should be read as meaning that there is cover for the business interruption consequences of a Notifiable Disease which has occurred, i.e. of which there has been at least one instance, within the specified radius, from the time of that occurrence. The wording of the clause, in other words, indicates that the essence of the fortuity covered is the Notifiable Disease, which has come near, rather than specific local occurrences of the disease."*

70. At paragraphs 111 and 112 of the judgment, the Court held that even on the assumption that the word "*following*" in RSA3 imported a requirement to establish proximate causation:[34]

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32 {C/3/102}.
33 {C/3/67}.
34 {C/3/69}.

"… we would consider, that given the nature of the cover as we consider it to be, this is to be regarded as satisfied in a case in which there is a national response to the widespread outbreak of a disease. In such a case we consider that the right way to analyse the matter is that the proximate cause of the business interruption is the Notifiable Disease of which the individual outbreaks form indivisible parts.

Alternatively, although we regard this as being less satisfactory, each of the individual occurrences was a separate but effective cause"

71. Two matters are evident from these passages:

    (i) The insured peril is not, according to the Court, the "*occurrence*" or as the case may be the "*manifestation*" of COVID-19 within the insured area. Rather it is the disease generally, of which individual outbreaks form "*indivisible parts*".

    (ii) The proximate cause of the BI is the Notifiable Disease *simpliciter* and because of that, the requirement is to establish that the notifiable disease was the proximate cause of the BI, not that the BI was proximately caused by its local manifestation or occurrence.

72. Having identified the insured peril thus, it followed that the disease clauses responded to BI caused by measures taken in response to cases of the disease occurring anywhere (or at least anywhere in the UK) irrespective of whether there was any evidence, or even any suggestion, that manifestation of disease within the insured area had led to BI.

73. Leaving aside the conceptual difficulties inherent in viewing individual cases of disease as parts of an *"indivisible cause"* or each of the individual cases of the disease as a *"separate but effective cause"*, the Court's findings on causation were wrong because it incorrectly identified the insured peril. In the case of QBE1 the Court misconstrued the disease clauses in holding that, provided that one instance of the disease had become manifest within the insured area, any BI loss caused by measures taken to inhibit the spread of the virus nationally was recoverable. This misreading opened the way for identifying COVID-19 generally as the insured peril.

74. The Court's treatment of COVID-19 as the insured peril and its conclusion that for BI loss to be recoverable under the QBE1 disease clauses it was enough to show that COVID-19 was the proximate cause of loss, also obscured the well-established distinction in insurance law between a causative event and the more remote or diffuse

cause from which that event may be said to have originated. This is impermissible as a matter of orthodox insurance construction and causation principles, since it involves "*going into the causes of causes*" (as Willes J put it in *Everett v The London Assurance* (1865) 144 ER 734).[35]

75. In *Becker, Gray & Co v London Assurance Corporation* [1917] AC 101, Lord Sumner stated the fundamental rule of indemnity insurance that the insurance responds if, and only if, the insured peril is proved to have been the proximate cause of the loss. He went on to say that (bold emphasis added):[36]

> "…*In a contract of indemnity… the insurer promises to pay in a certain event and in no other, namely, in case of loss caused in a certain way, and the question is whether the loss was caused in that way, and whether the event occurred,* ***and the remoter causes of this state of things do not become material****…"*

76. The Court was alive to the implications of this in its analysis of QBE2 and QBE3 but disregarded its significance when analysing the implications of the event constituted by the manifestation of disease under QBE1.

77. Further, in *Axa Reinsurance v Field* [1996] 1 WLR 1026 at 1035G, Lord Mustill addressed the difference in an insurance context between the meaning of "*originating cause*" and "*event*":[37]

> *"In ordinary speech, an event is something which happens at a particular time, at a particular place, in a particular way. I believe that this is how the Court of Appeal understood the word. A cause is to my mind something altogether less constricted. It can be a continuing state of affairs; it can be the absence of something happening. Equally, the word "originating" was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate*."

78. While it may be possible to view the existence of COVID-19 in the world generally as the originating cause from which the manifestation of disease by a person at, or within 25 miles of, the insured premises emanated, by no stretch of the wording may it be seen as the insured event contemplated by the QBE1 disease clauses.

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35 {E/16/302}.
36 {E/10/184}.
37 {E/8/120}.

C.2 The alleged 'indivisible cause'

79. At paragraph 229 of the judgment the Court observed that *"[QBE] clearly cannot… contend that the occurrence of the disease elsewhere, or the reaction to it, are to be regarded as separate causes.*"[38] In fact, that contention is correct. The BI has *"to arise from"* the disease having been *"manifested"* by someone at, or within 25 miles of, the insured premises. The expression *"arising from"* denotes proximate cause and the disease becoming manifest within the insured area constitutes an "*event*". The wider incidence of the disease in the country or the world generally may be the causal origin of the local cases but it is a separate cause. It may be viewed as a cause of a cause.

80. It is the Court's conclusion that each local occurrence or manifestation was *"part of an indivisible cause constituted by COVID-19"*[39] which is incorrect.

81. The Court appears to have fallen into error in this respect by impliedly adopting what the FCA in its Skeleton Argument for the trial below described as the "*jigsaw*" argument. The FCA put its case in the following way, at paragraph 241 of its Skeleton Argument below (bold emphasis added)[40]:

> *"All the areas of the country aggregated were concurrent causes, but* ***no single area satisfies the 'but for' test****. This is a 'jigsaw' cause that depends upon the totality of the pieces but no single piece is sufficient [.] It is unremarkable common sense.* ***No single rioter is a 'but for' cause of a riot, but without rioters there is no riot****…* ***No single occurrence of a disease is a 'but for' cause of a pandemic, but without any occurrences there would be no pandemic****. Common sense causation avoids the absurdity of the but for test's conclusion by aggregating the causes (reflecting language and common sense) to ask what would have happened but for all the jigsaw pieces."*

82. However, this passage illustrates why QBE's case is correct and the FCA's (and the Court's) analysis is wrong. As the FCA points out in the extract above, no single rioter will be the 'but for' cause of a riot, but without rioters there will be no riot. Assuming the relevant insured peril is "*riot*", then the question is not whether 'but for *any particular rioter*, the loss would have been suffered or not', but rather, 'but for *the riot*, would the loss have been suffered?'

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38 {C/3/103}.
39 {C/3/87}.
40 {D/20/1604}.

83. As such, assuming the insurance policy in question covered loss caused by a "*riot*" within a one mile radius of the insured premises, it is necessary for the riot (i.e. consisting of *multiple rioters*) to occur *within that radius*. It is not permissible to aggregate a collection of individual troublemakers across the country (one of whom is causing trouble within the one mile radius) in order to contend that cover for the consequences of a riot within the one mile radius area has been triggered under the policy.

84. The further mistake made by the FCA (and, by extension, the Court) is to equate the "*riot*" in this analogy with "*pandemic*" in the present case. The QBE1 disease clauses do not contain, as an insured peril, "*pandemic*". As such, there is simply no question of 'aggregating' local disease manifestation in order to construct a 'jigsaw' case establishing the existence of a "*pandemic*". To the contrary, if the whole 'jigsaw' was required to bring about the Government response, it follows that no single 'jigsaw piece' (i.e. the insured peril) did so by itself.

85. What matters for the purposes of the present case is simply whether the *insured peril* in the QBE1 disease clauses (i.e. the manifestation of COVID-19 at the insured premises or within 25 miles of those premises) has caused, both factually on a 'but for' basis and legally as a 'proximate cause', the policyholder's BI loss. When one keeps the nature of that insured peril in mind, the 'but for' test is simply and straightforwardly applied by asking whether, 'but for' that 'local' disease manifestation, the same loss would have been suffered?

C.3 The *"separate but effective"* causes

86. The Court's alternative view of causation, which it regarded as "less satisfactory", was that *"each of the individual occurrences was a separate but effective cause"*[41]. On the same theme the Court observed elsewhere that "*each of the cases of the disease was an independent cause, and they were all equally effective in producing the government response*."[42]

87. The problem here is that this theory bears no relationship to the facts and is not supported by any evidence.

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41 Paragraph 112 of the judgment at {C/3/69}.

42 Paragraph 165 of the judgment at {C/3/86-87}.

88. The FCA's pleaded case (at paragraph 18.25 of its Amended Particulars of Claim[43]) was that the 'lockdown' was a "*country-wide approach*", rather than a reaction to cases in any particular locality, whether London, the Midlands, or anywhere else, because "*the shape of the curve*" of infection rates was "*similar across the whole country*". Furthermore, the evidence relied upon by the Court in paragraph 112 of the judgment[44] does not support the suggestion that those national measures would not have been adopted 'but for' the individual occurrences.

89. A second objection is that whatever prompted the government's response, the disease clauses do not treat each individual case of COVID-19 as equally relevant or effective; they regard as potentially relevant for the purpose of BI loss only an occurrence or manifestation of BI within the relevant policy area.

90. Finally, whilst it is possible to have two or maybe even three effective proximate causes, it is remarkable to suggest that there could be thousands of equally effective proximate causes. The fact that this is the conclusion of the Court shows that the Court's analysis has gone wrong.

C.4 The orthodox approach to causation – causation under QBE2 and QBE3

91. QBE adopts MS Amlin's submissions in respect of the proper approach to causation and the application of 'but for' test and proximate causation in relation to the disease clauses. Although the following sets out QBE's position, it is envisaged that MS Amlin will make submissions on this subject on behalf of all insurers.

92. The Court adopted the correct approach to causation in relation to the QBE2 and QBE3 disease clauses, and the same approach should be applied with respect to the QBE1 disease clauses.

93. In relation to the QBE2 policy wording, the Court held, correctly, at paragraph 231 of the judgment[45] that the cover under the QBE2 disease clauses was "*intended to be confined to the results of specific (relatively) local cases*."

94. Similarly, the Court held at paragraph 237 of the judgment[46] that the QBE3 disease clause "*is confining cover to the consequences of certain happenings, in particular*

[43] {D/16/1578-1579}.
[44] {C/3/69}.
[45] {C/3/103}.
[46] {C/3/104}.

specific occurrences of the disease within the radius, as opposed to other happenings of events, including instances of people contracting the disease outside the radius."

95. The Court was correct in making these findings, and QBE respectfully submits that the Supreme Court should reach a similar conclusion in relation to the construction of the QBE1 disease clauses, for the reasons addressed above.

96. QBE further submits that the Court adopted the correct approach to causation in relation to the QBE2-3 disease clauses, which it said followed from its construction of those clauses (that is, from its identification of the insured peril). In this respect, the Court considered causation under the QBE2 disease clauses in the following terms, at paragraph 235 of the judgment:[47]

> "*Given our construction of [the QBE2 disease clause], the issues as to causation largely answer themselves. We accept that the words "in consequence of" imply a causal relationship. As we have found that this clause, unlike others we have considered, is drawing a distinction between the consequences of the specific cases occurring within the radius and those not doing so, because the latter would constitute separate "events", we consider that insureds would only be able to recover if they could show that the case(s) within the radius, as opposed to any elsewhere, were the cause of the business interruption. In the context of this clause, it does not appear to us that the causation requirement could be satisfied on the basis that the cases within the area were to be regarded as part of the same cause as that causing the measures elsewhere, or as one of many independent causes each of which was an effective cause, because this clause, in our view, limits cover only to the consequences of specific events.*"

97. While the causal language in the QBE1 disease clauses ("*arising from*" and "*caused by*" in different policy wordings) is at least as strong as that in the QBE2 disease clauses ("*in consequence of*"), QBE submits that the approach to causation taken by the Court in relation to the QBE2 wording was orthodox and correct and should apply equally to the QBE1 disease clauses. Once the manifestation of disease within the insured area is correctly identified as the event insured under QBE1, there should be no difference in the approach to causation.

98. Accordingly, QBE invites the Supreme Court to find that causation will only be satisfied for the purposes of the QBE1 disease clauses where the insured is able to show that

[47] {C/3/104}.

manifestation of the disease (i.e. diagnosed or symptomatic cases) at, or within 25 miles of, the insured premises was the cause of its BI loss.

D GROUND 4: THE CORRECT COUNTERFACTUAL AND THE 'TRENDS' CLAUSE

D.1 Introduction

99. Ground 4 of QBE's appeal concerns the Court's approach to the 'trends' clauses and the correct counterfactual to be applied when calculating an indemnity under the QBE1 disease clauses.

100. The BI Section of each of the QBE Wordings begins with a general insuring clause which provides cover for interruption of or interference with the business which results directly from damage to property (QBE1 and QBE3), or is in consequence of damage to property by an insured peril (QBE2).

101. In practice, accurately calculating the indemnity due to an insured for the loss of profit, revenue, etc. which resulted from the BI is both challenging and complex. In order to simplify the calculation, the QBE1 Wordings (as is typical in BI insurance policies) include bases of settlement (contract machinery) to calculate (relatively crudely) the indemnity for loss of insurable gross profit, gross fees, gross revenue, increased cost of working, rent receivable, etc.

102. The definitions of the bases of settlement include trend adjustment language.[48] By way of example, in the QBE1 lead wording the rate of 'gross profit' and 'turnover' are referred are as being *"the rate of gross profit earned, trend adjusted, on the turnover during the financial year immediately before the date of damage"** and *"the turnover excluding VAT, trend adjusted, during the twelve months immediately before the date of damage"* respectively. *"Trend adjusted"* is defined in the QBE1 lead wording as:[49]

> *"Trend adjusted means adjustments will be made to figures as may be necessary to provide for the trend of the* ***business*** *and for variations in or circumstances affecting the* ***business*** *either before or after the* ***damage*** *or which would have affected the* ***business*** *had the* ***damage*** *not occurred, so that the figures thus adjusted will represent as nearly as may be reasonably practicable*

[48] See paragraphs 206, 212 and 215 of the judgment where the relevant clauses in the QBE Wordings are set out and/or summarised at {C/3/96,98,100}.

[49] {C/12/819}.

*the results which but for the **damage** would have been obtained during the relative period after the **damage**."*

103. The trends adjustment language is therefore an important part of the contractual machinery because it allows for the components of the standard formula to be adjusted to give effect to the requirement that the insured is only entitled to an indemnity in respect of the insured peril. The 'trends' clause therefore makes explicit what would be the test under common law.

104. An example illustrating the proper operation of the 'trends' clause in the present circumstances could be where a particular area was the subject of a specific 'local lockdown', which imposed stricter measures on businesses in that area than those imposed on the country generally. The policyholder (a restaurant owner, for example) would probably be able to satisfy the 'but for' and 'proximate cause' tests, since they would have suffered loss which they would not have suffered 'but for' the specific occurrences of COVID-19 within their relevant policy area. They would therefore be able to establish causation, *per se*.

105. The QBE 'trends' clauses, and the 'but for' test within them, would then operate at the *quantification* stage, so as to adjust the value of the insured's indemnity in line with the trend of that sort of business across the country more generally (i.e. businesses outside the local area would still have been affected by the nationwide restrictions even if to a lesser extent than those within the local area). The 'trends' clause provisions may increase or decrease the quantification of the relevant indemnity in line with those national trends. For instance, an increase might be required where a particular type of business was experiencing an increase in trade across the country generally, but was forbidden to operate at all by means of a 'local lockdown'.

106. The Court correctly held that:

    106.1. at paragraph 121 of the judgment,[50] the 'trends' clauses is the quantification machinery for a claim so that it is not part of the delineation of cover, but part of the machinery for calculating the BI loss on the basis that there is a qualifying insured peril;

[50] {C/3/71}.

106.2. at paragraph 121 of the judgment,[51] the object of the quantification machinery (including any 'trends' clause or provision) is to put the insured in the same position as it would have been if the insured peril had not occurred; and

106.3. at paragraph 240 of the judgment,[52] all of the QBE policies should be interpreted as applying the contractual quantification machinery applicable to damage-related BI claims to non-damage BI covers, including the 'manipulation' of the requirement for "*damage*" in the 'trends' clause.

107. However, QBE maintains that the Court erred:

107.1. in its formulation of the applicable counterfactual to be applied when applying the 'trends' clause by deciding at paragraph 532 of the judgment[53] that *"the whole of the disease both inside and outside the relevant area has to be stripped out in the counterfactual";* and

107.2. by holding that *Orient-Express Hotels Ltd v Assucurazioni Generali SA* [2010] Lloyd's Rep I.R. 531[54] was distinguishable as a matter of principle and that it if had been relevant, it was wrongly decided and they would not have followed it.

108. QBE adopts the detailed submissions of MS Amlin regarding the proper operation of the 'trends' clauses and *Orient-Express*.

D.2 The correct counterfactual

109. The Court's error in respect of the correct counterfactual stems from its improper construction of the QBE1 disease clauses. For the reasons set out above, on a proper construction of the QBE1 disease clauses, the relevant insured peril is the manifestation of COVID-19 within the relevant policy area.

110. The correct counterfactual should therefore strip out only the insured peril, i.e. the (relatively) local event comprising the manifestation of COVID-19 (or occurrence of COVID-19 for QBE2-3) and only that event. As such, cases of COVID-19 *outside* of the relevant policy area (and the authorities' and public's responses thereto) would remain in the counterfactual, as would any cases of COVID-19 *within* the relevant policy area

51 {C/3/71}.
52 {C/3/105}.
53 {C/3/179}.
54 {E/31/921}.

which had no causative potency / did not form part of the insured peril. Other circumstances falling outside of the insured peril, such as what might be said to be an 'originating' or underlying clause of that insured peril including, in this case, the pandemic or the response of the authorities to COVID-19 elsewhere, should remain in the counterfactual.

111. Further, the application of the 'trends' clauses should reflect the result which *'but for'* insured peril would *"have been obtained during the relative period after the"* insured peril. This means that losses which the insured would still have suffered but for the insured peril, which in this case would include losses caused by COVID-19 outside of the relevant policy area and/or the consequences of the national responses, should be excluded from the indemnity.

112. This conclusion is supported by and consistent with the decision of Hamblen J (as he then was) in *Orient-Express*, which QBE maintains was not properly distinguishable and was not wrongly decided.

D.3 *Orient-Express*

The decision

113. The facts of *Orient-Express* are well known and are set out in paragraphs in 3 to 5 of the judgment in that case[55]. The relevant policy terms are set out in paragraph 12[56]. In summary:

    113.1. The insured was the owner of a hotel in New Orleans. The hotel suffered significant physical damage as a result of Hurricane Katrina and Hurricane Rita in 2005. The surrounding area of New Orleans was also devastated by the hurricanes. The insured made a claim under its material damage and BI policy.

    113.2. The policy's insuring clause provided that the insurers would indemnify the insured under: (1) the material damage section against *"direct physical loss destruction or damage except as excluded herein to Property as defined herein such loss destruction or damage being hereafter termed Damage"*;[57] and (2) under the section *"against loss due to interruption or interference with*

[55] {E/31/922-923}.
[56] {E/31/923-924}.
[57] {E/31/923}.

the Business directly arising from Damage…".[58] The main insuring clause of the BI section of the policy provided that cover would be provided *"if any property … suffers Damage as defined… and the business be in consequence thereof interrupted or interfered with the Insurers will pay to the Insured the amount of loss resulting from such interruption…"*[59]

113.3. Insurers contended and the tribunal held that, under the property-damage based BI clause, the insured could only recover such loss as would not have arisen had the damage to the hotel not occurred, i.e. which satisfied the 'but for' test for causation.

113.4. The insured appealed the arbitration award on two points of law. First, whether on its true construction the policy provided cover in respect of BI loss which was concurrently caused by physical damage to the property and damage to or consequent loss of attraction of the surrounding area. Second, whether on the true construction of the policy, the same event(s) which give rise to the BI loss were also capable of being or giving rise to "*special circumstances*" for the purposes of allowing an adjustment of the same BI loss within the scope of the 'trends' clause.

114. Hamblen J (as he then was) found that: (1) the Tribunal had not erred in law in adopting the 'but for' approach to causation in assessing the insured's losses under the relevant property damage based BI insuring clause; and (2) for the purposes of adjustment under the 'trends' clause the same events which caused the damage to the insured property giving rise to the BI loss were capable of being "*special circumstances*" meaning the correct counterfactual to be applied under the 'trends' clause involved stripping out only the physical damage to the hotel but leaving intact the other effects of the hurricanes.

115. As Hamblen J held, "*the relevant insured peril is the damage; not the cause of that damage"* and the 'trends' clause[60]:

> *"… is concerned only with the Damage, not with the causes of the Damage. What is covered are business interruption losses caused by Damage, not business interruption losses caused by Damage or "other damage which resulted from the same cause"… The assumption required to be made under the Trends*

[58] {E/31/923-924}.
[59] {E/31/924}.
[60] {E/31/931}.

Clause is "had the Damage not occurred"; not "had the Damage and whatever event caused the Damage not occurred"…"

Orient-Express cannot properly be distinguished

116. The Court wrongly held that the decision in *Orient-Express* was *"clearly distinguishable from the present case".*[61] Whilst it is correct that the insured peril in QBE1 was not the same insured peril under consideration in *Orient-Express,* the decision is plainly relevant to the question of the proper construction and application of the 'trends' clauses in QBE1 (and indeed QBE2 and QBE3 as well).

117. In *Orient-Express*, Hamblen J had to consider how a 'trends' clause - in substantially similar terms to the 'trends' clause in the QBE Wordings - operated when the hurricanes had caused damage to the insured's property (for which cover was provided under the property damage section of the policy and the BI consequences of which were insured under the BI section of the policy) but had also caused damage to the surrounding area (which was not insured under the material damage or the main BI insuring clause although there was cover - as accepted by insurers - under the prevention of access and loss of attraction extensions).

118. The issue in this case is how the 'but for' test within the 'trends' clause operates, in circumstances where the COVID-19 pandemic has caused not only COVID-19 within a specified radius of the insured premises (any specific BI consequences of which are insured), but has also caused cases of COVID-19 outside of that area (the BI consequences of which are uninsured). In other words, this case concerns the operation of a 'trends' clauses which is in substantially the same terms as the 'trends' clause in *Orient-Express* in circumstances where there has been wide area damage / a wide area event as there was in *Orient-Express*.

Orient-Express was correctly decided

119. The Court identified what they described as *"several problems"* with the Court's judgment in *Orient-Express.* As to which, QBE respectfully submits that:

    119.1. contrary to the suggestion made in paragraphs 523 to 525 of the judgment,[62] Hamblen J correctly identified the insured peril under the main insuring clause of the BI insurance as the damage to the hotel. As is clear from the terms of

[61] {C/3/178}.
[62] {C/3/176-177}.

the policy, the insured peril under the property damage section was *"physical loss destruction or damage except as excluded herein to property"*.[63] The policy was an 'all risks policy' and the insured peril under the property damage policy was a non-excluded fortuity. Again, as is clear from the terms of the policy, the insured peril under the main BI insuring clause was *"Damage"* as defined in the policy. The cause of the *"Damage"* was therefore relevant to the question of whether or not the physical damage was of the type insured under the BI section but did not form part of the insured peril itself. The extensions to the BI section extend the list of insured perils beyond damage to the property. The insured peril is therefore the event identified in the extension and not the underlying cause of that event.

119.2. the Court was wrong to conclude (at paragraph 523 of the judgment)[64] that the alleged misidentification of the insured peril *"may have come about because the judge focused only on the 'but for' causation issue and, to our minds surprisingly, did not pose the question of what was the proximate cause of the loss claimed"*. There was no error. Hamblen J correctly identified the peril by reference to the terms of the policy and by reference to the 'but for' test expressly referred to in the 'trends' clause. As Hamblen J correctly held, the 'trends' clauses clearly imported a 'but for' test for the purposes of calculating the indemnity due to the insured and it followed that to disapply that test required the 'trends' clause to be "*re-drafted*" and would be "*inconsistent with the causation requirement of the main insuring clause which OEH accepts requires proof that the losses claimed were caused by damage to the hotel*"[65].

119.3. the effect of Hamblen J's analysis was not to render cover illusory because cover was not provided under the main BI insuring clause for all of the consequences of the hurricanes provided that there was some damage, however small, to the hotel. Cover under the main BI insuring clause was, as is clear from its express terms, only provided for the BI loss caused by damage to the hotel. It could not properly be said that had only a window of the hotel been broken as a result of the hurricanes that it would have been entitled to recover all of the consequences of the hurricanes under the main BI insuring clause. This, however, would be one consequence of the approach of

63 {E/31/923}.
64 {C/3/176}.
65 Paragraph 58 of the judgment in *Orient-Express* at {E/31/932}.

the Court below. The other consequences of the hurricanes would be covered by any applicable extensions to that main insuring clause. In *Orient-Express,* this cover was provided by the prevention of access and loss of attraction extensions.

119.4. given that the hurricanes were not an *"integral part of the insured peril"*, Hamblen J was correct to conclude that the words *"had the damage not occurred"* meant that the correct counterfactual was one where only the damage to the hotel was to be stripped out.

D.4 Application of *Orient-Express*

120. The Court should have found that the relevant insured peril for QBE1 (as with QBE2 and QBE3) was the manifestation of COVID-19 within the relevant policy area, and should then have followed the decision in *Orient-Express*. This would have meant that the correct counterfactual would strip out only the local (or relatively local) event comprising the manifestation of COVID-19 (or the occurrence of COVID-19 for QBE2-3) and only that event. As such, cases of COVID-19 outside of the relevant policy area (and the authorities' and public's responses thereto) would remain in the counterfactual, as would any cases of COVID-19 within the relevant policy area which did not form part of the insured peril.

E. CONCLUSION

121. In summary, QBE's appeal should be allowed for the following reasons:

121.1. The Court ought to have held that on the proper construction of the QBE1 disease clauses, the peril insured was a manifestation of a notifiable disease by anyone within, or within 25 miles of, the premises.

121.2. Accordingly, the Court should have concluded that the cover is triggered only where it is proved that an interruption of or interference with the insured business has arisen from or has been caused by an occurrence of the peril referred to in (i) above; and that was conceded not to have happened in this case.

121.3. Had the Court correctly identified the peril insured under the QBE1 disease clauses it should, and would, have concluded that for the purpose of the

counterfactual required by the 'trends' clause and at common law, it was only necessary to assume that the peril described in (i) above had not occurred.

121.4. The Court wrongly concluded that the peril insured by the QBE1 disease clauses was a manifestation of notifiable disease anywhere in the UK and accordingly, that cover for the impact of the disease on the insured business would be triggered under the QBE1 disease clauses provided that one case of the disease in question could be shown to have appeared in someone located within 25 miles of the insured premises.

121.5. Having incorrectly identified the insured peril as that described in (iv) above, the Court wrongly concluded that the QBE1 disease clauses covered interruption of or interference with the business caused by the appearance of a notifiable disease anywhere in the UK and by measures taken to inhibit the transmission of such disease nationally (subject only to the proviso mentioned in (iv) above).

121.6. Having incorrectly identified the insured peril as that described in (iv) above, the Court wrongly concluded that for the purpose of the counterfactual required by the 'trends' clause and at common law, it was necessary to assume that the notifiable disease in question had not appeared in the UK and that none of the official measures taken to inhibit the spread of the disease nationally had occurred.

2 November 2020

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