

IN THE HIGH COURT OF JUSTICE

Claim No. FL-2020-000018

BUSINESS & PROPERTY COURTS OF ENGLAND & WALES

COMMERCIAL COURT (QBD)

FINANCIAL LIST

FINANCIAL MARKETS TEST CASE SCHEME

BETWEEN:

**THE FINANCIAL CONDUCT AUTHORITY**

Claimant

- and -

**(1) ARCH INSURANCE (UK) LIMITED**

**(2) ARGENTA SYNDICATE MANAGEMENT LIMITED**

**(3) ECCLESIASTICAL INSURANCE OFFICE PLC**

**(4) HISCOX INSURANCE COMPANY LIMITED**

**(5) MS AMLIN UNDERWRITING LIMITED**

**(6) QBE UK LIMITED**

**(7) ROYAL & SUN ALLIANCE INSURANCE PLC**

**(8) ZURICH INSURANCE PLC**

Defendants

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**SIXTH DEFENDANT'S (QBE'S) SKELETON ARGUMENT**

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**A. Summary of QBE's Case**

1. QBE's case is simple and straightforward:

1.1. QBE provides to each of its insureds who purchased (through their insurance broker) the relevant extension in QBE1-3, cover against loss caused by interruption to or interference with the insured's business ("BI") caused by a specific insured peril: the occurrence (or manifestation) of a notifiable disease at

the insured premises or within 1 mile of those premises (QBE3) or within 25 miles of those premises (QBE1-2).

- 1.2. On its face each such extension does not provide insurance against the risk of a pandemic or an epidemic (i.e. a worldwide or nationwide disease or the effects thereof) or against the risk of the UK Government or foreign government or public response to such events. It does provide insurance against the risk of BI and loss consequential thereon, caused by the specified insured peril. Simply put: if the specified insured peril has caused the insured loss then there is cover; if it has not, there is no cover. This is not a question of asking what is excluded from the extension (a straw man that the FCA sets up in order to knock down); it is a question of determining what is within the scope of the cover.
- 1.3. Any insured bringing a claim against QBE under the extension must demonstrate, therefore, that the specified insured peril has operated, i.e. that there has been an occurrence (or manifestation) of COVID-19 at the insured premises, or within 1 mile or within 25 miles of those premises, as the case may be, and the insured peril has caused the relevant BI of which they complain, and that *that* BI, i.e. the BI caused by the occurrence of COVID-19 at the premises or in the relevant policy area, has caused the loss which they contend flows from it. If they cannot demonstrate each of those things, in particular because the BI and the loss flowing therefrom would have been sustained in any event, whether or not there was an occurrence or manifestation of COVID-19 on their premises, or within 1 mile or 25 miles of the insured premises, as the case may be, they have no entitlement to an indemnity.
- 1.4. This is simply a classic and orthodox application of familiar rules of (i) construction of each of the QBE Wordings, giving the words used their ordinary and natural meaning and (ii) the rules of causation and, in particular, the 'but for' test and the test of proximate cause.
- 1.5. Such a result is not "*unjust*", "*absurd*," "*unreasonable*" or whatever other similar epithet the FCA or the HIGA interveners choose to deploy. It is simply the result

of the bargain between QBE and each of its insureds, namely that it has agreed to cover each of them in respect of BI losses caused by the insured perils, but not in respect of BI losses not so caused and which would have been suffered in any event, and whether or not one of the ingredients or pre-requisites to cover (occurrence / manifestation of the disease in a specified location) had occurred when no other ingredients or pre-requisites to cover had occurred.

2. To set matters in context:

2.1. COVID-19 first manifested itself in Wuhan, China; the World Health Organisation (“WHO”) was informed of cases of pneumonia of unknown cause on 31 December 2019.<sup>1</sup> As its capacity to spread (from individual to individual) and to injure health became recognised, the public became increasingly fearful and governments also became concerned and fearful of the risk of spread of the disease and the effect of such spread on public health and the ability of health services to cope and not to be overrun.

2.2. Thus, different governments took various measures, with varying degrees of success, to seek to combat it, ranging from advice concerning matters such as personal hygiene to more or less severe ‘lockdowns’, in the most extreme cases restricting nationals of some countries from even venturing outside their own homes, save in limited circumstances.

2.3. From early 2020 as knowledge of the existence of COVID-19 became more widespread, as public and governmental concern began to grow and various governments all over the world took steps to combat the virus, it is likely that many insureds will have felt an effect on their business even before the UK Government and the devolved administrations took steps in the UK to combat the spread of COVID-19 whether by way of advice or ultimately the different ‘lockdown’ measures.

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<sup>1</sup> Agreed Fact 1, Chronology, No. 1 within Table. See [C/1/2].

- 2.4. Such effects in the vast majority of cases would have been without reference to whether the disease had occurred or manifested itself in any particular location.
- 2.5. Thus, the public were likely to have become increasingly concerned about the risks of catching the virus and have sought to stay away from public places, particularly as the Government advice to do so became more vociferous.
- 2.6. Business dependent on consumers from abroad would have also felt an impact due to restrictions on travel imposed by overseas governments and people's reluctance to travel.
- 2.7. COVID-19 became a notifiable disease in England on 5 March 2020 and in Wales on 6 March 2020.
- 2.8. On 11 March 2020, COVID-19 was declared by the WHO to be a pandemic.
- 2.9. The advice and actions taken by the UK Government from early 2020 onwards *"were imposed on all locations in England and Wales at the same time because of the anticipation and occurrence of a nationwide pandemic. They were not limited to particular areas where COVID-19 was present or feared...because all of the UK was ...considered to be at risk"* [PoC #42<sup>2</sup>; QBE Defence #48 admits this<sup>3</sup>].
- 2.10. The steps taken by the UK Government, initially by way of issuing advice and subsequently, by imposing 'lockdown' measures, may well have interfered with or interrupted many insureds' businesses – indeed they were designed to do just that.
- 2.11. However, it is plain that an insured, and indeed anyone else in England and Wales, was affected by the Government's advice and actions whether or not COVID-19 had occurred on their premises or within any particular distance of their premises.

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<sup>2</sup> See [A/2/28].

<sup>3</sup> See [A/11/13].

(i) A simple example

3. Before embarking on a detailed analysis, the simplicity of QBE's case can be demonstrated by reference to a simple example.
4. Consider the position of four insureds, A, B, C and D. Each is a retail shop selling clothing. Each is insured on the basis of QBE3 which provides an indemnity in respect of *"Loss resulting from interruption of or interference with the business... in consequence of... the following events... an occurrence of a notifiable disease within a radius of one (1) mile of the premises..."*
  - 4.1. Each business suffered a downturn in trade throughout February and increasingly in March<sup>4</sup> as the public stayed away and foreign consumers ceased to visit the UK, and then experienced a complete cessation of trade following the imposition of the lock down on 23 March 2020.
  - 4.2. Shop A was not within 1 mile of any outbreaks.
  - 4.3. Shop B is 100 yards away from Shop A and just under 1 mile from a care home. Prior to 23 March no cases of COVID-19 had been diagnosed in the care home, but subsequently one resident died and a post-mortem established that they had contracted COVID-19 and must have done so prior to 23 March.
  - 4.4. Shop C is a further 100 yards away from Shop B and as a result just under 1 mile from a hospital, whereas Shops A and B are just over a mile away from the hospital. At that hospital, a patient was admitted with symptoms of COVID-19 on 20 March and subsequently died. After 23 March a number of patients were admitted and diagnosed with COVID-19, a proportion of whom died.
  - 4.5. Shop D was visited by a Spanish national on 1 March, another on 6 March, and another on 10 March who was in the UK for the purposes of attending the Liverpool v Atletico Madrid football match. All were subsequently diagnosed

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<sup>4</sup> Agreed Fact 8: It is agreed that by 11 March 2020 that there was more than *de minimis* impact from COVID-19 on many businesses (albeit not all businesses necessarily suffered a negative impact). See [C/14/2].

with COVID-19. The fact that the first two visitors were so diagnosed was not known by Shop A until after 23 March, but it did learn of the diagnosis of the third individual who became ill on his return to Spain and informed Shop D on 12 March that he had tested positive for COVID-19. Otherwise Shop D was not within 1 mile of any outbreaks of COVID-19.

4.6. Do any of A, B, C or D have cover in respect of interruption to or interference with their businesses whether before or after 23 March 2020? The answer is plainly 'No' save possibly for Shop D and then to a limited extent. Each can be considered in turn.

5. Shop A:

5.1. Its business has potentially been affected by the COVID-19 pandemic, i.e. consumers have stayed away during February and March. Its business was forced to close as a result of the Government regulations.

5.2. It does not have insurance against such risks, as even the FCA and the Interveners would necessarily accept.

5.3. In the period prior to 5 March COVID-19 was not a notifiable disease. Therefore, whilst the *nationwide* or *worldwide* occurrence and/or spread of COVID-19 (or fear thereof) was causing interruption to or interference with the insured's business, that was not capable of being an insured peril. The position was no different after 5 March. The fact that COVID-19 became notifiable in England and Wales did not create an insured peril in the absence of an occurrence or manifestation of the disease within 1 mile of Shop A causing BI. Equally the UK Government's 'lockdown' measures on and after 23 March, whilst plainly interrupting Shop A's business, were not an insured peril.

5.4. Whilst the above example may appear obvious, which it is, QBE refers to it at the outset as it reveals four fundamental related points which must be borne in mind throughout:

5.4.1. First, the extensions in the QBE Wordings do not provide insurance against loss caused by BI caused by a pandemic or by a national or international governmental response or by public fear of a pandemic;

5.4.2. Secondly, the extensions in the QBE Wordings do provide insurance cover against loss caused by BI caused by the occurrence of a notifiable disease in the relevant policy area, i.e. within 1 mile or 25 miles of the insured premises;

5.4.3. Thirdly, it is that occurrence which is required to be the cause of the BI;

5.4.4. Fourthly, it is *that* BI (i.e. BI caused by the occurrence of the disease in the relevant policy area) which must be the cause of loss in respect of which an indemnity is provided.

6. Shop B:

6.1. Shop B is in fact in no different position to Shop A. Its experience of the pandemic and the Government regulations is precisely the same.

6.2. The fact that the owners of Shop B can with the benefit of hindsight and by happenstance establish that a person within 1 mile had contracted COVID-19 is not transformative of their situation vis-à-vis their insurance. That is so for the following simple reasons:

6.2.1. An unknown case of COVID-19 in the care home did not and could not in fact have any effect on the business of Shop B. It simply did not cause interference or interruption to the business.

6.2.2. What in fact caused interference and interruption to Shop B's business was precisely the same circumstances that caused interference with and interruption to Shop A's business.

6.2.3. Whilst the occurrence of a case of COVID-19 at the care home might have been an insured peril, it did not cause any interference with or interruption to the business.

6.2.4. Moreover, the position of Shop B would have been exactly the same, whether or not there had been a hindsight diagnosed case of COVID-19, i.e. whether or not the insured peril had occurred. That is clear from a simple application of causation or the 'but for' test: would Shop B have suffered the same loss in any event if the case of COVID-19 had not occurred in the care home? The answer is plainly 'Yes'.

## 7. Shop C:<sup>5</sup>

7.1. Does it make any difference that Shop C was within 1 mile of a person who was diagnosed with COVID-19 on 20 March?

7.2. The critical difficulty for the insured would be to establish that the occurrence of a diagnosed case of COVID-19 in the hospital one mile away had any causative effect on its business.

7.3. Any downturn in its business in February and March was due to the general concern about the risk of contracting the virus and the Government's advice and then the ordered cessation of the business. All of that would have occurred whether or not there was a diagnosed case of COVID-19 in the local hospital.

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<sup>5</sup> The Assumed Facts Example (Category 2) used by the FCA at page 280 of its Skeleton is effectively a 'Shop C' case, albeit one involving a city centre nightclub insured under QBE2, since it refers to a "reported COVID-19 case in the city [which] occurred before the club reduced its opening times." See [I/1/110].



7.4. Put simply: whilst the insured peril had occurred it had not caused the BI loss. The position of the insured would have been precisely the same whether or not the case of COVID-19 had been diagnosed.

8. Shop D:

8.1. The visit on 1 March was prior to COVID-19 being a notifiable disease and was unknown. Accordingly, it did not amount to the occurrence of a notifiable disease.

8.2. The visit on 6 March might have amounted to the occurrence of a notifiable disease in the relevant policy area, but being unknown, that occurrence did not cause any interruption or interference. Any interruption or interference was the result of the pandemic and the response of the general public / UK Government to the same. It was not as a result of the fact that an asymptomatic virus carrier had visited Shop D on 6 March. Indeed the position of Shop D would have been precisely the same whether or not that person had visited their premises.

8.3. The visit on 10 March is theoretically a more promising basis for a possible claim in principle. Here, there was an occurrence which was known about. However, whether there would be any claim, by reference to a transient incident of COVID-19, would be fact specific to what followed the discovery of the occurrence. If Shop D had closed following the discovery of the visit that would depend on whether the closure was a required response. But any claim would be for the loss in business that Shop D suffered as a result of the particular occurrence, over and above the loss it would have suffered anyway as a result of the pandemic (such losses being unrelated to any occurrence at the premises of Shop D or within the relevant policy area). In so far as losses would have been suffered anyway as a result of the interference and interruption that would have been caused in any event, then those losses were not caused by an insured peril.

8.4. However, any losses after 23 March were not caused by the visit on 10 March. Such losses were caused by the Government 'lockdown' which would have

applied in any event, whether or not Shop D had experienced the visit on 10 March.

9. These illustrations reveal the nature of the cover and its limited scope. Each of shops A, B and C suffered BI for exactly the same reason. Each had insurance with QBE on the terms of QBE3. It would be remarkable and surprising if cover depended on the happenstance of whether or not a single case of COVID-19 could be proved to have occurred within the relevant policy area at some time – the FCA’s case would appear to be that it is sufficient for this to have occurred at any time prior to 23 March but not thereafter (Reply, #59<sup>6</sup>) – notwithstanding that it had no causative effect. (Shop D is essentially in the same position save for the limited possibility of cover described in paragraph 8.3 above).
10. The FCA appears to acknowledge that Shop A would have no cover. Whilst its submissions are replete with suggestions that it would be “*absurd*” and “*contrary to common sense*” for businesses in an analogous position to Shops B and C not to have cover, it is unable to articulate a case as to why it would make sense for Shop A to be denied cover but Shops B and C to be afforded cover for the effects of the COVID-19 pandemic when they are all in the same position, save for the happenstance of discovery of just a single case of COVID-19 (whether symptomatic or not and whether diagnosed or not) in their relevant policy area, but where that discovery has made no difference whatsoever to their position, as indeed is revealed by the consideration of the position of Shop A.
11. The previous point has been described as a ‘*postcode lottery*’ i.e. that cover depends on the happenstance in the above example of Shop A being just more than 1 mile away from the care home and the hospital, and Shops B and C being very slightly closer to the care home or hospital as the case may be. It would be surprising if cover really did depend on such happenstance. And the point is even more fundamental. The QBE Wordings are not intended to operate in such an arbitrary, capricious or perverse way. They are concerned with a local occurrence of a disease (i.e. within the relevant policy

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<sup>6</sup> See [A/14/31].

area) where that local occurrence actually causes BI. Where one insured has been exposed to such an occurrence which has actually caused him loss, and another has not, there is nothing arbitrary, capricious or perverse in the former having cover which is denied to the latter. But it would be entirely arbitrary, capricious and perverse to say that, for instance, Shop B had cover simply because it was within a mile of an undiagnosed case of COVID-19 when that case had had no impact on Shop B's business and where Shop B's business was affected by precisely the same circumstances as affected Shop A.

12. It is respectfully suggested that the above represents a straightforward and orthodox analysis of the position.
13. In truth, at the heart of this case lies the frustration of insureds that they have been adversely affected by the COVID-19 pandemic and the UK Government's actions to combat it, and the assertion that if they have "BI insurance" that insurance should respond and provide an indemnity to cover their loss. The simple and obvious difficulty with that approach is that it proceeds from a false premise. The QBE Wording does not provide an insured with a right to an indemnity against BI loss caused by any fortuity.
14. Whilst QBE sympathises with the plight of its insureds and indeed everyone else adversely affected by the COVID-19 pandemic, the simple and inescapable point is that whilst it did agree to provide a specific and limited form of BI loss insurance, it did not provide such insurance against the risk of a pandemic.
15. It is also fair to point out that treating an insurer who writes insurance against BI losses caused by the occurrence of diseases on an individual insured's premises, or within 1 mile or 25 miles of such premises, as if they had written policies providing cover against the risk of a pandemic would have a dramatic effect on the particular insurer's book of business and capital requirements. It is obvious that the risk exposure and particularly the risk of aggregation of losses would be entirely different if the insurance is transformed from one concerned with BI losses caused by the

occurrence of disease on or within a defined distance of the insured's premises, to one concerned with BI losses caused by the UK or worldwide pandemic.

16. The FCA and the Interveners seek to challenge this by arguments as to:

16.1. Scope of the cover and construction of the Wordings; and

16.2. The approach to causation.

17. As to the scope of the cover, in different ways it appears that the FCA attempts to argue that the QBE wordings do and were intended to provide cover in respect of loss caused by BI caused by a pandemic and government actions in response to such a pandemic. This is further considered in Section B below. The FCA's approach is plainly wrong.

18. The second is, to a large extent, built on the first. The FCA's approach to causation is largely conditioned on its argument that the QBE Wordings are intended to respond to a pandemic and government response to it. Once that is shown to be wrong its arguments on causation largely fall away.

(ii) Cover under the QBE "Murder, suicide or disease" insuring clauses (referred to by the FCA as "Disease Clauses")

19. A theme running through the FCA's submissions is that the insurer defendants are somehow trying to argue that there will never be cover under any of the relevant policy wordings for any loss suffered in connection with COVID-19. That is simply not the case. QBE fully accepts that there are likely to be valid claims in relation to COVID-19, both under the Wordings which are being considered in this test case, and under wordings not within these proceedings, provided that the circumstances of the claim properly fall within coverage.

20. This can be seen at the outset of the FCA's own Skeleton, which sets out (at #3)<sup>7</sup> a number of extracts from declinature letters issued by the insurer defendants in relation to certain COVID-19 claims. Despite introducing these extracts as "*key passages which*

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<sup>7</sup> See [I/1/4].

*reveal the blanket denials that were being communicated”, it is perfectly plain that QBE’s declinature letter made no such ‘blanket denial’. Rather, the extract from QBE’s letter confirmed that “this Extension will... provide cover where loss is in consequence of the occurrence of COVID-19 at the relevant locations...”*

21. The reality of the position is that the vast majority of claims which have been submitted to QBE to date have been very generic in nature; they have not identified or referred to ‘local’ outbreaks of COVID-19 or explained how any such local occurrences are said to have caused loss to the policyholder’s business. QBE’s responses to such generic claims have therefore been necessarily generic as well. As and when claims have identified more ‘local’ facts and matters (i.e. occurring within the relevant policy area), QBE has considered those claims carefully and has provided specific responses to them. QBE will of course continue to do so in response to further, more detailed claims.
22. While the scope of cover provided by the so-called (by the FCA) QBE Disease Clauses does not extend to cover ‘pandemics’, it does provide valuable insurance protection for policyholders in a range of situations. Most obviously, the QBE Disease Clauses cover loss caused by the occurrence or manifestation of a notifiable disease at the insured premises; for example, where a restaurant has to close for cleaning following an incident of food poisoning (involving a notifiable disease) or similar. In such cases, there will be a clear and obvious causal link between the disease and the BI loss suffered by the insured.
23. The QBE Disease Clauses do not stop at providing cover for BI loss suffered by a notifiable disease at the insured premises, however; they extend to provide cover for BI loss which is caused by the occurrence of such a disease within a specified radius, up to 1 mile in the case of QBE3 and up to 25 miles in the case of QBE1-2 (the “**relevant policy area**”). While this extends cover to protect against the consequences of a

notifiable disease occurring beyond the insured premises, the same type of causal link between the 'local' occurrence and the BI loss will still be required for cover to attach.<sup>8</sup>

24. In terms of the sort of circumstances that might be covered by the 'relevant policy area' aspect of the QBE Disease Clauses, the range of potential cases (generally but also in the particular context of the COVID-19 crisis) are myriad. A localised outbreak of a notifiable disease, including COVID-19, might lead to a particular street or square mile (etc.) being locked down, even though the rest of the country remains 'open for business'.
25. Two examples spring obviously to mind. First, in a situation such as the Salisbury Novichok poisonings: had the poison taken the form of a notifiable disease (such as Ebola), and BI loss had been caused to policyholders within 1 mile or 25 miles (depending on their wording) of the centre of that city by loss of visitors and loss of trade, etc., the QBE Disease Clauses would have been engaged.
26. Second, and returning to the present COVID-19 crisis, it is possible that, in particular cases, 'local lockdowns' in response to the local presence of the virus, could engage cover under the QBE Disease Clauses, but only where the 'local' occurrence (i.e. within the insured's relevant policy area) of COVID-19 has caused the policyholder to suffer loss which they would not have suffered otherwise. As and when (and if) such fact-specific claims, based on the effects of 'local' occurrences of COVID-19 are made by QBE's policyholders, it will (as indicated in the extracts from its declinature letter cited in #3 of the FCA's Skeleton<sup>9</sup>) consider, assess and (provided cover is properly engaged) pay those claims accordingly.
27. For the purposes of this test case, however, it is not generally the case that every QBE policyholder in the country whose business has suffered interruption or interference as a result of, for example, the national lockdown inevitably has a valid claim under the

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<sup>8</sup> This is really at the heart of the dispute between the FCA and QBE; the FCA effectively contends that no causal link is required, while QBE (conventionally) says that it is.

<sup>9</sup> See [I/1/4].

BI section of their policy. For this reason, and as set out in detail below, the FCA's claim for certain generalised declarations against QBE must fail.

28. Finally, that cover under the 'relevant policy area' aspect of the QBE Disease Clauses may fairly be seen as limited to the loss caused by the specified insured peril should not be surprising, to either policyholders or their insurance brokers. It must be borne in mind that the 'relevant policy area' coverage is (taking the example of the QBE1 lead wording) contained in just one of five 'limbs' of cover in the relevant "*Murder, suicide or disease*" insuring clause (as set out further below). The other four limbs also cover (one would hope / expect) relatively limited risks, such as murder, vermin, defective drains etc. at the insured premises.
29. Moreover, the QBE Disease Clause itself, containing all five 'limbs' of cover, sits alongside other 'damage-based' and 'non-damage' extensions which cover unquestionably limited risks, such as the risk of damage to property used whilst at an exhibition (Clause 7.3.6: "*Exhibitions*"<sup>10</sup>) and the potential for an employee or group of employees to resign from the insured business having won the lottery (Clause 7.3.8: "*Lottery winners increased costs*"<sup>11</sup>). The amount of premium paid for these rather limited risks will necessarily have been a very modest proportion of the overall premium paid for the policy generally – bearing in mind the wide range of more common risks covered by the same QBE Wordings (including property damage, employers' liability, public liability, products liability, etc.).
30. Fundamentally, however, where BI loss has been proximately caused by the specified insured perils in the relevant extensions, which includes the occurrence / manifestation of COVID-19 at the insured premises or within the relevant policy area of those premises as set out in the QBE Disease Clauses, there will be cover under the QBE Wordings.<sup>12</sup> QBE fully accepts its obligations to its policyholders in this respect.

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<sup>10</sup> See [B/13/30] or [L/13/8].

<sup>11</sup> See [B/13/30] or [L/13/8].

<sup>12</sup> Provided, of course, that the claim is not excluded for some reason and/or that all relevant claims conditions, etc., have been complied with. Such issues are outside the remit of this test case.

## B. The Scope of the Cover / Construction of the QBE Wordings

### (i) General principles of interpretation and the factual matrix

31. In relation to the general principles of construction and interpretation of contracts, particularly contracts of insurance, QBE refers to and adopts the submissions made in the Insurers' Joint note on construction. This includes the sections of that note which deals with issues of the factual matrix and the doctrine of *contra proferentem*.
32. However, it is important for QBE to make one discrete additional point about the relevant factual matrix which is applicable to the interpretation of all of the QBE Wordings, namely the role played by brokers in the placement of policies agreed on the basis of any of the QBE Wordings.
33. In this respect, it is an agreed fact that, in every policy entered into on the basis of the QBE Wordings, the insured was represented by an insurance broker. It appears to be a key aspect of the FCA's case that many of the policyholders will be small and medium enterprises ("SMEs") who are "*generally not sophisticated or well-resourced insurance buyers in the way a larger corporate would be*".<sup>13</sup> The FCA goes on to argue that, in relation to the clauses at issue in these proceedings, "*the question will be how they would be understood by a business which [sic] limited knowledge of insurance matters.*"<sup>14</sup>
34. This sort of argument simply does not apply where the policyholder is represented by an insurance broker. Each such broker will owe professional duties of care to its client, including duties to "*identify the type and scope of cover which the client needs, and advise the client accordingly*", "*take reasonable steps to arrange the insurance cover which... is suitable for and clearly meets the client's requirements*" and "*once the cover has been placed... consider and explain to the client what cover has been arranged*".<sup>15</sup> As such, every one of QBE's policyholders was owed a duty of care by its own specialist insurance advisor.

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<sup>13</sup> FCA's Skeleton #1 [I/1/3] and #8 [I/1/8].

<sup>14</sup> FCA's Skeleton #81 [I/1/36].

<sup>15</sup> See *Jackson & Powell on Professional Liability* (8<sup>th</sup> edn 2019), at paragraph 16-044 [K/200/3]. This paragraph was cited with approval by Butcher J in *Dalamd Ltd v. Butterworth Spengler Commercial Ltd* [2018] EWHC 2558 (Comm); [2019] Lloyd's Rep IR 295, at [80] [K/174/15]. Notably, this case concerned a claim against an insurance broker for, *inter alia*, an alleged failure to explain the scope of the client's business interruption cover.



In that sense, it is quite inaccurate to describe or treat the insureds under the QBE Wordings as “*not sophisticated*” or similar.

35. It is not clear that very much will turn on this in any event, since QBE contends that the relevant wordings are clear and capable of straightforward objective interpretation. However, to the extent that the FCA considers the size and nature of the individual policyholders to be a relevant part of the factual matrix, for example, then the same must equally apply to the fact that all of those policyholders were advised by insurance professionals. Indeed, it would be surprising if the FCA, as the conduct regulator of insurance brokers, took a contrary view.
36. However, where the FCA relies (as it must, and does, throughout its pleaded case) on unorthodox exceptions to well-established insurance law principles, particularly in relation to causation, it is important to bear in mind that each of QBE’s policyholders will have had the benefit of advice from an insurance professional who would understand and be familiar with the orthodox approach to such issues.

(ii) The nature of the cover

37. Moving to consider the QBE Wordings themselves, it is first necessary to consider the nature of the so-called (by the FCA) “*Disease Clause*” provided pursuant to QBE1-3. This shorthand description is not entirely accurate, as the ‘disease clause’ is but one limb of BI cover provided as part of a package.
38. Rather, the position is as follows:
  - 38.1. Each of the QBE Wordings covers a wide range of insured events. For example, QBE3 includes sections providing cover in respect of property, terrorism, money, fidelity, goods in transit, computer breakdown, contract works, cyber, personal accident, employers’ liability, public liability, products liability, professional indemnity and directors’ and officers’ liability, etc. Importantly, however, none of the QBE Wordings provide cover for worldwide or nationwide pandemics or epidemics. As set out further below, one of the central problems with the way

the FCA advances its case is to assume what it seeks to prove viz. that the QBE Wordings insure against pandemics; they do not.

38.2. One section of each of the QBE Wordings provides cover in respect of BI loss. The primary insuring clause provides cover for loss caused by interruption or interference with the insured's business arising from / caused by or in consequence of damage to property (or any building) used by the insured at the insured premises.

38.3. The cover provided by the primary insuring clause is extended by a limited number of extensions.<sup>16</sup> There are essentially two types of extension:

38.3.1. 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, 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 (QBE3, clause 3.4.1<sup>17</sup>) and the 'denial of access' clause which provides cover for BI loss resulting from damage to property within 250 metres of the perimeter of the insured premises which physically prevents the use of the premises or access thereto (QBE3, clause 3.4.3<sup>18</sup>).

38.3.2. Second, 'non-damage extensions' which extend the cover to include BI losses resulting from non-damage events which occur at or within a specified range of the insured premises. See, by way of example, the 'denial of access (non-damage)' extension (QBE1 lead wording, clause

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<sup>16</sup> In considering the correct interpretation of any given extension to cover, it is of course important to consider the context in which that extension appears in the policy, and particularly the nature of the main insuring clause from which it forms an extension: see, for example, *Tesco Stores Ltd v. Constable* [2008] EWCA Civ 362; [2008] 1 CLC 727. See [J/102/1].

<sup>17</sup> See [B/15/21] or [L/15/6].

<sup>18</sup> See [B/15/22] or [L/15/7].

7.3.5<sup>19</sup>) which provides cover for BI loss caused by action by the Police Authority following danger or disturbance within 250 metres of the insured premises which prevents or hinders the use of those premises or access thereto.

38.4. This test case is concerned only with the second type of extension, i.e. ‘non-damage extensions’.

38.5. The extensions to the primary insuring clause in the BI section and, more particularly, the non-damage extension under consideration in this test case, cannot be properly construed as removing both the damage and the proximity requirements of the primary insuring clause.

39. The FCA objects to what it describes as QBE’s “*elegant scheme*” in relation to the damage-based and non-damage extensions, arguing that “*the truth is rather messier*”.<sup>20</sup> It uses the example of the ‘Utilities supply’ extension (QBE1 lead wording, clause 7.3.13<sup>21</sup>) to argue that “*the nexus is built in: it must be a utility supplier that supplies the insured business but the location of the damage to the utility supplier’s property can be anywhere.*”<sup>22</sup> However, this very example illustrates QBE’s point, since the ‘Utilities supply’ extension has two ‘limbs’; the first is a ‘damage-based extension’ with no vicinity limit (the link to the insured is that the damage must be to the facilities of *the insured’s* utility supplier); the second is a ‘non-damage extension’ with a premises-related requirement (i.e. “*failure at the premises of... (ii) the supply of gas at the supply utility meters*”, etc.).

40. If there is one exception that proves the rule, it is the ‘Lottery winners increased costs’ extension (QBE1 lead wording, clause 7.3.8)<sup>23</sup>, which covers the (one assumes) highly unusual situation in which an employee resigns from the insured business “*as a direct consequence of their securing a win in either the UK National Lottery Prize Draws (including*

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<sup>19</sup> See [B/13/30] or [L/13/8].

<sup>20</sup> FCA’s Skeleton #824.1. See [I/1/268].

<sup>21</sup> See [B/13/32/] or [L/13/7].

<sup>22</sup> FCA’s Skeleton #824.2. See [I/1/268].

<sup>23</sup> See [B/13/30] or [L/13/8].

*Scratch Cards*), *UK National Football Pools*, *Euro Millions Lottery*, *Irish National Lottery* or *the UK Premium Bond Prize Draws*.” While this ‘non-damage’ extension is not related to the insured premises, *per se*, it is obviously a limited risk which has a close connection with the insured business. There are also strict conditions (for example, the employee must have resigned within 14 days of their win) and limits (no indemnity beyond 3 months of the date of the win, and limited to £100,000 in any event) on this cover.

41. Indeed, it is notable that such limited cover as ‘Lottery winners increased costs’ is given equal prominence in the QBE Wordings with the ‘Murder, suicide or disease’ clause at issue in this test case (QBE1 lead wording, clause 7.3.9<sup>24</sup>), one limb (out of five) of which is said – by the FCA – to consist of extremely broad and wide-ranging (not to mention high value) pandemic cover. It would be surprising if this was in fact the case. In reality, of course, the ‘Murder, suicide or disease’ clause does not provide cover for pandemics; its scope is more limited and, crucially, requires a premises-related causal link, as set out further below.
42. The ‘non-damage extensions’ relevant for present purposes in the three types of policy in issue are those concerned with “*Murder, suicide or disease*” (QBE1), “*Infectious disease, murder or suicide, food or drink*” (QBE2) and “*Notifiable disease, murder or suicide, food or drink poisoning*” (QBE3). These extensions, of which the so-called Disease Clause forms one part, are concerned with things that happen at the insured premises or, in some cases, within a defined radius of the insured premises and which cause BI, which BI results in loss to the insured.
43. In QBE1, the “*Murder, suicide or disease*” extension covers BI loss arising from events at or, in some cases, within a certain distance of, the insured premises. The full “*murder, suicide or disease*” clause in QBE1 provides as follows:<sup>25</sup>

“... **We** will indemnify **you** for: ...

**7.3.9 Murder, suicide or disease**

interruption of or interference with the business arising from:

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<sup>24</sup> See [B/13/31] or [L/13/9].

<sup>25</sup> See [B/13/31] or [L/13/9].

- 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.”

- 44. The wording in QBE2 is in very similar form.
- 45. The wording of the equivalent ‘non-damage extension’ in QBE3 is even narrower, since the relevant ‘radius’ for the ‘disease’ clause is just 1 mile, as follows:<sup>26</sup>

**“3.4.8 Notifiable disease, murder or suicide, food or drink poisoning**

Loss resulting from interruption of or interference with the **business** as covered by this **section** in consequence of any of the following events:

- a) an occurrence of a notifiable disease at the **premises** or attributable to food or drink supplied from the **premises**;
- b) the discovery of any organism at the **premises** likely to result in the occurrence of a notifiable disease;
- c) an occurrence of a notifiable disease within a radius of one (1) mile of the **premises**;
- d) the discovery of vermin or pests at the **premises** which causes restrictions on the use of the premises on the order or advice of the competent local authority;
- e) an accident causing defects in the drains or other sanitary arrangements at the **premises** which causes restrictions on the use of the **premises** on the order or advice of the competent local authority;
- f) an occurrence of actual or suspected murder, suicide or actual or alleged sexual assault at the **premises**.

Provided that:

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<sup>26</sup> See [B/15/22] or [L/15/7].

i) the **insurer** shall only be liable for loss arising at those **premises** which are directly subject to the incident;

ii) the **insurer** shall not be liable for any costs incurred in cleaning, repair, replacement, recall or checking of property except as provided for in the Property **section**;

‘Notifiable disease’ means illness sustained by any person resulting from any diseases that may be notifiable under the Health Protection (Notification) Regulations 2010.”

46. As such, the insured peril identified in the Disease Clause, is (1) the ‘manifestation’ or ‘occurrence’ of; (2) a ‘notifiable disease’; (3) at the insured premises or within 1 mile (QBE3) or within 25 miles (QBE1-2) of the insured premises.

47. One of the central fallacies in the FCA’s case is that it pays insufficient regard to the scope of the insured peril and to the necessary role that it must play in causing the insured’s BI loss. The ‘local’ occurrence / manifestation of the disease and the causative impact of such local occurrence / manifestation is a fundamental part of the insurance, and it must be taken into account in understanding the scope of the cover, in operating the relevant ‘but for’ test, and in considering whether it was the ‘proximate cause’ of any assumed BI loss. The FCA’s arguments in relation to such ‘vicinity’ requirements are addressed further below.

(iii) QBE’s ‘Causal Link’ Wordings

48. As noted above, QBE’s ‘causal link’ wordings are as follows:

48.1. “*Caused by*” in QBE1;

48.2. “*Arising from*” in QBE1; and

48.3. “*In consequence of*” in QBE2-3.

49. All of these ‘causal link’ wordings require the application of orthodox causation principles, including the ‘but for’ and ‘proximate cause’ tests. Contracting parties may of course modify those principles in particular cases, but such modification would require clear language. There is no such clear wording in the QBE Disease Clauses

50. The FCA accepts – for the purposes of its submissions at least – that “*these causal connectors all require something in the nature of a proximate cause test*”<sup>27</sup> and leaves the HIGA Interveners to argue that some sort of “*looser causal test*” may be implied by words such as ‘in consequence of’ and ‘arising from’. QBE’s response to the HIGA Interveners “*alternative approach*” is set out in **Section F** below. This section therefore proceeds on the basis (as is the case) that as a matter of construction:

50.1. The insured peril is the occurrence / manifestation of a notifiable disease in the relevant policy area;

50.2. In order for cover to apply, each insured must prove not only that ‘but for’ such occurrence / manifestation of the notifiable disease in the relevant policy area it would not have suffered the BI loss of which it complains but also that *that* BI loss was proximately caused by such occurrence / manifestation of the notifiable disease in the relevant policy area.

(iv) The FCA’s arguments on scope of cover and construction of the wordings

51. Much of the FCA’s case starts from what it sets out to prove. It asserts that whilst policies of insurance providing BI cover do not generally provide specific cover for losses consequent upon pandemics, the Wordings, including the QBE Disease Clauses, *provide such cover* [i.e. “*specific cover for losses consequent upon pandemics*”]<sup>28</sup>. There is not very much that can sensibly be said about this. An insurance wording which does not mention “*pandemics*” is hardly fertile ground for a submission that it provides specific cover for losses consequent upon pandemics. An insurance wording which provides cover for BI loss caused by the occurrence of a disease on the insured’s premises or within 1 mile or within 25 miles of those premises is similarly an unpromising start for such an argument.

52. It is also plain that the FCA could not seriously dispute that Shop A in the example posited above does not have cover or a right to an indemnity under the QBE Disease

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<sup>27</sup> FCA’s Skeleton #822. See [I/1/267].

<sup>28</sup> e.g. Reply #41. See [A/14/21].

Clauses in respect of its BI losses as a result of the COVID-19 pandemic whether as a result of the UK Government's actions to combat the pandemic or otherwise.

53. So what is the FCA's real case on construction? It appears to involve the following steps:

53.1. There is no exclusion provided within the QBE Wordings in respect of losses caused by pandemics.<sup>29</sup> It appears to be suggested that this somehow leads to the conclusion that losses caused by pandemics are, therefore, covered.

53.2. A disease may be part of a pandemic. Therefore, any BI caused by the disease, providing there is at least one occurrence or manifestation of the disease in the relevant policy area, is covered. This is what the FCA refers (in the PoC, if not its Reply or Skeleton) to as "*some sort of anchor*".<sup>30</sup> The FCA appears to have developed this point (and dropped its "*anchor*" terminology) in its Skeleton, where it claims that it is possible for the Court "*to find that the insured peril was 'inextricably linked' with other concurrent causes and therefore for these purposes amounts to a single cause...*"<sup>31</sup>

53.3. Alternatively, the FCA relies on what it calls "*Common sense causation*" to formulate a "*jigsaw*" argument, where "*All the areas of the country aggregated were concurrent causes, but no single area satisfies the 'but for' test...*" The FCA contends that the Court should aggregate all of the alleged causes together "*to ask what would have happened but for all the jigsaw pieces. They are either all treated as a single cause, alternatively, there are multiple concurrent causes of which each one contributes causatively to the whole.*"<sup>32</sup>

53.4. The parties therefore (according to the FCA's case) agreed a relaxation or variation of the normal rules of causation in relation to BI losses caused by the occurrence or manifestation of a disease in the relevant policy area where those

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<sup>29</sup> PoC #4.2 [A/2/4], 33 [A/2/23], 54.2 [A/2/36], 67 [A/2/41]; Reply #43 [A/14/22].

<sup>30</sup> PoC #54.1 [A/2/35], 67 [A/2/41].

<sup>31</sup> PoC#57 [A/2/29]; FCA's Skeleton #237 [A/I/1/95].

<sup>32</sup> PoC #57 [A/2/29], 68 [A/2/41]; FCA's Skeleton #241 [I/1/97].



losses were “concurrently caused” by something else, not itself an insured peril, but which has the same “underlying cause” as the insured peril.<sup>33</sup>

(v) The ‘Exclusion’ point

54. The FCA appears deliberately to misstate QBE’s case: see e.g. Reply #43: “*The Defendants contend that the prima facie cover for these losses is excluded*”. It asserts that QBE is relying on an exclusion from cover. QBE is doing no such thing. As already explained, QBE relies on the fact that the cover is in respect of BI losses caused by an occurrence or manifestation of disease in the relevant policy area. Quite simply, that has not on either the agreed and assumed facts, nor at least in the vast majority of cases in the real world, happened in reality.
55. It is correct that if coverage was otherwise provided by the QBE Wordings, such cover might be removed by an appropriate exclusion. So, for instance, it is accepted that an insured might be able to prove that, in fact, their particular business was interfered with or interrupted as a result of an occurrence of COVID-19 in the relevant policy area. In the example of Shop D posited above, the discovery that a Spanish asymptomatic carrier had visited the shop on 10 March might have caused interference or interruption to the business, e.g. because it was necessary to close down whilst disinfecting, or because staff could not work due to the need to quarantine. All of these matters are fact-specific to Shop D. Providing that the insured can prove the events and subject to (i) the operation of the trends clause; and (ii) the effect of the supervening event when the Government ordered all shops to shut down; the insured would have a claim. In that event, and only in that event, an exclusion for losses caused by a pandemic would be relevant. Such an exclusion would exclude from cover losses otherwise covered. But if the losses are not otherwise covered, the absence of such an exclusion is irrelevant.

(vi) The ‘Vicinity’ point

56. The FCA seeks to meet QBE’s response to the ‘Exclusion’ point, above, by suggesting that the effect of the absence of an exclusion is that the QBE Disease Clauses are

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<sup>33</sup> PoC#57 [A/2/39]; Reply #58.3 [A/14/30]; FCA’s Skeleton #244 [I/1/98], 256 [I/1/102], 267 [I/1/105].

capable of responding to a disease which occurs both within and outside the relevant policy area. Therefore, it appears to say it must follow that the cover is in respect of the effects of a pandemic provided there is, at least, an occurrence of the disease in the relevant policy area. So this amounts to the following:

- 56.1. The cover is not in respect of a pandemic unless there is an occurrence of the disease in the relevant policy area;
  - 56.2. But it is in respect of a pandemic if there is an occurrence of the disease in the relevant policy area.
57. This only has to be stated to see its obvious flaws:
- 57.1. The insurance is not in respect of the effects of a disease;
  - 57.2. The insurance is not in respect of BI loss caused by the effects of a disease or an epidemic / pandemic;
  - 57.3. The insurance *is* in respect of BI loss caused by the occurrence of a disease in the relevant policy area;
  - 57.4. Where a disease extends outside the defined area, so that it occurs both within and without, it will be for the insured to establish what BI loss, if any, was caused by the occurrence of that disease *in the relevant policy area*, because it is only in respect of BI loss caused by that event that it has purchased indemnity insurance.
58. At #54.1 of the PoC,<sup>34</sup> the FCA states that:
- “Where wordings require a disease... to be within a particular locality to the premises, that prevents cover in cases of **solely** remote events. It does not prevent, and is not intended to prevent, cover in cases of events that are both local and extend outside the vicinity, including where they cover a broad region or the entire country.”

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<sup>34</sup> See [A/2/35].

59. The essential difficulty with this is that it ignores the nature of the cover, i.e. cover in respect of BI loss caused by the occurrence / manifestation of the disease in the relevant policy area. Rather:

59.1. Disease which does not occur and/or is not manifest in the relevant policy area is incapable of causing relevant BI loss. Of course, it may cause BI loss but that is not relevant / covered because it is not BI loss caused by the occurrence / manifestation of a disease in the relevant policy area, i.e. a 'local' event. See the example of Shop A above. So it is correct that solely remote events are not covered.

59.2. It is also correct that the mere fact that a disease may extend outside the relevant policy area does not necessarily prevent cover in respect of an insured's BI loss caused by the occurrence / manifestation of the disease in that insured's relevant policy area.

59.3. Thus, the fact that a disease may occur within an insured's relevant policy and extend beyond it does not derogate from the fact that as an essential ingredient of the cover it is necessary to prove that the occurrence / manifestation **in** the insured's relevant policy area did have the relevant causative effect, i.e. it did cause BI which caused loss.

60. Accordingly:

60.1. Remote events are indeed not covered. That is why Shop A in the example above is not covered.

60.2. Whilst local events (i.e. occurrences / manifestations in the relevant policy area) are covered, they will only be covered in so far as they cause the insured's BI loss. If the proximate cause of the insured's BI loss is the remote event, and that BI loss would have happened in any event, there is no cover. That is why Shop A's position is no different in relation to its BI loss consequent upon the COVID-19 pandemic to Shop B's or C's.

61. In this respect, the FCA misrepresents, or at least misunderstands, QBE's position throughout its Skeleton. It suggests, incorrectly, that QBE intends "*to argue that either the causal connectors... or a 'but for' test or both would defeat a claim where the disease within and without were both causes of interruption or interference*"<sup>35</sup> and that "*there is some sort of implication that a disease within 25 miles is not covered if it is also a disease beyond 25 miles.*"<sup>36</sup>
62. That is simply not QBE's position. QBE fully accepts (and insures against the risk) that a 'local' disease may cause BI loss to its policyholder's business, and that the same applies *whether or not* the disease extends beyond the relevant policy area. Indeed, that is precisely what the 'relevant policy area' part of the Disease Clause is sold to protect against – the damage caused by **local** (i.e. in the relevant policy area) occurrence of the disease. If it is so caused it does not matter that the disease is also present elsewhere; but it does matter if it is the fact of the disease being elsewhere, rather than in the relevant policy area, that is the cause of the BI loss.
63. An example advanced by the FCA, ostensibly in support of its argument that "*the prima facie cover... is for wide area emergencies or diseases*",<sup>37</sup> is that of "*accidental interruption to utility services... Such terms have the potential to make insurers liable for both local and wide-area events, provided the local supply is affected.*" While the key question in any case will obviously be 'what is the insured peril, based on proper construction of the policy wording?', on its face this example precisely aligns with QBE's case: in most cases, the policyholder will care not a jot about a blackout across the country as a whole; it is the effect of the *local supply* being affected that has the potential to cause BI loss.
64. The FCA's approach to 'vicinity' clauses, as set out in its Skeleton, suffers from two further fundamental problems:

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<sup>35</sup> FCA's Skeleton #832. See [I/1/271].

<sup>36</sup> FCA's Skeleton #836 [I/1/272]. See also #182-183. See [I/1/69].

<sup>37</sup> FCA's Skeleton #184. See [I/1/70].

64.1. First, it pays insufficient regard to the causal requirements of the relevant policy area terminology, claiming that the *“better reading of the 25 mile maximum remoteness distance is as ‘something extra’... to trigger the cover but which does not then cut down the insured peril: i.e. there is cover for diseases which extend within 25 miles, not only for diseases solely to the extent that they are within 25 miles.”*<sup>38</sup> This appears to be a slight re-formulation of what the FCA formerly described as its *“some sort of anchor”*<sup>39</sup> methodology (although the FCA appears to have dropped its *“anchor”* terminology). It is addressed by QBE as the ‘Anchor’ point immediately below.

64.2. Second, it relies on what it says is *“common sense”* to *“ask not merely what would have happened ‘but for’ the defendant’s wrongdoing (or here, the insured peril), but rather what would have happened ‘but for’ a set of events of which the defendant’s wrongdoing is one element. Providing the defendant’s wrongdoing was part of a set of events which common sense dictates can be combined, the necessary causal test is satisfied.”*<sup>40</sup> This argument apparently leads the FCA to suggest that *“the vicinity clause... engages what might be called the ‘jigsaw’ argument”*.<sup>41</sup> This is addressed by QBE as the ‘Jigsaw’ point below.

(vii) The ‘Anchor’ point

65. The extreme nature of the FCA’s case is illustrated by #67 of the FCA’s PoC:

*“The Wordings do not distinguish between local-only diseases (e.g. food poisoning) and broader diseases and could easily have done so (e.g. by covering “diseases occurring only at the premises” or “diseases only with a [x] mile radius, or by excluding pandemics). The proper construction is that the insurer is distinguishing between remote-only diseases that cause government action, which are not covered and diseases that include a **local manifestation which have some sort of anchor** to the happenings in the area of the insured premises. It was open to the insurer specifically to exclude a pandemic/epidemic (as some policies do) if cover was not intended to extend this far.”*

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<sup>38</sup> FCA’s Skeleton #184. See [I/1/70].

<sup>39</sup> PoC #67. See [A/2/41].

<sup>40</sup> FCA’s Skeleton #238. See [I/1/95].

<sup>41</sup> FCA’s Skeleton #241. See [I/1/97].

66. This assertion appears to lead the FCA to make the following points at #68 and #69 of the PoC<sup>42</sup> which commences “*Accordingly*”:

66.1. That the “*sort of anchor*” referred to in #67<sup>43</sup> of the PoC is provided by **any** single person within the 1 mile or 25 mile policy area having carried or contracted COVID-19 (whether known or unknown) **at any time** prior to the UK Government advice or actions to deal with the fear of a national pandemic.

66.2. Therefore, cover is provided against the consequences of a nationwide pandemic and the Government response thereto, provided an ‘anchor’ is present.

67. As noted above, the FCA appears to have dropped its “*anchor*” terminology in its Skeleton; the word does not appear anywhere in its 321 pages of submissions. The same argument is, however, maintained as a matter of substance, although it appears to have developed and/or merged into the FCA’s ‘inextricably linked’ case, i.e. that “*the insured peril was ‘inextricably linked’ with other concurrent causes and therefore for these purposes amounts to a single cause... So in the present, case [sic] if the Court considers that the disease within and without the locality... and/or the emergency and public authority action... are inextricably linked, they would amount to a single cause and not separate concurrent causes.*”<sup>44</sup> For convenience, QBE continues to refer to this as the ‘Anchor’ point in this Skeleton.

68. The FCA’s ‘Anchor’ argument is, of course, entirely divorced from the wording of the QBE Disease Clauses. The FCA does not descend to explain which words in the QBE Disease Clauses are alleged to have the effect that the cover is in respect of an insured’s BI loss caused by a nationwide disease providing that there is “*some sort of anchor*” in the vicinity. This is unsurprising. There are no such words. The FCA’s argument requires a wholesale rewriting of the QBE Disease Clauses in a way that would fundamentally change their meaning and effect.

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<sup>42</sup> See [A/2/41-42].

<sup>43</sup> See [A/2/41].

<sup>44</sup> FCA’s Skeleton #237. See [I/1/95]].

69. It would be remarkably strange for the insurance to operate in the way contended. Where there is a national pandemic and Government intervention, what rational reason could there be for providing cover to Shop B in the example above because – by happenstance – it was (just) within a mile of an (unknown) case of COVID-19 in the care home, and not to Shop A which was just over a mile away, when both in fact have suffered BI loss through precisely the same mechanism? There is none and none is suggested by the FCA.
70. Just as importantly, the argument is entirely inconsistent with the QBE Disease Clauses. As explained above, those wordings make clear that what is covered is BI loss caused by an occurrence / manifestation within the relevant policy area, i.e. at the premises or within 1 mile or within 25 miles, as the case may be. There is no basis for treating the local occurrence of the disease as *some sort of anchor*; the local occurrence is **the** event that has to be the cause of the BI loss for cover to attach.
71. The reason why the FCA has to resort to this contorted approach to construction is transparent. Although this is a test case, it is important not to lose sight of the fact that ultimately any claim has to be brought forward by an individual insured on the terms of their individual policy. The FCA cannot demonstrate that an (assumed for present purposes) occurrence or manifestation of COVID-19 at any such insured's premises, or within 1 mile or within 25 miles thereof, was a cause of the BI loss of that insured, let alone the 'proximate cause' of their loss. So the FCA is driven to 'write out' of the insurance the need for the local occurrence / manifestation to have causative effect, instead relegating it to the subsidiary or supporting role of "*some sort of anchor*".
72. This difficulty in the FCA's argument is further exemplified by #43 of the Reply,<sup>45</sup> which needs to be broken down into its constituent parts:

72.1. It is first alleged that:

“The relevance of pandemic exclusions arises in the following circumstances: the Wordings provide cover that on their face, could be

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<sup>45</sup> See [A/14/22].

triggered by pandemic or other wide-area disease provided the requirements of the Wording(s) are met.”

72.2. That statement is not controversial in so far as it recognises that the requirements of the QBE Disease Clauses must be met. Of course the critical requirements of those wordings, which are then overlooked, are that the occurrence of the disease in the relevant policy area must cause the BI which must result in loss to the insured.

72.3. The fact that some diseases may extend outside the policy area does not mean that either (i) cover is excluded for BI losses that **are** caused by the local occurrence, or (ii) cover is extended to cover BI losses that are caused not by the local occurrence of a disease but by the pandemic or other wide-area disease.

72.4. The FCA goes on to say:

“In those circumstances, had loss resulting from pandemics been intended to be excluded, then the reasonable person would anticipate that it would have been excluded by clear words... The Defendants contend that the prima facie cover for these losses is excluded not by clear words addressing the issue, but rather by words such as ‘due to’ and ‘caused by’ or trends clause wording when read in a particular way. Those phrases do not, on an objective construction, have the dramatic effect of excluding the contemplated pandemic underlying cause as the Defendants contend.”

72.5. As has already been noted, the premise of this paragraph is the false point that QBE is arguing for an exclusion from cover; the true position is that QBE relies on the express wording as to the scope of cover.

72.6. But this paragraph is revealing: the FCA refers to “*the dramatic effect of excluding the contemplated pandemic underlying cause*”. It is not entirely clear what this is supposed to mean:

72.6.1. The indemnity insurance operates by reference to defined perils. The insured is entitled to an indemnity in respect of the defined peril, viz. BI loss caused by occurrence or manifestation of the disease in the relevant policy area.



72.6.2. If it is meant that the insurance contemplated covering a disease which might be part of a pandemic, that is unilluminating. The cover was in respect of BI losses caused in a particular way, viz. caused by occurrence or manifestation of the disease in relevant policy area. The fact that some diseases may and some may not extend beyond the relevant policy area does not change the nature of the cover provided which is focussed on the effect of the disease having occurred in the relevant policy area.

72.6.3. Indeed, the fact that it is recognised that some diseases might extend broadly and outside the relevant policy area undermines the FCA's case. The parties have chosen an indemnity in respect of BI losses caused by events within the relevant policy area; they have not chosen an indemnity in respect of BI losses caused by other events. The FCA wrongly conflates a disease occurring in the relevant policy area and the effect of that, and such disease occurring anywhere and the effect of that.

(viii) The 'same underlying cause' point

73. A similar confusion is evident at #58.3 of the Reply<sup>46</sup> (see also #58.4 of the Reply), where it is said:

“Where a policy contemplates (expressly or impliedly) an underlying cause and that underlying cause must have been contemplated as being of a nature which would or might have a range of effects capable of causing business interruption losses, losses concurrently caused by both the insured effect and the contemplated underlying cause ought in principle to be recoverable, otherwise the cover will be largely illusory.”

74. Presumably what is being referred to here as “*the underlying cause*” is COVID-19. The occurrence / manifestation of the disease in the relevant policy area for the purposes of the Disease Clause in the QBE Wordings is not “*the underlying cause*”; it is what is required to cause the BI loss. But insofar as it can be understood, the FCA is

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<sup>46</sup> See [A/14/30].

distinguishing between, in the present case (i) COVID-19, the disease and (ii) COVID-19 occurring / manifesting itself in the relevant policy area and (iii) the occurrence of COVID-19 elsewhere. As far as it can be understood, this appears to be saying that (ii) and (iii) share a common underlying cause, i.e. COVID-19. So this paragraph appears to be saying that as a matter of construction the QBE Wordings provide cover in respect of BI loss caused by the effects of COVID-19, wherever that occurs, providing the BI loss is “concurrently caused” by the occurrence / manifestation of COVID-19 in the relevant policy area.

75. The paragraph does not explain what is meant by “concurrently caused”. But presumably this is intended to refer to a situation where due to the occurrence of COVID-19 outside the relevant policy area, and the Government actions in response, the insured would not, applying normal and orthodox principles of causation (i.e. ‘but for’ and ‘proximate cause’, considered further below) be able to establish that the occurrence / manifestation of COVID-19 in the policy area caused the BI loss. In other words, the argument is a variant on the “anchor” argument and is that as a matter of construction the parties agreed to relax – indeed to disapply – the ordinary rules of causation.
76. The first thing to note is that the factual premise is false. The (assumed) occurrence / manifestation of COVID-19 in the relevant policy area of any particular insured will not, in the overwhelming majority of cases, have had any causative effect. So it will not be “a concurrent cause” of that insured’s BI loss.
77. In so far as this point is made by way of construction, the answer is simply this. That is not what the policy says. There is nothing in the policy to suggest that the normal rules of causation are relaxed. Indeed the opposite is the case. This is borne out both by (i) the wording of the QBE Disease Clauses themselves (see above) and (ii) the trends clauses which specifically require the application of the ‘but for’ test of causation to any claim for loss.
78. The trends clauses are considered at paragraphs 147 to 184 below. For present purposes it is sufficient to make the following two points. First, the trends clause and

indeed the QBE Wordings as a whole show that the parties intended to apply the normal rules of causation to claims for indemnity thereunder. There is nothing to indicate that the parties intended to disapply the 'but for' test and to apply some special rule of causation to claims for BI losses caused by the occurrence / manifestation of a disease in the relevant policy area. Secondly, the argument of the FCA makes no sense: even if the insured were able to establish a BI loss caused by the occurrence / manifestation of COVID-19 in their relevant policy area (and it is accepted there will be some insureds who can do that, e.g. Shop D potentially for the period from 12 March to 23 March 2020), any such claim will then be subject to the 'but for' provision in the trends clause. Thus, a suggestion that the parties intended to disapply the ordinary rules of causation makes absolutely no sense, particularly where such rules would fall to be applied in any event by reason of the application of the trends clause.

79. It is interesting to note that the FCA's argument appears to be an echo of the (rejected) argument in *Orient Express* that the storms in that case were the underlying cause of both the damage to the hotel and the damage to the city of New Orleans, and, therefore, the effect of the storms on the city of New Orleans and on the hotel should be eliminated for the purposes of a counterfactual. In that case the answer (correctly) was that the "*underlying cause*", the storms, was not the insured peril. The insured peril was damage to the hotel. The question was whether **that** insured peril operated so as to cause BI loss. It did not. Because that BI loss would have been suffered in any event as a result of the damage to New Orleans.
80. So too here, in so far as you could even sensibly talk about COVID-19 being the underlying cause of the occurrence / manifestation of COVID-19 in the relevant policy area, the insurance is not in respect of the underlying cause, i.e. the disease generally wherever it occurs, it is in respect of the occurrence / manifestation of the disease in the relevant policy area and the BI effect on the insured of that occurrence / manifestation. (This case is *a fortiori* to the position in *Orient Express*. There, the damage to the hotel would have normally meant that the hotel would suffer business interruption. It simply did not in fact because of the devastating damage to New

Orleans. That meant that the insurers were not liable notwithstanding something had happened which normally might have been expected to trigger cover but which in fact did not. It is obvious that a single case of COVID-19 within an insured's relevant policy area does not inevitably lead to BI or even render BI likely. An insured has only suffered a BI loss in this case, save with few exceptions, due to the pandemic and the Government's reaction to it. Absent those things it is most unlikely any loss would be have been suffered.)

81. As to the suggestion that cover provided by the QBE Wordings, if not to be construed as contended by the FCA, would be largely illusory, that is false and a *non-sequitur*. The cover is provided clearly on a limited basis. It is intended to provide for the local occurrence / manifestation of diseases with local BI effects. The fact that some diseases might have broader scope does not detract from the point that insurers have provided a limited type of cover.
82. For instance, the Disease Clause in QBE3 is plainly narrower than the Disease Clause in QBE1. That does not render the cover illusory; it just means that the insured must prove BI as a result of an occurrence in that limited area (approximately 3 square miles) as opposed to the larger area. But in both cases if the cause of the insured's BI is, in fact, something other than the occurrence / manifestation of disease in the relevant policy area and which would have caused the loss in any event, the cover is not rendered illusory – it simply does not respond to events which are not an insured peril.
83. In this respect, there are hints running throughout the FCA's Skeleton that, particularly in the case of the 25 mile radius limits, the amount of square mileage covered as a result effectively means that the Court should disregard those limits altogether. It says, for example, that a 25 mile radius from the insured premises covers an area "*bigger than any city and around a quarter of the size of Wales.*"<sup>47</sup> The contention appears to be that, since the area covered *may* be substantial (and it is worth noting that, for many insured premises, a sizeable part of the area will fall in the English

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<sup>47</sup> FCA's Skeleton #180. See [I/1/67].

Channel or North Sea, etc.), the Court should treat the relevant policy area as if it was effectively nationwide. The objection to this approach is obvious; it is not what the QBE Wordings say.

84. Accordingly, it is submitted that it is clear as a matter of construction that on the QBE Wordings cover is only provided in respect of BI loss caused by an occurrence or manifestation of a notifiable disease in the relevant policy area. The need for proof of an occurrence or manifestation in the relevant policy area is not “*some sort of anchor*” allowing the insured to recover any BI losses caused by the disease anywhere. Nor is there any basis for suggesting that the parties agreed to relax or vary the normal rules on causation. Occurrence / manifestation of the disease in the insured’s relevant policy area is a key ingredient of cover and it necessary for the insured to prove BI loss caused by that key ingredient, i.e. the occurrence or manifestation of the disease in the relevant policy area.

(ix) The ‘jigsaw’ point

85. As part of its ‘scattergun’ approach to unorthodox causation (i.e. disapplying or modifying the ‘but for’ test), the FCA argues that “*the vicinity clause... engages what might be called the ‘jigsaw’ argument*”.<sup>48</sup> The FCA puts this argument as follows (bold emphasis added):

“The Government responded to the fear/risk/danger/emergency/prevalence of COVID-19 all around the country and the incidence of the disease. Had there been no such fear/risk/danger/emergency prevalence anywhere, it would not have acted. But had there been such fear etc in the entire country other than any one 25 mile radius (2,000 square miles) area, it would probably still have acted.<sup>49</sup> Does this mean that the fear etc in that 25 mile circle did not cause the Government action? Plainly not. 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**

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<sup>48</sup> FCA’s Skeleton #241. See [I/1/97].

<sup>49</sup> This is precisely QBE’s case on ‘but for’ causation.

**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.*"

86. This passage perfectly illustrates why QBE's case is correct and the FCA's is wrong. As the FCA points out, 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 'but for *any particular rioter*, would the loss have been suffered' but rather 'but for *the riot*, would the loss have been suffered?'
87. As such, assuming the insurance policy in question covered loss caused by a "*riot*" within a 1 mile radius, it is necessary for the riot (i.e. consisting of *multiple rioters*) to occur within that radius; it is not possible to aggregate a collection of individual troublemakers across the country (one of whom is causing trouble within the 1 mile radius) in order to contend that there has been a riot within the 1 mile radius area for the purposes of the policy.
88. The further mistake made by the FCA is to equate the "*riot*" in this analogy with "*pandemic*" in the present case. As set out in detail above, the QBE Wordings do not contain, as an insured peril, "*pandemic*". As such, there is simply no question of 'aggregating' local disease occurrence or manifestation in order to construct a 'jigsaw' case establishing the existence of a "*pandemic*".
89. In this respect, the FCA's contention in #826 of its Skeleton<sup>50</sup> that "*QBE seems to accept the jigsaw point*" is firmly denied. While it may be correct that the UK Government was responding to the 'jigsaw' or 'aggregate' of COVID-19 occurrences *nationwide* or *worldwide*,<sup>51</sup> that does not mean that such a 'jigsaw' approach is relevant in determining coverage under the QBE Wordings. 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.

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<sup>50</sup> See [I/1/269].

<sup>51</sup> Which is what QBE pleaded in #66.2 of its Defence [A/11/23], referred to by the FCA in this context.

90. What matters for the purposes of the present case is simply whether the *insured peril* in the QBE Disease Clauses (i.e. occurrence or manifestation of COVID-19 within the relevant policy area) 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 occurrence, would the same loss have been suffered in any event?

91. Accordingly, we now turn to the issues of causation.

### C. Causation

#### (i) Introduction

92. As set out above, and in the Defendants’ Joint Skeleton Argument on Causation (“**the Defendants’ Causation Skeleton**”) it is a basic requirement of orthodox causation principles in insurance law that an insured must prove: (1) factual causation (i.e. satisfy the ‘but for’ test) and (2) legal causation (i.e. prove the insured peril was the ‘proximate cause’ of its loss<sup>52</sup>).

93. It follows that:

93.1. The insured must prove that ‘but for’ the occurrence of the insured peril, they would not have suffered the alleged harm (i.e. the interruption of or interference with their business). The insured must therefore first prove factual causation.

93.2. If the insured can prove factual causation, the insured must then prove that the insured peril was the ‘proximate cause’ of that harm, i.e. legal causation.

94. The legal principles applicable to the ‘but for’ and proximate cause tests are set out in the Defendants’ Causation Skeleton.

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<sup>52</sup> Or at least ‘a’ proximate cause of the loss and that no other proximate cause of the loss is the subject of a policy exclusion.

(ii) Application of the ‘But For’ Test to Claims under the QBE Disease Clauses

95. The FCA commences its analysis by boldly asserting that “[n]othing in the Wordings or in the law entitles the insurer to deny cover or requires the Court to find a lack of cover or reduce the indemnity by reason loss not being caused by the insured peril.”<sup>53</sup> This is obviously a very unpromising start. The whole essence of indemnity insurance is to provide an indemnity in respect of loss caused by an insured peril. Plainly the assertion of the FCA is misconceived: the QBE Wordings specifically provide that the insured is only entitled to an indemnity in respect of loss caused by the insured peril.
96. The FCA later makes a similar but slightly different and no less bold assertion that all of the Representative Terms across all of the Wordings at issue in this test case “do not require a strict ‘but for’ test in that they do not require a close enquiry into a technical counterfactual containing some of the elements of the COVID-19 pandemic and Government interventions.”<sup>54</sup>
97. No justification or reasoning for these unorthodox assertions has been advanced. There is no basis for such an approach either in the QBE Disease Clauses themselves (most notably the ‘causal linking’ wordings set out above) or in the particular circumstances (both agreed and assumed) of this test case. It may also be pointed out that, just as in the *Orient-Express* case, the relevant contracting parties have expressly envisaged the utilisation of the ‘but for’ test, since this exact phrase is used in the ‘trends clause’ contained in the QBE Wordings, as further discussed below.
98. Realistically the argument is not so much about whether the ‘but for’ test applies but its application. Here there is also much confusion in the FCA’s case.
99. We start with the basic principle: the insured alleges a loss as a result of an insured peril. The issue is whether that insured peril has in fact caused the loss. The purpose of the ‘but for’ test is to consider the extent to which the insured peril has in fact operated

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<sup>53</sup> PoC #4.3 [A/2/4]. See also FCA’s Skeleton #10.3: “Nothing in the Wordings or in the law entitles the insurer to deny cover, or requires the Court to find a lack of cover or reduce the indemnity, by reason of loss not being caused by the insured peril but because it was caused by COVID-19 more generally...” [I/1/10].

<sup>54</sup> PoC #59. See [A/2/39].



to cause the loss. Thus, the court asks what would have happened by considering a counterfactual where the insured peril did not operate, i.e. but for the insured peril what would have been the position? It is critical for this purpose to identify *the insured peril*.

100. The insured peril is, as explained above, the occurrence or manifestation of COVID-19 at the insured premises or within 1 mile or within 25 miles of those premises.
101. Therefore, any counterfactual has to ask what would have happened 'but for' the occurrence or manifestation of COVID-19 at the premises or in the relevant policy area? Essentially this boils down to what would have happened had there been no occurrence of COVID-19 at the premises or in the relevant policy area.
102. However, the FCA proposes, first, that the "*proper counterfactual... is the situation in which there was no COVID-19 in the UK and no Government advice, orders, laws or other measures in relation to COVID-19...*"<sup>55</sup> and even goes as far as to suggest that "*the correct counterfactual is a world in which there was no COVID 19 and no Government intervention in relation to it...*"<sup>56</sup>
103. The obvious problem with the FCA's counterfactual is that it bears no relation whatsoever to the insured peril in the QBE Disease Clauses, i.e. manifestation or occurrence of COVID-19 at the insured premises or within 1 mile, or 25 miles, of the insured premises. The insured peril in the QBE Disease Clauses is not the 'occurrence of disease nationwide' even less 'occurrence of disease worldwide and Government intervention in relation to the disease' which is how the FCA has approached its primary counterfactual.
104. As an alternative, the FCA proposes that "*the correct counterfactual is to assume that there is no disease... within [the relevant policy area] but that the disease... continued outside it. Accordingly, there remains cover for losses that would not have been suffered had the [relevant*

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<sup>55</sup> PoC #77. See [A/2/45].

<sup>56</sup> PoC #4.3. See [A/2/4].

*policy area] been disease / action-free, including on the counterfactual... that there was an 'island' of normal disease-free trade in a 'sea' of disease / public action.*"<sup>57</sup>

105. This second counterfactual is, *prima facie*, less objectionable than the first, since it does at least pay some regard to the 'local' element of the relevant insured peril. However, the FCA then by sleight of hand entirely misapplies this counterfactual because it asks not simply what would have happened but for the insured peril; it adds to that what would have happened if the event causing the insured's BI loss had not happened, i.e. a nationwide pandemic and Government action applicable to the entire nation to combat it. Thus, the FCA posits a counterfactual in which the insured peril does not operate and the insured's relevant policy area is not subjected to the UK Government's measures to combat COVID-19. By analogy with *Orient Express*, this is a counterfactual where the hotel was not damaged and damage to New Orleans should be treated as if it did not in any way impede the hotel's business. It is totally unclear how the FCA arrives at such a counterfactual when, irrespective of whether COVID-19 was or was not present in the relevant policy area, the Government advice and actions would have been precisely the same. Shop A was subject to the same measures as Shops B and C in the examples given at the outset of this Skeleton.
106. Indeed, it is common ground that the Government measures were not location-specific and so there is no question in a counterfactual world of an "island" of normal disease free trade. As the FCA says in its Skeleton:<sup>58</sup>

"Overall... the UK national Government proceeded in its response to this nationwide disease in a nation-wide way, indivisibly combining action in respect of restrictions on individuals with action relating to inhibitions on businesses."

107. To use such a response as the basis for a 'but for' counterfactual in the present case is therefore another way of seeking to extend the cover to a "pandemic" or at any rate in respect of disease occurring outside the relevant policy area (as well as within it, potentially). In this respect, the FCA's counterfactual is designed to lead to an

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<sup>57</sup> PoC #79. See [A/2/46].

<sup>58</sup> FCA's Skeleton #66. See [I/1/31].

indemnity in respect of a pandemic or disease occurring on a nationwide basis (and therefore outside of the relevant policy area) where the effects of such events are felt (in terms of BI loss) inside the relevant policy area. It would turn the insurance on its head. But more simply it is a counterfactual which eliminates too much – both the insured peril *and* other events which in fact occurred and which in fact caused the BI loss.

108. In reality, all that the FCA is doing is proposing counterfactuals which do not reflect the insured peril in order to claim recovery of BI loss which is not caused by the insured peril.
109. Against that background the debate about realistic and unrealistic counterfactuals is somewhat arid. By definition, a counterfactual is concerned with something that has not occurred. In an insurance context the purpose of the counterfactual is not to posit a real world situation that might have occurred. It is to isolate the effect of the insured peril and to ask if that is removed, would the insured in the light of what has in fact occurred suffer the same loss.
110. Hence in *Orient Express*, the Arbitrators, and Hamblen J, in turn, all rejected a counterfactual based on the premise that the hurricanes had not occurred. The question in that case was ‘did the damage to the hotel which was undoubtedly capable of causing BI in fact cause the loss?’ By applying the ‘but for’ test the conclusion was the BI was caused by the devastating damage to New Orleans and would have been suffered in any event. Accordingly, the damage to the hotel was not the ‘but for’ cause of the BI in that case. To have held otherwise would have given the insured an indemnity in respect of the damaging effect of the storm on New Orleans, rather than the indemnity to which they were entitled under the policy in question.
111. The same is true in this case: to give the insured an indemnity by assuming a counterfactual of either ‘no COVID-19 and no Government intervention’ (the FCA’s primary case) or ‘no Government intervention that extended to the relevant policy area’ (the FCA’s alternative case) is to extend the scope of the cover.

112. The correct counterfactual is entirely straightforward and, with respect to the FCA, plain and obvious from the actual wording of the *insured peril* in question; that is, one simply asks whether, had the manifestation or occurrence of COVID-19 at the insured premises or within 1 mile, or 25 miles, of those premises (i.e. the insured peril in the QBE Disease Clauses) not happened, would the insured in the light of the events that in fact occurred have suffered the same harm in any event? This is the only legitimate counterfactual permitted by the QBE Disease Clauses.
113. Moreover, the only sensible answer to this correct counterfactual is ‘yes’, the insured would have suffered the same harm in any event in almost every case. In this respect, QBE does not rule out that there may be some highly fact-specific case where a certain business did, like Shop D in our example for a limited period, suffer BI loss which was caused by the insured peril but that is not something which the Court can, with respect, determine in this test case.
114. Taking what might be described as the ‘high water mark’ of the FCA’s case, i.e. a business which had the benefit of a QBE1 policy, the question is, where there were multiple occurrences (or manifestations) of COVID-19 within the 25 mile relevant policy area, and the insured business was mandated to close, would the business have suffered harm by means of the Government’s ‘lockdown’ even if all of those occurrences or manifestations had not happened? The answer can only be ‘yes’; the nationwide ‘lockdown’ did not depend on occurrences in any particular 1 mile or 25 mile radius zone anywhere in the UK, but rather, was the Government’s response to the spread of COVID-19 across Europe and/or the nation as a whole (or the fear of such spread). Indeed, the ‘nationwide’ rather than ‘region-specific’<sup>59</sup> nature of the Government ‘lockdown’ (and, by extension, other forms of human action and/or intervention in response to the COVID-19 crisis) appears on the face of the FCA’s own pleaded case.
115. By way of example:

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<sup>59</sup> Let alone ‘1 mile or 25 mile zone-specific’, as per the QBE Wordings.

115.1. In #4.1 of the PoC,<sup>60</sup> the FCA acknowledges that the “*Government response... was a single body of public authority intervention...*”

115.2. This is echoed in #17 of the PoC,<sup>61</sup> where the FCA notes that “*steps taken by UK public authorities (especially the UK Government), have interrupted and interfered with many business and their activities.*”

115.3. In #23-27 of the PoC,<sup>62</sup> the FCA refers to various data on reported cases and hospital deaths, etc. Such ‘local’ hospital data, etc., could realistically have no relevance in the present context except insofar as it added to the overall picture of ‘nationwide’ occurrence and/or spread of COVID-19. The fact that someone in a hospital 25 miles away from the insured premises may have been treated for COVID-19 had no effect (or at least no immediately obvious effect) on that business. Rather, that occurrence (and by extension, the data recording that occurrence) added to the overall *nationwide* picture, which may then have led to the various Government responses, etc. (The reality is that the FCA seeks to prove such matters **not** because they caused the insured’s BI loss but as some sort of independent (non-causative) fact – “*some sort of anchor*”.<sup>63</sup>)

116. It follows from the foregoing that most claims under the QBE Disease Clauses for BI loss suffered as a result of the COVID-19 crisis generally must fail at the first stage of ‘but for’ causation; that is, ‘but for’ the occurrence of the *insured peril*, in almost every case the policyholder will have suffered the same harm (i.e. interruption of or interference with their business) in any event.

117. The FCA seeks to avoid this inevitable conclusion in a number of ways:

117.1. First, by reference to its “*some sort of anchor*” construction;

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<sup>60</sup> See [A/2/3].

<sup>61</sup> See [A/2/7].

<sup>62</sup> See [A/2/17-19].

<sup>63</sup> PoC #67. See [A/2/41].

117.2. Secondly, by contending that there is *“only one proximate cause, namely the nationwide COVID-19 disease including its local presence or manifestation”* and that *“one cannot separate out the ‘local disease ... and the national disease... and the business closure orders and other measures”* meaning that:

117.2.1. All of the interruption of and/or interference with the business and the closure or restrictions placed on the premises that post-dated COVID-19 being contracted by a person within 1 mile or within 25 miles of the premises was *“caused by”, “in consequence of”, or “a result of”* the occurrence / manifestation of the disease in the relevant policy area because the measures were to deal with the *“developing and aggregate prevalence of COVID-19 across the UK including within [the relevant policy area]”*;<sup>64</sup>

117.2.2. The occurrence / manifestation of COVID-19 in the relevant policy area is a concurrent interdependent cause of the BI (and so of the loss); alternatively, is *“inextricably linked”* with the national disease, the public authority action and the business closure orders and other measures;<sup>65</sup> or

117.2.3. Alternatively, is one of a set of causes, none of the elements of which are sufficient on their own and should be considered together;<sup>66</sup>

117.3. Thirdly, by disregarding the ‘but for’ test for causation altogether.<sup>67</sup>

118. The argument on *“some kind of anchor”* has already been addressed. Once the flaw in that is recognised, the reality is that much, if not all, of the FCA’s case on causation falls away. An insured must prove that an occurrence/manifestation of COVID-19 in their relevant policy area caused the BI and loss of which they complain.

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<sup>64</sup> PoC #68. See [A/2/41].

<sup>65</sup> PoC #57. See [A/2/39].

<sup>66</sup> PoC #57. See [A/2/39].

<sup>67</sup> Last sentence of PoC #57 [A/2/39]. Independent causes can only not prevent cover if the ‘but for’ test does not apply.

119. The 'Jigsaw' point has also already been addressed. Whilst it might be said that the 'local' occurrence was part of the "*developing and aggregate prevalence of COVID-19 across the UK*" that does not assist the FCA because the fact is (as the FCA itself asserts and is common ground) that the advice and actions of the UK Government were imposed upon all locations in England and Wales at the same time and were not limited to particular areas where COVID-19 was present or feared because all of the UK was considered to be at risk. It is therefore impossible to see how it can be said that the occurrence / manifestation of COVID-19 at a particular insured's premises or within 1 mile or 25 miles thereof (i.e. the *insured peril*) was a cause of that insured's BI loss. The local occurrence on its own did not and would not have caused the lockdown. The accumulation or aggregation of local and non-local occurrences is not an insured event (cf. the "*riot*" example addressed above).
120. The insured peril, i.e. the occurrence / manifestation of COVID-19 in an insured's relevant policy area, was plainly not an interdependent cause in the sense used in the authorities, such as in *JJ Lloyd Investments v. Northern Star Insurance Co (The Miss Jay Jay)*.<sup>68</sup> That can be tested very simply. As the FCA accepts, the actions of the UK Government were not dependent upon the occurrence / manifestation of COVID-19 at a particular insured's premises or within 1 mile or 25 miles thereof. It follows that if no occurrence / manifestation had occurred in an insured's relevant area the interference and interruption, and therefore the BI loss, would still have occurred.
121. The FCA sets out the legal basis, such as it is, for its argument that the nationwide COVID-19 and the UK Government's response was "*inextricably linked*" with a local occurrence and/or is one of a set of causes, none of the elements of which are sufficient on their own and should be considered together, in #237 of its Skeleton. It places reliance on *The Silver Cloud*<sup>69</sup> to argue that the Court should "*find that the insured peril was 'inextricably linked' with other concurrent causes and therefore for these purposes amounts to a single cause...*" As such, this appears to be no more than a development of the FCA's 'Anchor' case, which was addressed above. Further, and in any event, for the

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<sup>68</sup> [1987] 1 Lloyd's Rep 32. See [J/66/1].

<sup>69</sup> [2004] EWCA Civ 769; [2004] 1 Lloyd's Rep IR 696. See [J/91/1].

reasons set out in the Defendant's Causation Skeleton *The Silver Cloud* does not support the FCA's contention.

122. The key question remains, therefore: how, if at all, has the insured peril in the QBE Disease Clause (i.e. occurrence or manifestation of COVID-19 in the insured's relevant policy area) caused the BI loss of which the insured complains? And the position would remain that it did not.
123. Thus, if the occurrence / manifestation of COVID-19 at a particular insured's premises or within 1 mile or 25 miles thereof was a cause at all (and it was not) of that insured's BI loss it remains the case that the nationwide or potential nationwide spread of COVID-19 and the UK Government's response was (per the FCA) another cause. So, at best, there were independent causes in which case an insured could not satisfy the 'but for' test of causation by pointing to the occurrence of COVID-19 in their relevant policy area.
124. The FCA contends, finally, that an unorthodox approach to causation should be taken in this case, i.e. that the 'but for' test should not apply. It is not clear from the FCA's pleadings whether this approach is said to be required by the QBE Disease Clauses themselves or from the supposedly novel or difficult factual background to the assumed BI claims. In reality, it is a device based on wishful thinking to create cover which otherwise does not exist on the true construction of the QBE Disease Clauses and the application of conventional and orthodox principles of construction.
125. There is however no basis for the disapplication of the 'but for' test. We have already considered above the FCA's case that on the true construction of the QBE 'Disease Clauses' the parties relaxed or varied the normal rules as to causation. Plainly they did not and indeed it would be curious if in the QBE Wordings a special rule, absent very clear language, had been adopted in relation to one limited aspect, namely BI as a result of the occurrence of a disease in the relevant policy area, whereas the rest of the policy was subject to the ordinary rules on causation.



126. The simple answer to the suggestion of a relaxation or variation of the normal rules of causation is that is not what the QBE Wordings say and indeed would be contrary to what they do say. Therefore, questions of policy or fairness do not arise. But even if such matters are to be considered they do not assist the FCA. Even if it were to be accepted that in theory there might be an appropriate case for an exception to orthodox causation principles, including the 'but for' test, to be applied in the context of indemnity insurance (as Hamblen J suggested, *obiter*, in *Orient-Express*, at [33]), there is no justification for the Court to adopt an unorthodox approach in the present case.
127. While the FCA has been careful in its Skeleton not to mention the unorthodox and, indeed, controversial decision in *Fairchild v. Glenhaven Funeral Services Ltd*,<sup>70</sup> or most of the so-called "*Fairchild* enclave" of cases which followed it,<sup>71</sup> its references to "*the defendant's wrongdoing*" and claims "*involving multiple wrongdoers*"<sup>72</sup> necessarily invokes that anomalous and unorthodox series of cases.
128. In this respect, the present case may be distinguished from *Fairchild* in at least the following material ways:
- 128.1. First, the defendant insurers are not "*wrongdoers*" who have created some sort of risk as were the defendant employers in *Fairchild*. There, it was highly significant that all of the defendants had been in breach of duty to their employees and had exposed them to the risk of harm. By contrast, QBE has not created or even contributed to any risk of COVID-19 and/or its effect on the policyholders. It has simply undertaken to provide cover against certain limited risks, such cover to be considered by reference to orthodox causation principles.
- 128.2. Second, there are not "*multiple wrongdoers*" – or even (in reality) multiple defendants – as in *Fairchild*. While this test case makes it appear as if there is one

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<sup>70</sup> [2003] 1 AC 32. See [K/106/1].

<sup>71</sup> Including, for example, *Barker v. Corus UK Ltd* [2006] UKHL 20; [2006] 2 AC 572 [K/126/1]; *Sienkiewicz v. Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 AC 229 [K/144/1]; *International Energy Group Ltd v. Zurich Insurance plc* [2015] UKSC 33; [2016] AC 509 [K/158/1]; and *Equitas Insurance Ltd v. Municipal Mutual Insurance Ltd* [2019] EWCA Civ 718; [2020] QB 418 [K/178/1].

<sup>72</sup> FCA's Skeleton #238. See [I/1/95].

single policyholder (the FCA acting collectively on behalf of policyholders across the UK) and multiple defendant insurers, it is important not to lose sight of the fact that the reality of the situation is that, in each and every case, there will be a single policyholder claiming under a policy of insurance written by a single insurer. Neither insurers nor insureds are one homogenous mass. This is not a case where one defendant relies on harm concurrently caused by another defendant in order for both to escape liability. Rather, it is a simple question of whether one insurer defendant assumed liability for the particular risk in question, with the occurrence of such risk and its consequences to be considered by reference to orthodox causation principles.

129. Fundamentally, the FCA's case proceeds as if all of the policyholders across the UK were a single entity (or 'victim' as in *Fairchild*) facing multiple 'wrongdoer' defendants, each of whom are attempting to escape liability by reference to the others' contribution to the same 'harm'. When the situation is viewed, correctly, as an insurance claim by a single policyholder against a single insurer, it is clear that there is no justification for the introduction of a *Fairchild*-type exception to orthodox causation principles in the present case. The sort of anomalies which arise in the '*Fairchild* enclave' can and should be avoided. As Lord Brown said in the *Sienkiewicz* case, "*the law tampers with the "but for" test of causation at its peril.*"

130. To take the point made at #58 of the Reply,<sup>73</sup> there is nothing anomalous in, for instance, QBE:

130.1. Denying cover to an insured in the South West on the basis that the BI loss of which it complains was not caused by the occurrence of COVID-19 at its insured premises or within 1 mile or within 25 miles of those premises but by reason of factors outside its area including COVID-19 elsewhere in the UK and/or the national response to it; and

130.2. Denying cover to an insured in the North East on a similar basis.

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<sup>73</sup> See [A/14/29].

131. The simple point is that neither has suffered BI loss by reason of the insured peril in their policy and its application to each insured's particular policy and circumstances. The fact that the result is that most insureds do not recover is simply a reflection of the limited nature of the BI cover provided by QBE1-3 to each of them and that the QBE Wordings do not provide cover to insureds in respect of BI loss caused by a pandemic.
132. The FCA also relies upon a number of classic 'multiple wrongdoer' examples in #238 of its Skeleton:<sup>74</sup>

"A classic example is where two people simultaneously but independently shoot a victim dead, each could contend that 'but for' their wrongdoing, the death would have occurred anyway. Another classic example is where two persons independently search for the source of a gas leak with the aid of lighted candles."

133. The FCA then cites the first instance case of *Greenwich Millennium Village Ltd v. Essex Services Group plc*, which involved "two equally efficacious causes" in support of its claim that the 'but for' test should be disapplied in the present case. There are two fundamental points to make in response to this:

133.1. First, and as set out above, there are *not* 'multiple wrongdoers' in the present case. There is one insured and one insurer. The question is simply whether, upon the proper application of the policy wording, the insurer assumed the sort of risk which has occurred and caused loss (both in fact and in law) to the insured. Questions of 'fairness' do not arise so as to disapply orthodox causation requirements; it is simply about identifying the relevant insured peril and then asking whether, 'but for' the occurrence of that particular peril, the insured would have suffered the loss in any event.

133.2. Second, this is not a case where there will be "two equally efficacious" causes as in the *Greenwich* case. As explained further below, the *insured peril* (i.e. occurrence / manifestation of COVID-19 at the insured premises or within 1 mile, or within 25 miles, of those premises) was not (in the vast majority of cases) the (or even a)

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<sup>74</sup> See [I/1/95].

proximate cause of the insured's BI loss. Considering the classic example of two hunters, both of whom negligently shoot at a third person, the insurer is in the position of a hunter whose shot missed completely; that is, the insured peril did not proximately cause the harm complained of.

134. Finally, the FCA contends (in #74 of the PoC)<sup>75</sup> that to apply the 'but for' test in the present case would be to deny "*common sense*", a phrase of which the FCA is uncommonly fond, resorting to its use no less than 31 times in its skeleton argument. In this respect, *Clarke on the Law of Insurance Contracts* is instructive, at paragraph 25-1:<sup>76</sup>

"Judges may appeal to common sense to support a proposition which they regard as self-evident and which it would be a waste of time to trawl for precedent in support. However, resort to "*common sense*" is sometimes a cloak for intuition or "*gut instinct*" when supporting data is hard to find or, worse, as Lord Hoffmann suggested in his 1999 lecture, to conceal "*a complete absence of any form of reasoning*".<sup>77</sup> Law based on common sense has been viewed with suspicion: a remit for judicial discretion without external control or for the application of personal values without the requirement of justification.

Less dismissive but scarcely less sceptical was, first, Devlin J who once observed that common sense "*is a blunt instrument not suited for probing into minute points*"; and Lord Mustill who once pointed out that common sense for one person may be uncommon sense for another, just after he wrote this the members of the High Court of Australia agreed that causation was simply a matter of common sense but then divided 3-2 on the application of common sense to the facts before it. Moreover, psychologists tell us that there is little or no consistency in what the ordinary man means by common sense and Hart and Honoré tell us "*that it is impossible to characterise any principles on which common sense proceeds*" ..."

135. As the French philosopher Roland Barthes observed, the "*war against intelligence is always waged in the name of common sense.*"<sup>78</sup>

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<sup>75</sup> See [A/2/44].

<sup>76</sup> See [K/198/2].

<sup>77</sup> A view cited with evident approval by Lord Mance in *The Kos (ENE Kos v. Petroleo Brasileiro)* [2012] UKSC 17; [2012] 2 Lloyd's Rep 292, at [48]. See [J/116/12].

<sup>78</sup> Cited in the footnotes to the extract from *Clarke*, above. See [K/198/10].

136. Put another way, there is no rule of “*common sense*” which requires (or allows) the Court to override the terms of QBE’s Wordings. Accordingly, the FCA’s resort to unorthodox causation principles, in defiance of several centuries of insurance jurisprudence and, indeed, the inferred or implied intentions of the contracting parties themselves, should be rejected. The Court should adopt a conventional approach to causation, applying first the ‘but for’ test and then a ‘proximate cause’ analysis, to which we now turn.

(iii) Application of ‘proximate cause’ analysis to claims under the QBE Disease Clauses

137. The starting point for the ‘proximate cause’ analysis is the same as the starting point for the ‘but for’ test, namely the QBE Wordings. The question for the Court is: was the occurrence of the insured peril in the QBE Wordings, i.e. the occurrence / manifestation of the disease in the relevant policy area, the ‘proximate cause’ of the assumed BI loss?

138. The answer in almost all cases must be ‘no’. Although questions of proximity are ultimately fact-specific, meaning that there may be cover in certain, limited cases, in *most* cases the occurrence of the *insured peril* under the QBE Disease Clauses will not be a ‘proximate cause’ of the loss suffered.

139. Whatever the ‘proximate cause’ of the assumed loss was in most cases, it was *not* the occurrence of COVID-19 within 1 mile or within 25 miles of any particular insured premises. Had only the *insured peril* occurred, the policyholder would not have suffered the loss in question. It was only because other events took place, whether those events consisted of the widespread occurrence of COVID-19 *outside of* the relevant policy area and/or human action and/or intervention, whether in response to the *nationwide* or *worldwide* spread of COVID-19 (and/or the fear of such spread), that the loss was suffered.

140. This is made all the more clear by the FCA’s proposed “*anchor*” methodology (referred to above), whereby any *local* manifestation or occurrence of COVID-19, whether diagnosed (and therefore known about) or not, within the relevant policy area would

act as “*some sort of anchor*” (see #67 of the PoC<sup>79</sup>) or ‘inextricable link’ entitling the policyholder to an indemnity in respect of BI loss which was, in reality, caused by *nationwide* measures and actions.

141. The artificiality of the FCA’s “*anchor*” formulation, and indeed its general approach to ‘proximate cause’ in this case, is clearly illustrated by the example of the four shops above.
142. This sort of ‘postcode lottery’ is not only undesirable, but it is also the result of an incorrect application of not only the ‘but for’ test but also the ‘proximate cause’ test. The true position is the loss suffered by all four shops was proximately caused in the same way and by the same source, whether there was only one such proximate cause (e.g. the nationwide Government ‘lockdown’) or multiple proximate causes (e.g. the *nationwide* and/or *worldwide* spread of COVID-19 *and* the nationwide Government ‘lockdown’, etc.). What can be said with certainty, however, is that the occurrence of the particular *insured peril* in Shops B, and C was *not* the ‘proximate cause’ of their (or indeed Shop A’s) loss. (And Shop D is in precisely the same position save as explained in paragraph 8.3 above).
143. Finally, the FCA raises the question of concurrent *proximate* causes, whether independent or interdependent, as explained above in the context of the prior, ‘but for’ stage of causation. The answer to this is plain from the FCA’s own submissions, since it correctly states, at #231 and #232.4 of its Skeleton,<sup>80</sup> that “*there are concurrent proximate causes only where the two causes are of equal or nearly equal efficiency in bringing about the damage... If one of the concurrent causes, albeit contributing was not of (broadly) equal efficiency with a second cause, then only the second cause is a proximate cause.*”
144. In the present case, even if it could – somehow – be said that the insured peril in the QBE Disease Clause, i.e. the occurrence or manifestation of COVID-19 at the insured premises or within 1 mile, or within 25 miles, of those premises, was a ‘but for’ cause of the BI loss (which could only be the case through an unorthodox and unwarranted

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<sup>79</sup> See [A/2/41].

<sup>80</sup> See [I/1/93].

disapplication of the normal ‘but for’ test), it cannot be said, on any view, that such ‘local’ occurrence was anything approaching “*nearly equal efficiency*” with other concurrent causes, most notably the *nationwide* or *worldwide* occurrence of COVID-19 and/or the UK Government’s *nationwide* response to it. The FCA appears to accept this itself, since it states at #825 of its Skeleton (bold emphasis added):<sup>81</sup>

“Government action was a response to the presence of COVID-19 **across the country**. It was a response to the danger **around the country**, and the presence of COVID-19 **around the country**. If there was a case of COVID-19 within 25 miles or 1 mile of the premises then that was **part of** what the Government was responding to...”

145. Accordingly, and even if the policyholder was able to pass the ‘but for’ stage of causation (which is denied for the reasons set out above), it would not be able to prove (in the majority of cases, at least) that *the insured peril* was the (or even a) proximate cause of the BI loss. In this respect, as the FCA states at #236 of its Skeleton:<sup>82</sup>

“If the harmful event would have happened at the same time in exactly the same way even without the insured peril... then plainly the causal nexus provided for in the contract is not satisfied.”

146. This is a correct statement of the law, and must lead to the Court declining to make the causation-related declarations sought by the FCA in the present case.

#### D. Stage 3: ‘Trends’ Clauses

##### (i) Introduction

147. Business interruption cover is intended to provide an indemnity for the profit / revenue that the insured business would have generated had the insured peril not occurred.
148. In practice, accurately calculating the true sum required to compensate this exactly is challenging and complex. In order to simplify the calculation of the indemnity, BI policies typically include contractual machinery to (crudely) calculate the appropriate

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<sup>81</sup> See [I/1/269].

<sup>82</sup> See [I/1/95].

indemnity sum due. The trends clause is an important part of that contractual machinery because it “allows for an appropriate adjustment to be made to the components of the standard formula so as to give effect to the requirement that the insured be indemnified in respect of the loss caused by the insured damage, not more and not less.”<sup>83</sup>

149. Four issues arise in respect of the trends clauses in the QBE Wordings (“**the QBE Trends Clauses**”), namely:

149.1. Whether QBE1 (POFPO40120 only) contains a trends clause at all;

149.2. Whether certain of the QBE Trends Clauses are applicable only to claims made under the primary insuring clauses and/or damage-based extensions and accordingly, are inapplicable to the relevant QBE (non-damage) Disease Clauses;

149.3. How any trends clauses found to be applicable to the clauses in issue should be operated and what effect(s) they would have on the quantification of any indemnity which might be due to the policyholder in question as a result; and

149.4. Whether the application of general common law / insurance law principles produce a similar result as would the operation of a trends clause in any event, i.e. by quantifying the amount of any indemnity which might be due to the policyholder by reference to their actual loss, taking into account loss which they would have suffered in any event.

150. In its Skeleton, the FCA makes a number of significant concessions from the position asserted in the PoC. If QBE understands the FCA’s Skeleton correctly:

150.1. The FCA now accepts that the trends clause must be applied to QBE3 and to one of the four QBE1 policy wordings (namely POFF180120). In relation to QBE3, for example, the FCA states that the “explicit reference back to the general insurance

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<sup>83</sup> See Hamblen J in *Orient Express* at [45]. See [J/106/10].



*under the section is accepted to bring in the machinery and require application of the trends clause.”<sup>84</sup>*

150.2. Similarly, in relation to QBE1 (POFF180120), the FCA confirms that it now “*does not dispute that the trends clause applies...*”<sup>85</sup>

151. However, the FCA maintains its pleaded position in relation to QBE2 and the remaining three QBE1 policy wordings (even though “*the structure of the quantification machinery*” in QBE3, which the FCA accepts requires application of the trends clause, is “*similar to that with in [sic] QBE1 Wordings PBCC040120 and PBCC170619*”,<sup>86</sup> where the FCA does not appear to accept that the trends clauses should apply).

(i) Proper Construction of the QBE Wordings

152. The primary insuring clause in the Lead QBE1 Wording (namely, PBCC040120),<sup>87</sup> which provides cover for “*interruption of or interference with*” the business resulting from physical damage to property, states (bold emphasis original; underlined emphasis added):

“7.1.1 Insuring Clause

**We** will indemnify **you** in accordance with each item of business interruption insurance described below and shown as the ‘Cover basis’ in the schedule, for loss caused by the interruption of or interference with the **business** resulting directly from **damage to property** used by **you** at the **premises** within the **territorial limits**, provided that:

...

c) **our** liability under this **section** shall not exceed the lower of:

i) the **sum(s) insured** shown in the schedule; or

ii) any applicable **sub-limit** stated in any extension clause.”

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<sup>84</sup> FCA’s Skeleton #854. See [I/1/277/].

<sup>85</sup> FCA’s Skeleton #857. See [I/1/277].

<sup>86</sup> FCA’s Skeleton #851. See [I/1/276].

<sup>87</sup> See [B/13/17] or [L/13/5].

153. Clauses 7.1.2 to 7.1.7<sup>88</sup> identify how the various heads of BI loss which are covered by the main insuring clause will be quantified. Taking by way of example, *Insurable Gross Profit*, clause 7.1.2<sup>89</sup> states:

“7.1.2 Insurable gross profit

**Our** liability under this **section** in respect of **insurable gross profit** will be:

a) in respect of reduction in **turnover**: the sum produced by applying the **rate of gross profit** to the amount by which the **turnover** during the **indemnity period** will, **in consequence of the **damage****, fall short of the **standard turnover**;

b) in respect of increased cost of working: the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in **turnover** that would otherwise have occurred during the **indemnity period** in consequence of the **damage**, but not exceeding the sum produced by applying the **rate of gross profit** to the amount of reduction thereby avoided;

c) minus, regardless of whether the calculation is based on the reduction of **turnover** or increased cost of working, any sum saved during the **indemnity period** in respect of such of the charges and expenses of the **business payable out of insurable gross profit** as may cease or be reduced in consequence of the **damage**;

except that, in either case, if the **sum insured** in respect of **insurable gross profit** is less than the sum produced by applying the **rate of gross profit** to the **annual turnover** (or to a proportionately increased multiple thereof where the **maximum indemnity period** exceeds twelve months), **our** liability will be proportionately reduced.

If any **specified working expenses** of the business deducted in arriving at the **insurable gross profit** are not insured under this **section** then in computing the amount recoverable as increased cost of working, the amount of additional expenditure that will be taken into account will be reduced by the proportion that the **insurable gross profit** bears to the sum of the **insurable gross profit** and the **specified working expenses**...”

154. Clauses 7.1.3 to 7.1.7,<sup>90</sup> which deal with the other heads of BI loss which are covered by the main insuring clause (including gross fees, gross revenue, increased cost of working, etc.), are similar in that they refer to heads of loss being “*consequent on*

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<sup>88</sup> See [B/13/27-28] or [L/13/5-6].

<sup>89</sup> See [B/13/27] or [L/13/5].

<sup>90</sup> See [B/13/27-28] or [L/ 13/5-6].

*damage*” and refer to defined inputs such as “*gross fees*”, “*gross revenue*”, and “*rent receivable*”, etc.

155. Definitions of the inputs used to calculate QBE’s liability, if any, are provided in clause 23 of the policy, as follows (bold emphasis original; underlined emphasis added):

“23.6 Annual gross fees

Annual gross fees means the **gross fees, trend adjusted**, during the twelve months immediately before the date of the **damage**

23.7 Annual gross revenue

Annual gross revenue means the **gross revenue, trend adjusted**, during the twelve months immediately before the date of the **damage**.

23.8 Annual rent receivable

Annual rent receivable means the **rent receivable, trend adjusted**, during the twelve months immediately before the date of the **damage**.

23.9 Annual turnover

Annual turnover means the **turnover** excluding VAT, trend adjusted, during the twelve months immediately before the date of the **damage**...

23.85 Rate of gross profit

Rate of gross profit means the rate of gross profit earned, trend adjusted, on the turnover during the financial year immediately before the date of the **damage**...

23.104 Sub-limit of liability /Sub-limit of indemnity /Sub-limit

Sub-limit of liability, Sub-limit of indemnity or Sub-limit means the maximum liability of the insurer under a specified section, clause or other part of this policy...”

156. The term “*trends adjusted*” is defined in clause 23.117 as (bold emphasis original; underlined emphasis added):

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

157. The other QBE1 Wordings, save for QBE1 (POFP040120), are in materially similar terms to the QBE1 Lead Wording. The QBE2 Wordings also provide for the indemnity to be calculated by reference to defined terms such as “*gross profit*” and “*rate of gross profit*” (see, for example, clause 3.4.5 of the QBE2 Lead Wording<sup>91</sup>) in materially identical terms. Again, the definitions of these terms require the relevant figures to be “*trend adjusted*”. The same is also true of the one policy wording within QBE3.
158. The reason for the FCA’s acceptance that the QBE Trends Clauses must be applied to some but not all of the QBE Disease Clauses appears to be that the ‘favoured’ clauses include a reference to the BI section of the policy generally and thereby incorporate the general quantification machinery, including the trends clauses. In relation to QBE3, for example, the FCA notes that:

“... several extensions, including the disease clause, begin with the words “*loss resulting from interruption of or interference with the **business** as covered by this section in consequence of...*”

Although the point could be far clearer, the statement that is [sic] “*as covered by this **section***” probably provides sufficient cross-reference to the main Cover clause to incorporate the quantification machinery set out there. It does require some adaptation, given the indemnity requires calculation of the loss “*due to the damage*” or by reference to the period “*immediately before the damage*”; and the trends clause also refers to the damage, but this explicit reference back to the general insurance under the section is accepted to bring in the machinery and require application of the trends clause.”

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<sup>91</sup> See [B/14/33] or [L/14/10].

159. Thus, the FCA accepts that (i) a reference to the BI section generally is sufficient to incorporate the contractual quantification machinery therein, including the trends clauses; and (ii) when such incorporation is achieved, references to “*damage*” can be the subject of “*adaptation*” such that the trends clauses will be treated as applying to BI loss covered by the non-damage extensions. Despite that (obviously) sensible view, and inconsistently therewith:

159.1. In relation to QBE1 (PBCC040120 and PBCC170619), the FCA appears to maintain that the trends clauses do not apply because “*the bases of settlement in their terms only apply to property damage*”; and

159.2. As far as QBE2 and the three remaining QBE1 wordings are concerned, the FCA maintains that the trends clauses do not apply to the QBE Disease Clauses – which are ‘non-damage extensions’ – because the definition of “*trends adjusted*” refers to adjustments which account for trends “*affecting the **business** either before or after the damage...*” On the FCA’s case, the reference to “*damage*”, being a defined term, means that the trends adjustments do not apply to claims for BI losses unless the cause of the BI is damage to property (or, one assumes, a claim under a damage-based extension).

160. However, these contentions are not only inconsistent with the FCA’s acceptance of the application of the QBE Trends clauses in relation to other (favoured) QBE Wordings and make no sense, they ignore the facts that:

160.1. All of the QBE Wordings include a mechanism to calculate the amount of the indemnity due under the BI Section which depends upon defined concepts / inputs, such as “*rate of gross profit*”, etc., most of which are “*trends adjusted*” (whether as a defined term or otherwise);

160.2. The basis of settlement / valuation provisions are also contingent on ‘*damage*’ meaning it is difficult to see how it can be said that the settlement / valuation provisions apply when they refer to loss consequent on damage but the trends clause does not apply because it is contingent on damage; and

160.3. The contractual mechanism cannot be operated without applying the *trends adjusted* wording, because to do so would offend the indemnity principle.

161. This means that either:

161.1. The use of the word “*damage*” in the trends adjusted clause (and indeed the other settlement / valuation provisions) must, in the context of non-damage claims, be construed as referring to the ‘insured contingency’ or ‘incident’ (i.e. the word must be the subject of the “*adaptation*” which the FCA accepts in relation to QBE3 and one of the QBE1 wordings<sup>92</sup>); or

161.2. There is no contractual machinery for the quantification of non-damage claims at all within the disputed QBE Wordings because the settlement / valuation provisions cannot be applied without being “*trends adjusted*” as that would be to offend the fundamental principle that the insured is only entitled to an indemnity for its loss.

162. The former is the correct answer. The word “*damage*” should be construed in both the settlement / valuation provisions and the trends clauses as being shorthand for the ‘insured contingency’ or ‘incident’ which would recognise the reality that: (1) there is no commercial reason why the trends clauses should apply only to damage-based cover or even certain non-damage extensions and not others (and indeed every commercial reason why it should apply to all BI cover clauses unless specifically excepted); and (2) there is no logical reason why loss resulting from non-damage extensions should not be calculated using the mechanism set out in the policy and if that mechanism is used it must be applied as a whole, including the trends clauses.

163. Turning now to QBE1 (POFP040120), which the FCA maintains has no trends clause at all:

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<sup>92</sup> FCA’s Skeleton #854 [I/1/277] and #857 [I/1/277].

163.1.QBE1 (POFP040120) has similar settlement / valuation provisions as the other QBE1 wordings and includes the following defined inputs which form part of the contractual machinery used to calculate the indemnity due to the insured:<sup>93</sup>

**“20.75 Standard gross fees**

The **gross fees, trend adjusted**, during that period in the twelve (12) months immediately before the date of the **damage** which corresponds with the **indemnity period**.

**20.76 Standard gross revenue**

The **gross revenue, trend adjusted**, during that period in the twelve (12) months immediately before the date of the **damage** which corresponds with the **indemnity period**.”

163.2.However, notwithstanding the inclusion of the term “*trend adjusted*” in bold text (signifying that it is a defined term) in the above two definitions, a definition of the phrase “*trend adjusted*” is not itself included within clause 20 of that policy wording.

164. It is on this basis that the FCA asserts that QBE1 (POFP040120) does not contain a trends clause “*at all*”.<sup>94</sup>

165. This is the wrong analysis. Such a finding would mean no effect would be given to the words “*trend adjusted*” at all, and would run counter to the natural meaning of those words and the objective intentions of the parties, particularly given that the FCA have accepted, as an agreed fact in this test case, that customers were represented by brokers in all sales of the QBE Wordings.<sup>95</sup>

166. The FCA contends that QBE’s pleaded position in relation to how the phrase “*trends adjusted*” in QBE1 (POFP040120) might be interpreted differently, or perhaps even the subject of a claim for rectification, depending on the facts of particular cases is “*hopelessly speculative*”.<sup>96</sup> It is not. It is, however, fact-specific, and therefore not

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<sup>93</sup> See [B/76/85].

<sup>94</sup> PoC #75.2. See [A/2/44].

<sup>95</sup> See [C/15/2].

<sup>96</sup> FCA’s Skeleton #861. See [I/1/278].

something which the Court can determine as a matter of general principle in this test case.

167. To conclude, QBE maintains that the QBE Trends Clauses, and indeed the contractual quantification machinery within the QBE Wordings generally, apply to claims for business interruption / interference losses arising where there is no damage to property, including the QBE Disease Clauses.

(ii) Operation of Trends Clause

168. The QBE Trends Clauses clearly import a 'but for' test, for the purposes of calculating the indemnity due to the insured. The fact that the 'but for' test applies is clear from the words used in the trends clauses. It is however separate and distinct from the 'but for' test which applies when considering whether or not there is cover under the policy, *per se*. The 'but for' test which applies for the purpose of establishing factual causation, i.e. for determining whether or not there is cover under the policy, involves asking a question which has a binary 'yes / no' answer. The 'but for' test at the quantification stage, i.e. the one imported by the QBE Trends Clauses, is a question which admits of a range of possible answers; 'but for' the occurrence of the insured interruption or interference, would the insured's loss been different and, if so, how would it have been different?
169. When applying the 'but for' test imported by the QBE Trends Clauses – which will only apply when the insured has proved entitlement to cover – the only event which is not to be considered is the insured peril itself (#72.2 of QBE's Defence).
170. An example in the present case might 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*.



171. The QBE Trends Clauses, and the 'but for' test within it, would then operate at the *quantification* stage, so as to adjust the value of the policyholder'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 (an increase might be required where, for example, a particular type of business – takeaway food providers, for example – were experiencing an increase in trade across the country generally, but were forbidden to operate at all by means of a 'local lockdown').
172. This conclusion is supported by the decision of Hamblen J in *Orient-Express*. There, Hamblen J decided that the arbitral tribunal had not made an error of law in rejecting the argument made on behalf of the Orient Express Hotels Ltd that the 'but for' test did not apply when at the trends clause stage. This was because the parties had, in his view, plainly agreed that the 'but for' test should apply in the trends clause at [34]-[35]:

“34. First, as the tribunal held... this is a policy under which it has been agreed that a “*but for*” approach to causation should be adopted to the assessment of loss of revenue. This is made clear in the Trends clause which is predicated on calculating the recoverable losses on the basis of what would have happened “*had the Damage not occurred*” or “*but for the Damage*”. As such, it is difficult to see how it could ever be appropriate to disregard that causal test, or how the policy would work if one did.

35. OEH submits that this is to treat the Trends clause as an exclusion clause, which it is not. However, in my judgment it merely involves adopting an approach to causation which is consistent with and indeed required under the policy. The tribunal regarded this as an important and indeed conclusive consideration. Whether or not it is conclusive, it is very difficult to see how the tribunal could be said to have erred in law in adopting the causal approach laid down in the policy itself. On any view it is highly relevant to what “*fairness and reasonableness*” requires.”

173. In his judgment, Hamblen J confirmed that a trends clause is concerned with the *quantification* of loss or damage and not the *cause* of that loss or damage. Hamblen J then found, at [57]-[60] (bold emphasis added):<sup>97</sup>

“I agree with the Tribunal that **the clause 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*”. Nowhere in the Trends Clause does it state that “*variations or special circumstances affecting the Business either before or after the Damage or which would have affected the Business had the Damage not occurred*” has to be something completely unconnected with the Damage in the sense that it had an independent cause to the cause of the Damage. The assumption required to be made under the Trends Clause is “*had the Damage not occurred*”; not “*had the Damage and whatever event caused the Damage not occurred*” ...”

174. Therefore, the FCA is wrong to say that trends clauses ought to be understood as not “*excluding the natural/probable inevitable result of the insured peril that has resulted in loss*” and that they rather “*contemplate something extraneous which can fairly be described as an ordinary vicissitude of commercial life, such as economic trends*” (at #76 of the PoC).<sup>98</sup>

175. First, it is unclear what precisely is meant by the FCA’s case that the trends clause contemplate something “*extraneous*”.

176. Secondly, insofar as the FCA submits that the QBE Trends Clauses only take account of variations affecting the insured business where they are completely unconnected to the cause of the business interruption, there is no support for such a suggestion as it runs contrary to the plain meaning of the words used.

177. Thirdly and finally, it is clear that this argument would have failed in the *Orient Express* itself. The FCA’s case effectively requires a redrafting of the trends clause, as indeed did Orient Express Hotels’ argument in that case. Accordingly, as Hamblen J said at [58]<sup>99</sup>: “*such a re-drafting of the Trends Clause, which would allow OEH to recover for*

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<sup>97</sup> See [J/106/11-12].

<sup>98</sup> See [A/2/45].

<sup>99</sup> See [J/106/12].

*the loss in gross operating profit suffered as a result of the occurrence of the insured event (ie the hurricanes) as opposed to the loss suffered as a result of the damage to the hotel, is 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”.*

178. The ‘but for’ test forms a necessary part of the application of the QBE Trends Clauses, with the effect that only the interruption or interference caused by the insured peril is excluded from the proper counterfactual.

(iii) Common Law Position

179. As noted above, trends clauses are simply a reflection of the fact that BI cover is provided within contracts of indemnity which fundamentally seek to put the insured into the same trading position after the interruption or interference as if the interruption or interference had not occurred. Even in the absence of specific ‘trends clauses’ the common law enshrines the indemnity principle, which still requires insured to be fully and fairly indemnified for actual loss, and not under- or over-indemnified. Therefore, even if the FCA is correct that the QBE Trends Clauses do not apply in the disputed QBE wordings to non-damage claims, it will make little or no difference in practice, as the disputed QBE Wordings would still require a similar trends analysis to take place.
180. This is well illustrated by the decision of *Sartex Quilts & Textiles Limited v Endurance Corporate Capital Limited*,<sup>100</sup> recently upheld by the Court of Appeal (see *Endurance Corporate Capital Limited v Sartex Quilts & Textiles Limited*<sup>101</sup>). In that case, the claimant sought an indemnity pursuant to a property loss or damage insurance policy issued by the defendant in respect of buildings, plant and machinery at its manufacturing premises, arising from a fire which had destroyed the buildings and rendered the plant and machinery a total loss. The insurance policy did not include an express ‘trends clause’. The insured did not reinstate the business at the premises in the eight

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<sup>100</sup> [2019] EWHC 1103; [2019] Bus LR 2255. See [K/182/1].

<sup>101</sup> [2020] EWCA Civ 308. See [K/184/1].

years that followed, but nevertheless the Court held that the insured was entitled to recover the sums claims on the reinstatement basis.

181. In doing so, the Court explained that the relevant question it had to answer was:

181.1. At [57]: “... *what has the insured lost as a result of the insured peril, and this requires considering the value of the relevant property (real or personal) to him at the date of the fire...*”; and

181.2. At [75]: “...*The relevant question to ask is what is the loss which has been suffered by the insured as a result of the fire, and what measure of indemnity fairly and fully indemnifies it for that loss...*”

182. The Court went on at [76] to note:

“In answering that question, the primary focus is on the position as at the time of (and immediately before) the fire. If the insured intended then to use the property, as opposed (for example) to selling, or demolishing it, the appropriate measure of indemnity, and the best reflection of the value of the property to him at that time, is likely to be the reinstatement basis. But subsequent events (and not just those foreseeable at the time of the fire) may show that such measure would over-compensate the insured, in which case the court at trial is likely to consider another measure of loss to be more appropriate.”

183. Accordingly, even without an express trends clause, the same quantification process and analysis must take place in any event. Whilst *Sartex Quilts* concerned a first party property claim, there is no reason *per se* why it does not or ought not apply in a business interruption context.

184. QBE notes that the FCA has not made any attempt to address this argument, which was fully and clearly pleaded in QBE’s Defence,<sup>102</sup> in its Skeleton; one therefore assumes that the FCA either agrees with QBE’s pleaded position or has no answer to it.

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<sup>102</sup> QBE’s Defence #70.8 and #71.5. See [A/11/29].

## E. Other issues

### (i) Introduction

185. As stated above, the QBE Disease Clauses provide cover for loss resulting from (QBE2-3) / an indemnity against (QBE1) *"interruption of or interference with"* the insured's business 'arising from', 'caused by' or 'in consequence of' the (1) the 'manifestation' or 'occurrence' of; (2) a 'notifiable disease'; (3) at the insured premises or within 1 mile (QBE3) or 25 miles (QBE1-2) of the insured premises.
186. There is no dispute between the parties that COVID-19 was from 5 March 2020 (in England) and from the 6 March 2020 (in Wales) a 'notifiable disease' or as to how the relevant policy area is calculated.
187. There is a dispute between the parties as to whether questions as to the existence of (1) *"manifestation"* or *"occurrence"* of a notifiable disease; or (2) *"interruption or interference"* with the insured's business for the purpose of triggering cover under the QBE clauses are questions of fact, as contended by QBE. The FCA maintains that these are not questions of fact because:
- 187.1. On the FCA's case, there was an occurrence or manifestation of COVID-19 within the relevant policy area whenever after 5/6 March 2020 and wherever a person or persons had contracted COVID-19 such that it was diagnosable and was/were within the relevant policy area; and
- 187.2. QBE has admitted that certain of the human actions and/or interventions and closure measures which it is common ground took place, could, in principle, cause interference with the insured business.
188. There is a further issue as to whether there was interruption of or interference with: (1) the business from 16 March 2020, or such date as determined by the Court, by reason of the advice, instructions and/or announcements as to social distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working; and (2) the business for insureds in Categories 1, 2, 4, 6 and 7, from 20, 21, 23, 24 and/or 26 March 2020.

(ii) "interruption of" or "interference with"

189. The terms "interruption of" or "interference with" are not defined terms in the QBE Wordings. They must therefore be given their natural and ordinary meaning.
190. The Oxford English Dictionary defines 'interruption' as: "A breaking in upon some action, process, or condition (esp. speech or discourse), so as to cause it (usually temporarily) to cease; hindrance of the course or continuance of something; a breach of continuity in time; a stoppage."
191. An 'interference' is defined as "The action or fact of interfering or intermeddling (with a person, etc., or in some action)."
192. Interference therefore has a broader meaning than interruption. As all of the QBE Wordings contain the phrase "interference with" as well as "interruption of", QBE does not contend that an insured premises would have to be forced to cease all of its operations in order to satisfy this hurdle. What is required is an 'intermeddling' with this business such that it cannot be operated by the insured as they had originally intended.
193. However, there must be a causal nexus between (i) the insured peril, namely the occurrence or manifestation of a notifiable disease within the relevant policy area; and (ii) the inability to operate the insured business as originally intended. For example, a pub that was undertaking substantial renovation works which were due to take nine months to complete and which commenced on 31 December 2019 cannot, on any view, be said to have suffered any relevant "interruption of" or "interference with" their business to date.
194. As such, the question of whether there was a relevant interruption to and/or interference with the insured business must be a matter of fact for each insured to prove. This is so notwithstanding QBE's admission that certain human actions and/or

interventions and closure measures (which it is common ground took place) *could*, in principle, cause interference with the insured business.<sup>103</sup>

195. Similarly, it is not possible for the court to determine that from a specific date a relevant interruption / interference will necessarily have occurred for every insured business, nor indeed every business which falls within categories 1, 2, 4, 6 and 7. Nor indeed is there any legal basis for a reversal of the burden of proof, a ‘rebuttable presumption’, or similar to operate in the insured’s favour. Rather, each insured, in every individual claim, will have to discharge their burden of proving (on the balance of probabilities) that as a matter of fact there was a relevant interruption to or interference with the insured business. In some cases this will be readily established, in others the issue may well be more contentious.

196. For the reasons set out above, therefore, the FCA’s objection to QBE’s pleaded position on “*interruption*” and “*interference*” as being “*unhelpful*”<sup>104</sup> is rejected. Its position is not unhelpful, but rather inevitable. While the FCA is obviously doing all it can to establish liability on the part of all insurers to all insureds, the burden must remain on individual insureds to advance their own claims and, as part of that process, to prove what, if any, interruption or interference their own business has actually suffered (and, moreover, that such interruption or interference was actually caused by a relevant insured peril, i.e. the occurrence / manifestation of COVID-19 at the insured premises or within the relevant policy area).

(iii) “occurrence” or “manifestation”

197. The terms “*occurrence*” or “*manifestation*” are not defined terms either and must be given their natural and ordinary meaning.

198. The Oxford English Dictionary defines:

198.1. “*occurrence*” as a “*thing, that occurs happens or takes place*”; and

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<sup>103</sup> QBE’s Defence #51.1–51.2. See [A/11/13-14].

<sup>104</sup> FCA’s Skeleton #818. See [I/1/266].

198.2. “manifestation” as “the demonstration, revelation, or display of the existence, presence ... of something...”

199. There would therefore be:

199.1. An “occurrence” in the relevant policy area if, after 5 March 2020 (in England) and 6 March 2020 (in Wales) – being the dates, respectively, when COVID-19 became ‘notifiable’ – a person or persons had contracted COVID-19 within 1 or 25 miles of the insured premises; and

199.2. A “manifestation” of COVID-19 in the relevant policy area, if after 5/6 March 2020 the presence of COVID-19 had been demonstrated and/or revealed and/or displayed in the relevant policy area.

200. The issues that arises is whether or not an “occurrence” or a “manifestation” of a disease occurs whenever a person or persons had contracted COVID-19 such that it was diagnosable, whether or not their case of COVID-19 was verified by medical testing or a medical professional, whether or not it was formally confirmed or reported, and whether or not it was symptomatic.

201. There is no case law directly on point. However, the decision of *Durham v BAI (Run Off) Ltd*<sup>105</sup> (known as the “Trigger litigation”) is informative. It concerned whether, pursuant to nine specimen insurance wordings, insurers were liable to meet the claims of employees who had contracted mesothelioma when they were on cover at the time the employees inhaled the asbestos fibre being the time of exposure, of inhalation or ingestion, or when they were on cover much later (up to forty years later) when the employee’s tumours developed. At first instance, Burton J found that the phrases “injury sustained” and “disease contracted” (which were the triggers within the relevant insurance wordings) referred to when the disease became “diagnosable”.<sup>106</sup> In the Supreme Court, Lord Mance quoted Burton J approvingly, noting at [6(iv)]:

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<sup>105</sup> [2012] UKSC 14; [2012] 1 WLR 867. See [J/113/1].

<sup>106</sup> [2009] Lloyd’s Rep IR 295, at [244]. See [J/105/1].



“For a lengthy period (perhaps another five years) after the development of the first malignant cell, there remains a possibility of dormancy and reversal, but at a point (Burton J thought a further five years or so before the disease manifested itself, and was thus “diagnosable”) a process of angiogenesis will occur. This involves the development by malignant cells of their own independent blood supply, so assuring their continuing growth.”

202. In light of the above, QBE’s position is that, as matter of principle, an “*occurrence*” of COVID-19 could be said to have taken place within the relevant policy area when a person contracted COVID-19 which was diagnosable (that is to say, the disease was sufficiently advanced such that it *could* have been diagnosed) but that person is asymptomatic and/or remains asymptomatic. Similarly, it could be said that there was a “*manifestation*” of COVID-19 in a relevant policy area, notwithstanding that no person was showing any symptoms, if, by way of example, sewage samples showed there were people with COVID-19 in the relevant policy area. The question of whether or not there has been an “*occurrence*” or a “*manifestation*” of a notifiable disease within the meaning of the QBE Disease Clauses in any particular case will therefore be a question of fact (QBE Defence #47).<sup>107</sup>
203. QBE submits that it is not possible for the Court, in these proceedings, to determine that, from a specific date, an “*occurrence*” or “*manifestation*” of COVID-19 will necessarily have occurred within every relevant policy area of every insured business, given the Court’s case management decision of precluding expert evidence on the issue of prevalence.
204. In support of that submission, QBE adopts and endorses the insurers’ joint note on prevalence in full. That note summarises the limitations and weaknesses within the data sets referred to by the FCA; explains why the ‘Undercounting Ratio’ and ‘Averaging Methodology’ processes relied on by the FCA do not circumvent these difficulties and accordingly criticises the FCA for effectively ignoring the Court’s rulings at the Case Management Conferences in these proceedings by continuing to seek declarations on this issue. The note also explains that there is no legal basis for a

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<sup>107</sup> See [A/11/12].

reversal of the burden of proof, either derived from the decision of *Equitas* or any other authority, or any sort of ‘rebuttable presumption’ to operate in the insured’s favour that there has been an “*occurrence*” and/or “*manifestation*” of COVID-19.

205. Rather, QBE avers that it will be a question of fact in each case whether there was an “*occurrence*” or “*manifestation*” of COVID-19 within the relevant policy area. In this respect, QBE does not make any “*indirect admission of the FCA’s case as to what the words ‘manifested’ or ‘occurrence’ mean*”.<sup>108</sup> While there *might* have been an “*occurrence*” or “*manifestation*” where COVID-19 was present in a person in a particular location but was asymptomatic and undiagnosed, as with the sewage sampling example given above, something more than just a person with undiagnosed and asymptomatic disease will be required in most if not all cases.
206. Further, and more importantly, it is difficult to see any circumstances in which it could be said that an undetected and undiagnosed occurrence and/or manifestation in the relevant policy area would cause interruption or interference with the insured’s business in any event. To put it another way, it is difficult to see how there could be BI to an insured business caused by an “*occurrence*” and/or “*manifestation*” of COVID-19 in the relevant policy area in circumstances where the insured, its suppliers and its customers have no knowledge of the fact that someone with COVID-19 had been at the premises or within the relevant policy area.
207. This also illustrates the oddity of the FCA’s ‘statistical’ approach to the alleged prevalence of COVID-19, particularly as set out in #23-27 of the PoC. The essence of BI insurance is to cover events that have caused BI loss. The purpose of the FCA’s statistical approach is not to identify events which have caused loss; after all, if a business has suffered BI one would expect the cause of that to be manifest and not to require resort to hindsight statistics. BI is to be established as a matter of fact in each individual case, it cannot be inferred retrospectively from statistical data on the prevalence of COVID-19.

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<sup>108</sup> FCA’s Skeleton #816. See [I/1/265].

## F. Response to the Particular Points raised in the HIGA Interveners' Arguments

### (i) Introduction

208. In this Section QBE responds to the arguments raised by the HIGA Interveners in their Skeleton Argument (“**the HIGA Skeleton**”).
209. Whilst, as stated above, QBE has the utmost sympathy with the plight of all businesses and their employees who have been adversely affected by the COVID-19 pandemic, that is not a reason for finding that cover is provided pursuant to QBE1-3 and is not a reason for not applying the proper legal analysis to the proper construction of QBE1-3 (as appears to be suggested in #10 and #26 of the HIGA Skeleton<sup>109</sup>).
210. QBE is not (as alleged in #26 of the HIGA Skeleton<sup>110</sup>) seeking to “[walk] away unscathed from the devastation wrought by Covid-19 on the HIGA Interveners’ businesses”. QBE will indemnify (and has indemnified) its policyholders in respect of COVID-19 claims which are covered under its policies. The only COVID-19 claims QBE is refusing to pay are those claims which do not fall within the scope of the cover it agreed to provide to its policyholders.
211. The question of whether or not the HIGA Interveners “would naturally and reasonably expect [their policies] to respond in the present circumstances”<sup>111</sup> depends upon the proper construction of QBE1-3. Properly construed, the QBE Disease Clauses do not provide cover save for in specific circumstances. Accordingly, the HIGA Interveners cannot have “naturally” or “reasonably” expected their policies to respond save in those specific circumstances.

### (ii) The HIGA Interveners’ primary case / alternative approach

212. The HIGA Interveners’ primary case / alternative approach is based on the proposition that on a proper construction of the QBE Disease Clauses, the causal link required between the interruption to and interference with the business (which it says is the

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<sup>109</sup> See [I/2/4/] and [I/2/8].

<sup>110</sup> See [I/2/8]].

<sup>111</sup> HIGA Skeleton #25 and #161(4). See [I/16]] and [I/1/62].

first part of the insured peril) and the occurrence / manifestation of the disease is not the proximate cause test and only a weaker causal link is required.

213. This case is wholly without merit.

(iii) Insured Peril

214. The HIGA Interveners are correct to say that QBE does not treat the interruption / interference as part of the insured peril. The insured peril is (as stated at paragraph 46 above) the (1) 'manifestation' or 'occurrence' of; (2) a 'notifiable disease'; (3) at the insured premises or within 1 mile (QBE-3) or 25 miles (QBE1-2) of the insured premises. The loss is "*Loss resulting from interruption to or interference with the business*", i.e. BI loss. To put it another way the purpose of the phrase "*interruption or interference with*" is to describe the loss in respect of which QBE has agreed to provide an indemnity.

215. The HIGA Interveners suggest that this analysis is wrong because the insured peril is the interruption / interference arising from, etc. the occurrence / manifestation of COVID-19 at the premises or within the relevant proximate area.

216. QBE does not accept this analysis but in any event in the case of the QBE Disease Clauses this is an arid debate and a matter of semantics. The HIGA Interveners accept the causal link required as part of the description of the insured peril will depend on what has been agreed. In this case the causal link which has been agreed as part of the description of the insured peril, i.e. "*caused by*", "*arising from*" or "*in consequence of*", are the "*usual*" 'but for' and proximate cause tests.

217. It follows that whichever analysis is the correct one, the "*usual*" or "*default*" 'but for' and proximate cause tests will have to be applied in relation to the occurrence / manifestation of the disease in the relevant policy area when considering whether there is cover under the QBE Disease Clauses. The insured will therefore have to show either that:

217.1. 'but for' such occurrence /manifestation of the notifiable disease in the relevant policy area the business would not have suffered the BI Loss and that the BI loss

was proximately caused by such occurrence/manifestation of the notifiable disease in the relevant policy area; or

217.2. 'but for' such occurrence /manifestation of the notifiable disease in the relevant policy area the business would not have suffered interruption to or interference with the business and that interruption to or interference loss was proximately caused by such occurrence/manifestation of the notifiable disease in the relevant policy area.

(iv) The causative wording

218. As noted above, QBE's 'causal link' wordings are as follows:

218.1. "*Caused by*" in QBE1;

218.2. "*Arising from*" in QBE1; and

218.3. "*In consequence of*" in QBE2-3.

219. All of these 'causal link' wordings require the application of orthodox causation principles, including the 'but for' and 'proximate cause' tests. Contracting parties may of course modify those principles in particular cases, but such modification would require clear language.

220. As *MacGillivray*<sup>112</sup> states, at paragraph 21-004:

"The rule can be displaced by clear words, thus insurers might be liable for loss "*directly or indirectly*" caused, or loss caused "*directly or jointly*" with some other cause. But the words "*in consequence of*", "*originating from*" or "*arising from*" will not prevent the operation of the rule..."

221. There is no such clear wording in the QBE Disease Clauses.

222. "*Caused by*" or "*Arising from*":

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<sup>112</sup> 14<sup>th</sup> edn 2019. See [K/203/4].

222.1. As the extract from *MacGillivray*, above, makes clear, both “*caused by*” and “*arising from*” wordings connote orthodox insurance law causation principles, i.e. the ‘but for’ test is a necessary but not sufficient condition, while the insured peril must have been the ‘proximate cause’ of loss for cover to attach.

222.2. In *Coxe v. Employers’ Liability Assurance Company Ltd*,<sup>113</sup> an army officer was accidentally killed by a train while walking along the rails during wartime. The life assurance policy in question contained an exclusion for death “*directly or indirectly caused by, arising from, or traceable to... war.*” Although Scrutton J held that the words “*directly or indirectly*” permitted “*a more remote link in the chain of causation... than the proximate and immediate cause*”, he said of the terms ‘caused by’ and ‘arising from’, at 633<sup>114</sup>:

“The words in the condition “*caused by*” and “*arising from*” do not give rise to any difficulty. They are words which always have been construed as relating to the proximate cause.”

222.3. Similarly, in *Scott v. Copenhagen Reinsurance Company (UK) Ltd*,<sup>115</sup> the Court of Appeal considered whether the loss of aircraft and spares seized when Iraq invaded Kuwait were losses “*arising from one event*”. Rix LJ said, at [65]:

“... the causative link inherent in the words “*arising from*”, when coupled with the expression “*one event*”, should be regarded as a relatively strong and significant link...”

222.4. See also *Vardinoyannis v. The Egyptian General Petroleum Corporation (“The Evaggelos TH”)*,<sup>116</sup> *Orient-Express Hotels Ltd v. Assicurazioni General SpA (UK) (t/a*

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<sup>113</sup> [1916] 2 KB 629. See [J/40/1].

<sup>114</sup> See [J/40/5].

<sup>115</sup> [2003] EWCA Civ 688; [2003] 2 All ER (Comm) 190. See [K/110/22].

<sup>116</sup> [1971] 2 Lloyd’s Rep 200, per Donaldson J at 206. See [K/62/1].

*Generali Global Risk*);<sup>117</sup> *ARC Capital Partners Ltd v. Brit Syndicates Ltd*,<sup>118</sup> and *Sutherland Professional Funding Ltd v. Bakewells*.<sup>119</sup>

223. “In consequence of”:

223.1. Similarly, the causal linking phrase “in consequence of” is taken to require the application of ordinary causation principles.

223.2. In *Ionides v. The Universal Marine Insurance Company*,<sup>120</sup> a vessel carrying 6,500 bags of coffee was insured for loss with an exception for “capture, seizure, and detention, and all the consequences thereof of any attempt thereat, and free from all consequences of hostilities, riots, or commotions.” The vessel was lost, along with the coffee, and it was alleged that a light at Cape Hatteras, which might have saved the ship, had been extinguished, for hostile purposes, by the confederates, who were then in possession of North Carolina. In his judgment, Erle CJ said, at 455-6 (bold emphasis added):

“The great contention on the first part of the case was, whether the loss so brought about was a loss by the “consequences of hostilities” within the meaning of the policy. The extinguishment of the light was undoubtedly an act of hostility on the part of the confederates towards the federals. But, was the loss the consequence of hostilities? ... I agree with the learned counsel who suggested that the words of the exception in this policy are to be construed as they would be if the assured had re-assured his cargo against the perils which are excepted by the warranty now in question; so that, **to make the policy attach, the court must in that case have held that the consequence of hostilities was so connected with the loss of the ship as to make the underwriters liable. The maxim causa proxima non remota spectatur is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it.** Now, the relation of cause and effect is matter which cannot always be actually ascertained: but, if in the ordinary course of events a certain result usually

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<sup>117</sup> [2010] EWHC 1186 (Comm); [2010] Lloyd’s Rep IR 531. See [J/106/1].

<sup>118</sup> [2016] EWHC 141 (Comm); [2016] 4 WLR 18, per Cooke J at [32]-[43]. See [J/129/1].

<sup>119</sup> [2011] EWHC 2658 (QB); [2013] Lloyd’s Rep IR 93, per HHJ Hegarty QC at [82]-[94]. See [J/123/1].

<sup>120</sup> (1863) 143 ER 445. See [K/28/1].

follows from a given cause, the immediate relation of the one to the other may be considered to be established...”

223.3. More recently, in Blackburn Rovers Football & Athletic Club Ltd v. Avon Insurance plc,<sup>121</sup> the Court of Appeal considered an exclusion for “*disablement directly or indirectly consequent upon*” arthritic or other degenerative conditions in the context of an exclusion to an accidental injury policy taken out by a football club in respect of its players. The court stressed that with such wording it was still necessary for the insurer to show that the pre-existing condition was a ‘but for’ cause of the disablement, and not just the extent of the player’s disability. However, the extended wording, “*directly or indirectly*”, would reverse the usual rule that where a disease of the insured leads to an accident, that accident and not the disease is the proximate cause of the injury. The court stated the usual rule was derived from two well-known authorities, namely Winspear v. The Accident Insurance Co Ltd<sup>122</sup> and Lawrence v. Accidental Insurance Co Ltd.<sup>123</sup>

223.4. See also Liverpool and London War Risks Association Ltd v. Ocean Steamship Co Ltd.<sup>124</sup>

224. Accordingly, all of the relevant ‘causal linking’ wording in QBE’s Disease Clauses requires the insured to prove, on the balance of probabilities, that (i) the ‘but for’ test is satisfied (i.e. ‘but for’ the occurrence of the insured peril they would not have suffered the BI loss in question); and (ii) the relevant insured peril was the ‘proximate cause’ of the BI loss.

225. However, notwithstanding these authorities, the HIGA Interveners suggest (at #143(3) of the HIGA Skeleton)<sup>125</sup> that the contrast between: (1) the phrase “*results ... directly from*” (QBE1 and QBE3) and “*loss resulting from*” (QBE2) in the primary insuring clause and the phrase “*loss resulting from*” at the start of the Disease Clauses in QBE2-3 (which

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<sup>121</sup> [2005] EWCA Civ 423; [2005] Lloyd’s Rep IR 447. See [J/97/1].

<sup>122</sup> (1880) 6 QBD 42. See [K/33/1].

<sup>123</sup> (1881) 7 QBD 216. See [K/34/1].

<sup>124</sup> [1948] AC 243, per Lord Porter at 263-5. See [K/52/1].

<sup>125</sup> See [I/2/39].



does seem to have been inadvertently omitted from the start of the Disease Clause in QBE1) and (2) the terms “*arising from*”, “*caused by*” in QBE1 and “*in consequence of*” in QBE2-3, means that the latter terms should be read as requiring a less direct and immediate connection.

226. As to which:

226.1. As set out above, QBE does not accept that the words “*arising from*”, “*caused by*” or “*in consequence of*” fall within the description of the insured peril. In any event, even if they do form part of the description of the insured peril they define the causal link which has been agreed by the parties. The question is not then what the ‘*default*’ position is, but rather what the words mean.

226.2. The HIGA Interveners have not identified any proper basis for the suggestion that that the statement made in *MacGillivray* (quoted at paragraph 220 above) namely that the words “*in consequence of... or arising from will not prevent the operation of*” the ‘but for’ and proximate cause tests is incorrect and/or does not apply in the case of the QBE Disease Clauses.

226.3. The fact that *Coxe*, referred to above, and *Bell v. Lothiansure Ltd*,<sup>126</sup> which concern the phrase “*arising from*” are cases involving exclusion clauses does not mean the findings in those decisions are inapplicable. It is notable that the HIGA Interveners do not identify what different considerations they said applied and/or why such considerations mean that the conclusions reached in those cases do not equally apply in this case.

226.4. The suggestion implicit in footnote 36 to #143(b) that Cooke J only held that “*arising from*” did denote proximate cause because it formed part of the phrase “*arising from or in any way involving*” is misconceived. A reading of the relevant part of the judgment ([32]-[43]) makes it clear that Cooke J accepted that “*arising from*” did denote proximate cause. The only issue he was therefore concerned with was what the term “*or any way involving*” meant.

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<sup>126</sup> 1993 SLT 421. See [J/70/1].

226.5. When HHJ Hegarty QC concluded in *Sutherland*, at [94], that “*arising from*”, standing as it does, on its own, should be construed as referring to the dominant, effective or operative cause of liability”, he was comparing the clause in that case, where only the phrase “*arising from*” appeared, to other cases, including *Coxe*, where the phrase under consideration provided “*directly or indirectly caused by, arising from*”. The position in the present case is exactly the same as in *Sutherland*. The terms “*caused by*”, “*arising from*” or “*in consequence of*” in the QBE Disease Clauses stand on their own and so the ‘but for’ and proximate cause tests apply.

226.6. The fact that QBE has used other wording in other clauses to denote that proximate causation is required does not mean that the terms “*caused by*”, “*arising from*” or “*in consequence of*” do not also have that meaning. The contracting parties have also indicated that they intended ordinary, orthodox causation principles to apply by their inclusion of the ‘but for’ test in the QBE Trends Clauses (as already discussed above).

226.7. The fact that there are cases in which the Court has found that the term “*arising out of*” has, in context, been held to permit a wider causal link than the ‘but for’ and proximate cause tests is irrelevant. None of the QBE Disease Clauses contain the term “*arising out of*”.

(v) The application of the causal link to the requirement that there be an occurrence / manifestation of the notifiable disease within the relevant policy area

227. There is no basis for the contention made in #141 of the HIGA Skeleton that:<sup>127</sup>

“the somewhat tortured structure of the [QBE1-2 Disease Clauses] suggest that what was intended was that the required link is between (i) the interruption or interference with the business and (ii) the notifiable disease simpliciter, and that the requirement that a person has manifested the disease at the premises or within 25 miles is a necessary but separate requirement.”

228. This is not what the QBE1-2 Disease Clauses say / ‘suggest’.

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<sup>127</sup> See [I/2/38].

229. The fact that the QBE1-2 Disease Clauses define a notifiable disease as “any human infectious or human contagious disease ... an outbreak of which the local authority has stipulated shall be notified to them” rather than as an “illness sustained by any person resulting from any diseases that may be notifiable under the Health Protection (Notification) Regulations 2010”, which is how ‘notifiable disease’ is defined in QBE3 does not and cannot mean that the 25 miles requirement in QBE1-2 is relegated to “a necessary but separate requirement”.

230. Following the implementation of the Health and Social Care Act 2008 which replaced Part 2 of the Public Health (Control of Diseases) Act 1984, Local Authorities no longer have authority to make a disease notifiable to them. The QBE1-2 Disease Clauses have not been updated to reflect this fact. However, this does not mean that a notifiable disease has not occurred because no local authority has stipulated that COVID-19 shall be notified to them and nor does it mean as appears to be suggested by the HIGA Interveners that the requirement that the disease occurred within the 25 miles is only “a necessary but separate requirement”. Whichever of the two definitions of ‘notifiable disease’ is used in the QBE Diseases Clauses, the causal link is clearly required between the BI Loss and the notifiable disease in the relevant policy area.

(vi) Proper construction of the QBE Clauses

231. There is no dispute that the notifiable diseases covered by the QBE disease clauses are contagious and may therefore spread outside of or spread into the relevant policy area. However, that is the very reason why QBE imposes a geographical limit on the cover it provides and limits cover to BI loss caused by a notifiable disease in the relevant policy area. It is the very reason why that geographical limit must be taken into account when construing the scope of the cover. The fact that the 25 mile radius encompasses a relatively large area of c.2,000 square miles does not and cannot detract from the fact that QBE limited the cover which was provided under the QBE clauses.

232. In #144 of the HIGA Skeleton<sup>128</sup> it is submitted that:

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<sup>128</sup> See [I/2/40].

“What the 25-mile radius requirement was intended to do was require that the infectious disease had come within a specified distance of the insured premises. Its inclusion evinces an objective intention not to provide cover for entirely remote outbreaks of infectious diseases in a wholly geographical area which might still impact on the business of an insured. But it does not contrary to QBE’s assertion, demonstrate an objective intention not to provide cover for losses caused by nationwide pandemics in response to such matters.”

233. This is another way of putting the “*some sort of anchor*” point’ made in the PoC. QBE’s detailed response to this point is set out in paragraphs 65 to 72 above. QBE relies on those submissions in reply to the HIGA Interveners. In addition:

233.1. The obvious flaw in HIGA’s argument is that it ignores the nature of the express wording of the QBE Disease Clauses.

233.2. The imposition of the 1 mile or 25 miles radius was not only intended to require that the infectious disease had to come within a specified distance of the premises. The language is clear. Cover is expressly stated to be (and only to be) in respect of BI loss “*caused by*”, “*arising from*” or “*in consequence of*” the occurrence of the disease in the relevant policy area. In other words the imposition of the 1 mile and 25 miles radius was intended to require not only that the infectious disease had “*come in to the relevant area*” but also that the disease in the relevant area had caused the BI loss.

233.3. There is then no basis for treating the local occurrence of the disease as *some sort of ‘anchor’*; the local occurrence is **the** event that has to be the cause of the BI loss.

233.4. The objective intention demonstrated by the clause is that the only BI loss which is covered is BI loss caused by the local occurrence of the disease.

234. At #148 of the HIGA Skeleton<sup>129</sup> it is submitted that:

“... once is accepted, as it therefore must be, that the notifiable disease clause provides, in principle, cover for loss resulting from interruption or interference arising from a national government’s response to a notifiable disease, which

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<sup>129</sup> See [I/2/41].

might be an epidemic or pandemic, the use of the radius to achieve what QBE says it is intended to achieve is baffling. Rather the obvious way in which that would have been done would be by the inclusion of notifiable diseases (or, if only this was intended, notifiable diseases which became epidemics or pandemics in Clause 7.4.3(a) or an exclusion like it.”

235. This is another way of putting the ‘exclusion point’ made in the PoC. QBE’s detailed response to this point is set out in paragraphs 54 to 64 above. QBE relies on those submissions in reply to the HIGA Interveners. In addition:

235.1. It is not accepted that, in principle, and without more, the QBE Disease Clauses provide cover for BI loss “*caused by*”, “*arising from*” or “*in consequence of*” a national government’s response to a notifiable disease which might be an epidemic or pandemic.

235.2. The QBE Disease Clauses make clear that they only provide cover for BI loss arising from an occurrence / manifestation of a notifiable disease within 1 mile or 25 miles of the insured premises. Cover is therefore only provided, in principle, for BI loss which was “*caused by*”, “*arising from*” or “*in consequence of*” of the national government’s response to a ‘local’ occurrence of the notifiable disease. The fact that the notifiable disease may also be a part of an epidemic or pandemic does not change the position.

235.3. There is nothing “*baffling*” about the use of the 1 mile radius or the 25 mile radius. There was no need to exclude notifiable diseases which become epidemics or pandemics because the QBE Disease Clauses make it clear that they only cover BI loss caused by the local occurrence of the disease.

235.4. Neither the fact that QBE1 and QBE3 contain an exclusion (as quoted in #148 of the HIGA Skeleton<sup>130</sup>) which excludes loss caused by acts of any civil, government or military authority caused by conflagration, storm, etc. nor the fact that QBE2 has no such exclusion supports the HIGA Interveners case. QBE accepts that civil and/or government action “*caused by*”, “*arising from*” or “*in*

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<sup>130</sup> See [I/2/41].

*consequence of*” a **local** occurrence of the disease will be covered. There is no exclusion because there is no cover under the QBE Diseases Clauses for civil and/or government action caused by the effects of a disease outside of the relevant policy area.

236. QBE understands the submissions made at #19(3) and 19(4) to adopt the FCA’s “*underlying cause*” case.<sup>131</sup> QBE’s detailed response to this point is set out in paragraphs 73 to 84 above. QBE relies on those submissions in reply to the HIGA Interveners.
237. We turn now to how the QBE Disease Clauses operate as a matter of proper construction, and to the various examples posited by HIGA.
238. QBE accepts that if the Government had decided to ‘lock down’ just one area of the relevant size because of cases of COVID-19 only up to the boundary of the relevant policy area, there would, in principle, and dependant on the factual situation, be cover in relation to the resulting BI loss. It also accepts that that cover is not, *per se*, lost simply because there is one case (or more) outside of the relevant policy area.
239. QBE does not say (as suggested in #19(2) of the HIGA Skeleton) that if before the localised area lockdown occurred the disease had spread 100m further from the insured’s premises that the insured would have no cover save to the extent it was able to prove that the BI loss did not result from cases in and lockdown of the “extra” area. QBE simply says that in accordance with the terms of the policy the insured must prove that but for the disease in the local area the lock down would not have happened and that the disease in the local area was the proximate cause of the BI loss. Whilst it would depend on the facts of the case, i.e. where the COVID-19 had occurred within the 25 mile radius or outside and to which cases of COVID-19 the area lockdown was responding to, the insured could, as a matter of principle, show that the cases of COVID-19 in the relevant policy area were the proximate cause of local area shutdown and the resulting BI loss. However, the insured’s recovery would be subject

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<sup>131</sup> See [I/2/7].

to the application of the trends clause and would only continue for as long as the local occurrence of the disease remained a proximate cause of the BI loss.

240. As to the examples posited in #161(2)-(4),<sup>132</sup> it is not a case of X 'losing' cover because there were cases outside of X's policy area and the Government response embraced the entire effected area. X is simply required to prove that 'but for' the disease in its policy area the lockdown would not have happened and that the disease in its policy area was the proximate cause of the area lockdown. This will again be a question of fact and will depend on which cases the lockdown was responding to and whether the lockdown would or would not have affected the insured if they had no cases of COVID-19 in their relevant policy area. The insured's recovery would again be subject to the application of the trends clause and would only continue for as long as the local occurrence of the disease remained a proximate cause of the BI loss.

241. The HIGA Interveners have misunderstood the case pleaded at QBE Defence #57.<sup>133</sup> Using the HIGA Interveners' example of an insured's pub; QBE accepts that if the insured can prove that it has suffered BI loss which was proximately caused by the disease in the relevant policy area then the insured will be entitled to cover unless QBE can prove that the loss is separable as between the two causes and/or it is appropriate to apply the trends clause. It is wrong therefore to suggest that the insured has a "*difficult, if not impossible task*" to discharge its burden of proof. However, the fact remains that in the vast majority of claims that have arisen to date the insured have been unable to show that the BI loss which they claim was proximately caused by a local occurrence of COVID-19 in the relevant policy area. The fact is that if there had been a local occurrence and/or manifestation of COVID-19 which was a proximate cause of the loss to the insured it would be a relatively simple task for the insured to prove that it had suffered BI loss as a result of the insured peril. The 'difficulty / 'impossibility' only arises because cover is not provided for the loss claimed by most of the QBE policyholders. In any event, the fact that the task might be "*difficult*" is not a reason for not applying the terms of the QBE Disease Clauses.

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<sup>132</sup> See [I/2/45-46].

<sup>133</sup> See [A/11/18].

242. There is commercial sense in limiting the cover to BI loss “*caused by*”, “*arising from*” or “*in consequence of*” of the disease in the localised area. That is what QBE agreed to provide and that is what its policyholders, including the HIGA Interveners, paid a premium for. The QBE Disease Clauses did not provide insurance cover (i) in respect of a disease generally; or (ii) in respect of BI loss caused by the effects of a disease or an epidemic. The only loss which QBE agreed to cover was BI loss caused by the manifestation / occurrence of a notifiable disease in the relevant policy area. That limitation on cover was, as set out above, imposed by including the 1 mile and 25 mile requirement and by expressly stating that cover would only be provided in respect of BI loss “*caused by*”, “*arising from*” or “*in consequence of*” the disease in the relevant policy area.
243. The approach set out in #161(5) of the HIGA Skeleton<sup>134</sup> is not a common sense approach because it ignores the terms of the QBE wordings. Given that the HIGA Interveners accept that the Government’s response was nationwide, it is impossible to see how they can say that the occurrence / manifestation of COVID-19 at a particular insured’s premises or within 1 mile or 25 miles thereof was a cause of the BI loss of the insured. As stated above, the local occurrence on its own would not have caused the lockdown and the accumulation or aggregation of local and non-local occurrences is not an insured event.
244. It is not (as suggested in #141(6) of the HIGA Skeleton<sup>135</sup>) a logical nonsense to argue – when considering the proper application of the QBE Disease Clauses – that because the governmental measures were taken because of the presence of the disease throughout the country, they were not taken because of the presence of the disease in any particular geographical area. To suggest that the cases in each area were a cause of the nationwide measures is going into causes of causes which is not the proper application of the orthodox principles of causation.

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<sup>134</sup> See [I/2/46].

<sup>135</sup> See [I/2/46].



245. This is demonstrated by Everett v. The London Assurance:<sup>136</sup>

245.1. It was held that a policy which insured against risk of property damage by fire did not cover damage resulting from the disturbance of the atmosphere by an explosion of a gunpowder magazine a mile away from the insured premises. As Willes J said, at 736-7 (bold emphasis added) :

“We are bound to look to the immediate cause of the loss or damage, and not to some remote or speculative cause. Speaking of this injury, no person would say that it was occasioned by fire. It was occasioned by a concussion or disturbance of the air caused by fire elsewhere. **It would be going into the causes of causes to say that this was an injury caused by fire to the property insured.**”

245.2. Similarly, Byles J said, at 737 :

“The expression in the policy which we have to construe is, “loss or damage occasioned by fire.” Those words are to be construed as ordinary people would construe them. They mean loss or damage either by ignition of the article consumed, or by ignition of part of the premises where the article is: in the one case there is a loss, in the other a damage, occasioned by fire. Lord Bacon says: “It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.” If that were not so, a ship in the neighbourhood of Mount Etna or Vesuvius during an eruption, and receiving damage from substances projected therefrom, might be said to be damaged by fire. So, a shot falling amongst crockery-ware might in one sense be said to occasion a loss by fire. But neither of these cases would fall within these words, which must be understood in their plain and ordinary sense.”

246. As such, it does not and indeed cannot follow as a matter of common sense (if that is relevant at all) or more importantly on the basis of the terms of the QBE Diseases that provided an insured can show that there was COVID-19 in the relevant policy area there is cover for the BI loss. The insured must prove that the business has suffered BI loss “*caused by*”, “*arising from*” or “*in consequence of*” of the insured peril, i.e. that ‘but for’ the occurrence / manifestation of COVID-19 in the relevant policy area the insured

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<sup>136</sup> (1865) 144 ER 734. See [K/29/3].

business would not have suffered the BI loss and that the occurrence / manifestation of COVID 19 in the relevant policy area was the proximate cause of the BI loss.

247. Insofar as the London example (given at #161(7) of the HIGA Skeleton<sup>137</sup>) is concerned, the nationwide lockdown was the Government's response to the spread of COVID-19 across Europe and/or the nation as a whole (or the fear of such spread). It cannot therefore be said that if there had been no cases at all of COVID-19 in London as at 20 March 2020, the Government would not have ordered all the hotels bars and clubs in the UK, including London and the rest of the country to close. To leave London open in these circumstances would have defeated the purpose of the Government nationwide lockdown.
248. Contrary to the assertion made in #161(8) of the HIGA Skeleton,<sup>138</sup> it is very much to the point to identify areas which were subject to the nationwide measures which did not have any reported cases or only a very few cases. However, even more to the point is to consider the example of Shops A, B, C and D above. It would be remarkable and surprising if cover depended on the happenstance of whether a single case of COVID-19 could be proved to have occurred within the relevant policy area at some time prior to 23 March notwithstanding it had had no causative effect.
249. There is no basis for suggesting – which must be the basis for the submission in #161(9) of the HIGA Skeleton<sup>139</sup> – that the orthodox principles of 'but for' and proximate causes tests do not apply.

(vii) Conclusion

250. The HIGA Interveners' so-called common sense answer is not available to the Court. The QBE Disease Clauses and general principles of insurance law preclude that answer. There is no alternative route because the QBE Disease Clauses require the application of the 'but for' and proximate cause tests.

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<sup>137</sup> See [I/2/47].

<sup>138</sup> See [I/2/47].

<sup>139</sup> See [I/2/47].

## **G. Declarations Sought**

251. For the reasons set out above, the Court should decline to make such of the Declarations sought by the FCA as are identified in #78 of QBE's Defence.<sup>140</sup>

252. Moreover, the Court should make the Declarations sought by QBE in #80 of its Counterclaim.<sup>141</sup>

**MARK HOWARD QC**, Brick Court Chambers

**RACHEL ANSELL QC**, 4 Pump Court

**MARTYN NAYLOR**, 4 Pump Court

**SARAH BOUSFIELD**, Brick Court Chambers

**15 July 2020**

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<sup>140</sup> See [A/11/33].

<sup>141</sup> See [A/11/33].