IN THE HIGH COURT OF JUSTICE **Claim No. FL-2020-000018**

BUSINESS AND PROPERTY COURTS

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

SUBMISSIONS OF THE SEVENTH DEFENDANT (RSA)

INTRODUCTION

1 These are the Seventh Defendant's ("**RSA's**") submissions. In these submissions: references in the form **{Bundle Volume/Tab/Page}** are to the online trial bundle and RSA adopts the abbreviations used in the parties' statements of case.

2 Five RSA policy wordings are at issue in this action ("**the RSA Wordings**"). Detailed submissions in relation to the RSA Wordings are set out in the accompanying appendices:

(a) Appendix 1: RSA1 (Cottagesure), a wording taken out by holiday cottage owners **{B/16/1}**;

(b) Appendix 2: deals with two different wordings which have substantial (but not complete) overlap:

(i) RSA2.1, "Eaton Gate Super Facility Pubs and Restaurants", which was taken out by the owners of one or more pubs and restaurants **{B/17/1}**;

(ii) RSA2.2, "Eaton Gate Super Facility Retail" was taken out by the owners of one or more shops **{B/18/1}**;

(c) Appendix 3: RSA3, "Eaton Gate Super Facility Commercial Combined", which was taken out by the owners of a variety of businesses including building contractors, landscape gardeners, manufacturers and wholesalers of electronics, fabrics and metal goods **{B/19/1}**;

(d) Appendix 4: RSA4, Marsh/Jelf "Resilience", a wording provided to RSA and other insurers by Jelf/Marsh.[1] RSA4 was used for both SMEs and larger businesses **{B/20/1}**.

[1] Albeit a general condition provided that the wording was accepted and adopted as being that of the insurer.

3 It is common ground that the policies on RSA2.1, RSA2.2, RSA3 and RSA4 wordings were placed by authorised independent insurance intermediaries acting for and on behalf of the policyholder – see Agreed Facts 9 **{C/15/2}**.

GENERIC ISSUES

4 RSA adopts and relies upon the following submissions which have been made jointly by Insurers:

(a) Defendants' Joint Submissions on Principles of Construction of Contracts **{I/5}**;

(b) Defendants' Joint Skeleton Argument on Causation **{I/6};** and

(c) The Submissions of the Fifth Defendant (MS Amlin) on prevalence **{I/12/197-213}**.

5 In relation to the meaning of words and phrases which are recurrent features of all the lead wordings in the Test Case (and not just RSA's):

(a) These are addressed in the appendices relating to the particular RSA wordings in which they arise; but

(b) RSA adopts the submissions of the other Insurers.

SUMMARY OF RSA'S POSITION

6 With respect to RSA1, and for the reasons set out in Appendix 1 below, on the facts asserted by the FCA, there is no cover under Extension 2(A) to the Business Interruption Insurance section of RSA1:

(a) The Extension provides cover which is responsive, if at all, to:

(i) Events occurring within the prescribed locality rather than those occurring over a wider area; and

(ii) Losses which would not have been sustained *"but for"*, and which were proximately caused by, such events within the prescribed locality.

(b) The FCA cannot establish that the restrictions on which it relies were a result of a *"notifiable human disease manifesting itself ... within a radius of 25 miles of the* ***Premises****"*. The insured peril did not eventuate;

(c) Much, if not all, of the *"assumed losses"* would have been sustained in any event. Even if the insured peril did occur, its occurrence was not a cause in fact, still less a proximate cause, of such losses.

7 With respect to RSA2.1, and for the reasons set out in Appendix 2 below:

(a) There is no cover under the Public Emergency Extension, because the essential causal link between the components of the insured peril cannot be established;

(b) Even if the insured peril did occur, the assumed losses (or much of them) would have occurred in any event and were therefore not caused by the insured peril;

(c) Further, if the insured peril did occur, its occurrence was not a proximate cause of any such losses.

8 With respect to RSA2.2, and for the reasons set out in Appendix 2 below:

(a) On a proper construction of the Public Emergency extension in RSA2.2, all losses resulting from infectious or contagious diseases are excluded from cover.

(b) The position with respect to RSA2.1 is repeated;

9 With respect to RSA 3, and for the reasons set out in Appendix 3 below:

(a) On the facts asserted by the FCA, there is no cover under RSA3: the assumed losses were caused by an excluded peril, namely an epidemic;

(b) Even if the insured peril, in the form of an occurrence of COVID-19 within 25 miles of the insured premises, can be shown to have occurred:

(i) The peril was not a cause in fact, still less a proximate cause, of such losses.

(ii) The assumed losses would have been sustained in any event;

10 With respect to RSA4, and for the reasons set out in Appendix 4 below:

(a) The construction of the term *"Vicinity"* is fact sensitive and depends on the nature of the insured business and its location, but requires close spatial proximity. The term is not to be construed as the whole of the United Kingdom nor even, necessarily, as the whole of a city, town or village;

(b) The relevant insured perils are all events specific to the *"Vicinity"* of an "*Insured Location"*. Events affecting a wide area which happens to encompass

an Insured Location do not fall within the insured perils. Further, and as the FCA rightly accepts,[2] the COVID-19 epidemic is not an event;

(c) The FCA cannot establish the necessary causal link between the relevant events and any *"interruption or interference to the Insured's Business"*. It follows that the FCA cannot establish the occurrence of any insured peril;

(d) Even if the FCA could establish the occurrence of any insured peril, RSA4 will not respond to business interruption losses which would have been sustained in any event as a result of the wider impact of the Closure and/or Social Distancing Measures or the impact of the facts and matters set out in paragraph 17 of the RSA Defence and/or Agreed Facts 8.

DAVID TURNER QC

CLARE DIXON

SHAIL PATEL

ANTHONY JONES

4 New Square
LONDON WC2

14 July 2020

Contact Details:

David Turner QC	d.turner@4newsquare.com	020 7822 2131
Clare Dixon	c.dixon@4newsquare.com	020 7822 2033
Shail Patel	s.patel@4newsquare.com	020 7822 2101
Anthony Jones	a.jones@4newsquare.com	020 7822 2012

[2] FCA Skeleton Argument, paragraph 183.2 **{I/1/70}**.

APPENDIX 1 to RSA's SUBMISSIONS: RSA1

INTRODUCTION

1 RSA1 is known as "Cottagesure". Its title page records that it was "*The Holiday Cottage Owners' Insurance Policy"* **{B/16/1}**.

THE POLICY

The Wording

2 RSA1 provides a number of different types of cover, starting – unsurprisingly – with Property Damage Insurance **{B/16/6-11}** and Business Interruption Insurance **{B/16/12-19}**.

3 The wording provides **{B/16/5}** that:

> *"This **Policy** and any **Schedule**, Endorsements, Clauses or Certificates should be read as if they are one document"*.

4 It is logical to take the policy definitions next even though they appear towards the end of the wording. They include the following:

> *"…*
>
> ***Business***
>
> *That shown in the **Schedule** relating to your running of a Commercial holiday let **business** at the location shown"* **{B/16/70}**
>
> *"…*
>
> ***Damage***
>
> *Accidental loss, destruction or damage"* **{B/16/71}**
>
> *"…*

Gross Revenue

*Shall mean the money paid or payable to the **Policyholder** for **services** rendered in the course of the **Business**.*

…

Indemnity Period

*The maximum period from the date of the **Damage** for which **We** will pay any **loss of Gross Revenue** shown in the **Schedule**."* **{B/16/72}**

"…

Loss of Gross Revenue

*The actual amount of the reduction in the **Gross Revenue** received by **You** during the Indemnity Period solely as a result of **Damage** to **Buildings**…"* **{B/16/73}**

5 The insuring clauses for both the Property Damage Insurance and the Business Interruption Insurance are to be found after the insured perils ("Events") and extensions applicable to each section have been spelled out. Both insuring clauses are "hybrid" in nature, also including features often found in a free-standing basis of settlement provision. The insuring clause for the Business Interruption Insurance section **{B/16/22}** provides as follows:[1]

*"If **Damage** by any **Event** covered under this Insurance occurs*

1 *at the **Premises** to **Property** Insured by **You** for the purpose of the **Business***

2 *…*

*and causes interruption of or interference with **Your Business** at the **Premises***

***We** will pay **You** the amount of loss resulting from the interruption or interference caused by the **Damage** in accordance with the following*

1 *in respect of **Gross Revenue***

*the amount by which the **Gross Revenue** received during the **Indemnity Period** falls short of the Standard **Gross Revenue** as a result of the **Damage***

[1] The insuring clause for the Property Damage Insurance can be found at **{B/16/20}**.

> ***2*** *in respect of Increased Cost of Working the additional expenditure reasonably incurred in avoiding or minimising the* ***loss of Gross Revenue*** *which but for that expenditure would have taken place during the* ***Indemnity Period*** *…"*

6 The *"**Event**[s] covered under this Insurance"* within the insuring clause comprise the perils set out at **{B/16/12}**ff**,** which broadly track the equivalent list of perils for the Property Damage Insurance at **{B/16/6}**ff, but also includes "Event 13" in respect of *"Mechanical or electrical **breakdown** or derangement in respect of **Covered Equipment**"* **{B/16/15}**. While there are some textual differences between the two lists of perils, it is not suggested that they would be material. Note also the introductory wording to the listing of the Business Interruption Insurance perils **{B/16/12}**:

> *"THE FOLLOWING EVENTS ONLY APPLY WHERE SHOWN AS INCLUDED UNDER PROPERTY DAMAGE INSURANCE SECTION IN THE SCHEDULE"*.

7 The Business Interruption Insurance section also includes various extensions **{B/16/16}**ff (**"the Cottagesure BI Extensions"**). Most of the Cottagesure BI Extensions provide cover for losses caused by additional perils (see extensions 1 to 4 and 6 to 7) in the absence of "Damage" to the insured premises.[2]

8 So far as is directly relevant to the Test Case, the extensions provided as follows **{B/16/16}**:

> ***"Extensions to Cover***
>
> ***THIS INSURANCE ALSO COVERS***
>
> ...

[2] Extension 5 addresses outstanding credit balances recovery of which is prevented by insured "Damage", while Extension 8 makes specific provision for the cost of alternative accommodation following "Damage" **{B/16/17}**.

2. Disease, Murder, Suicide, Vermin and Pests

Loss as a result of

*A) closure or restrictions placed on the **Premises** as a result of a notifiable human disease manifesting itself at the **Premises** or within a radius of 25 miles of the **Premises**.*

..."

9 Under the heading "*What is not covered"*, the following applies to extension 2:

"1 Any amount in excess of £250,000 after the application of all other terms and conditions of this Insurance.

2. Any amount of the loss that continues more than twelve months after the occurrence of the loss."

10 The Court is asked to note the references to *"the **Indemnity Period**"* in the exclusions applicable to Extensions 1 **{B/16/16}** and 4 **{B/16/17}**.

11 The Business Interruption Insurance section is also subject to a "Material Damage Requirement" (in effect, a material damage proviso) **{B/16/23}** to which the only express exception is "Event 13" (for mechanical and electrical breakdown etc).

The Schedule

12 The sample schedule **{B/16/81-86}** includes a sum insured (of £150,000) for *"**Loss of Gross Revenue**"*, and also specifies a Maximum Indemnity Period of 24 months.

THE INSURED PERIL

13 So far as is relevant, the peril insured against is [1] "*closure [of] or restrictions placed upon the premises",* [2] "*as a result of*" [3] "*a notifiable human disease manifesting itself... within a 25 mile radius of the premises".* RSA addresses these three requirements for cover in the following order [1], [3] and [2].

"Closure of or restrictions placed upon the Premises" (requirement [1])

14 The FCA's case is that:[3]

(a) The requirement for "*closure*" or "*restrictions*" is satisfied by government orders for businesses and premises to close; and

(b) The "*restrictions*" requirement is also, or alternatively, satisfied by "*The advice, instructions and/or announcements as to social distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working on 16 March 2020 and on many occasions subsequently"*.

15 In its Amended Defence,[4] RSA defined these as "**the Closure Measures**" and "**Social Distancing Measures**" respectively and that nomenclature is adopted in these submissions.

16 RSA:

(a) Accepts that the Closure Measures imposed by regulation 5(3) of the 26 March Regulations upon holiday cottages with effect from 1pm on 26 March 2020 amounted to closure or restrictions for the purposes of RSA1;[5]

(b) Does not accept that (i) the period between 24 March (when the Government said that holiday accommodation providers should take steps to close) and 26 March when they were ordered to close and (ii) the Social Distancing

[3] Amended Particulars of Claim paragraphs 46 and 47 **{A/2/30-33}**.

[4] See paragraphs 50(a) **{A/12/21}** and 49(b) **{A/12/19}**.

[5] The reference to Category 1 in RSA's Amended Defence at paragraph 50(b) **{A/12/21}** is an error and should be read as a reference to a Category 6 business (being the category of business relevant to RSA1).

Measures amounted to restrictions "*placed upon the premises*" and therefore does not accept that an obligation to indemnify arose prior to 1pm on 26 March 2020.

17 The FCA's case is that both (i) and (ii) amounted to "*restrictions*" because (a) "*constraints had been placed on owners, employees and/or customers"* and (b) *"the way they could use or access the premises"* and (c) "*any business there"*.[6]

18 With respect to the period prior to 26 March 2020,[7] the FCA's analysis is flawed:

(a) To state, as the FCA does, that there is no requirement for the closure (or presumably the restriction) to "*originate from any authority, official or otherwise"*[8] leaves entirely unanswered the question as to who/what effects the closure of, or places restrictions upon, the Premises. The only logical answer is that the closure of the Premises or the *"restrictions placed upon the Premises"* requires nothing less than some form of legal order or regulation impacting the use of the Premises and specific to the Premises (or to Premises of such nature);

(b) Therefore advice (even if dressed up as an "instruction"), such as that given on 24 March, falling short of a legal requirement, to close would not – in ordinary parlance – amount to "*closure*" or *"restrictions"*, still less to *"restrictions placed upon the Premises"* (emphasis supplied);

[6] Amended Particulars of Claim paragraph 46.6 **{A/2/31}**.

[7] The point becomes of academic significance only for the period from 26 March since holiday lets were required to close from that date.

[8] FCA submissions paragraph 958.1 **{I/1/304}**.

(c) Further, so far as the Social Distancing Measures specifically are concerned the FCA:

(i) Wrongly conflates advice with a "*restriction*". Contrary to the position adopted at paragraph 958.3 of the FCA's skeleton argument, the advice given by the government on 16 March did not restrict free travel within the United Kingdom – indeed, it is plain that the Government was astute *not* to impose restrictions;

(ii) Wrongly conflates advice to customers who might choose to use the Premises with restrictions *"placed upon"* the Premises themselves; and

(iii) Without justification prays in aid General Condition 10, requiring policyholders to "*take all reasonable steps to prevent or minimise any Damage or any Injury to Employees or the public"*.[9] That contractual duty, which is placed upon the policyholder, not the Premises, remained unaltered before and after any manifestation of a notifiable disease within 25 miles.

"A notifiable human disease manifesting itself… within a 25 mile radius of the Premises" (requirement [3])

19 COVID-19 became a notifiable disease in England on 5 March 2020.[10]

[9] FCA submissions paragraph 958.3 **{I/1/305}**.

[10] In Scotland on 22 February 2020 **{J/20/1}**; Northern Ireland, 29 February 2020 **{J/21/1}** and Wales, 6 March 2020 **{J/18/1}**.

20 The FCA appears to suggest that something less than a person diagnosed as suffering from COVID-19 within 25 miles of the Premises will suffice to trigger cover. It states "*The cover would be expected to respond in circumstances including whenever a conclusion could be reached by civil authorities that disease had spread to the area concerned…"*[11]. This element of cover is triggered by the policyholder proving that there has been an incidence (as to which see below) of the disease inside, and not beyond,[12] the prescribed radius. Whilst the actions/conclusions of "civil authorities" is relevant to the closure/restrictions element of the peril it is irrelevant to the proof of manifestation aspect.[13]

21 The occurrence – or incidence – of a notifiable disease within the prescribed radius does not itself amount to a *"manifestation"* for the purposes of establishing the insured peril:

(a) First, and as a matter of ordinary language, the word *"manifestation"* indicates a requirement that the particular occurrence of the disease should be apparent. An asymptomatic episode of COVID-19 could not, at least at a time when the episode was unknown and undiagnosed, be a *"manifestation"*;

(b) Second, the requirement for a causal link between the *"manifestation"* of the disease and the imposition of *"closure of or restrictions placed upon the premises"* serves to emphasise the requirement that the particular

[11] FCA submissions paragraph 960 **{I/1/305}**.

[12] See https://dictionary.cambridge.org/dictionary/english/within. The ordinary meaning of the word "within" includes *"not beyond"* **{K/215/16-17}**.

[13] It is a different question whether the policyholder could prove prevalence by reference to information generated and/or used by the civil authorities.

occurrence(s)/episode(s) of the disease should be apparent: it would absurd to suggest that a causal link could be established between an unknown event and the government's decision to impose closure of or restrictions on the Premises;

22 Third, any construction of the words *"manifesting itself"* which did not involve a requirement that the particular occurrence of the disease should be apparent would effectively render those words redundant. There is no reason to suppose that the parties did intend those words to have no effect.

"As a result of" (requirement [2])

23 It is common ground that, the words *"as a result of"* require a proximate causal link[14].

24 For the purposes of RSA1, the relevant closure or restrictions has to be *"as a result of"* the manifestation of a notifiable disease within 25 miles of the Premises. If there were manifestations of the notifiable disease beyond that radius, as well as within it, then the only manifestation of causal relevance would be the manifestation(s) which fell within the relevant area. Plainly the 25 mile radius was intended to act as a limit on the scope of the peril insured, so that the policy would respond (if at all) to the consequences of events within the prescribed radius rather than to the consequences of events taking place within a wider area, still less the country as a whole.

[14] FCA submissions paragraph 591 **{I/1/204}**.

25 This can be exemplified by a real world example:

(a) As is well known, on 29 June 2020 local action was taken in Leicester following "*a surge in coronavirus cases in the area*";[15]

(b) Restrictions specific to a "protected area" in and surrounding Leicester were imposed with effect from 4 July 2020 by The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020 ("**the Leicester Regulations**");[16]

(c) The Leicester Regulations: require certain businesses within the protected area to close (Regulation 3); impose restrictions (including, in some cases, partial closure) on other businesses and business premises (Regulation 4); prohibit those living inside the protected area from staying outside overnight, and those who live outside from staying inside it overnight (Regulation 5); and impose restrictions on gatherings (Regulation 6);

(d) A holiday let situated within the affected postcodes which was required to remain closed because of the Leicester Regulations (when holiday cottages outside of the protected area are now permitted to open) would fall within the scope of cover under RSA1 because the closure/restriction would be a consequence of the manifestation of COVID-19 within 25 miles of the Premises.[17]

[15] https://www.gov.uk/government/news/leicestershire-coronavirus-lockdown-areas-and-changes.

[16] SI 2020 No. 685 **{K/22}**.

[17] It would be a separate question whether all or part of those losses would have been incurred in any event by reason of the reluctance of people to stay in the holiday cottage as a result of an ongoing fear of COVID-19.

26 Neither the Closure Measures nor the Social Distancing Measures (both of which, on the FCA's case, constitute "*closure or restrictions placed on the Premises*") were made as a result of a specific incidence of COVID-19 within the UK, let alone one within 25 miles of any particular holiday cottage. Rather, they were (as the FCA accepts):[18] "*imposed upon all locations in England and Wales at the same time because of the anticipation and occurrence of a nationwide pandemic"* 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"*. Further, (as the FCA accepts) the objectives of the strategy included the "*prevention of the spread of COVID-19", "preventing the capacity of the NHS being overwhelmed"* and "*minimising the number of people in the UK who died, in all areas of the UK*"[19]. As the example of the Scilly Isles demonstrates (see Agreed Facts 10 **{C/16/1-2}**), the restrictions imposed by the 26 March Regulations were imposed regardless of whether there had been a manifestation of disease within a 25 mile radius of any particular Premises.

27 Accordingly, any proven and known occurrence of COVID-19 within 25 miles of the Premises as at 26 March 2020 was neither the cause in fact nor the proximate cause of the Closure Measures or (if relevant) the Social Distancing Measures. Any proven manifestation of COVID-19 within 25 miles of the Premises was, in truth, irrelevant or (at its highest) incidental to the imposition of the Closure or Social Distancing Measures. Neither the Closure Measures nor the Social Distancing Measures were *"placed on the **Premises** as a result of a notifiable human disease manifesting itself within a radius of 25 miles of the **Premises**"* (emphasis supplied).

[18] Paragraph 42 of the Amended Particulars of Claim **{A/2/28}**. Emphasis supplied.

[19] Paragraph 50 of the Reply **{A/14/26}**. Emphasis supplied.

Conclusion on Insured Peril

28 For the reasons set out above, the FCA cannot establish the occurrence of the relevant peril insured under Cottagesure BI Extension 2(A).

CAUSATION

29 Cover under the non-damage extensions requires that the loss be *"as a result of"* the insured peril. It is common ground that this indicates a requirement for a proximate causal relationship, in this context between the peril and the loss.

30 In ***PMB Australia Limited v MMI General Insurance Limited & ors*** [2002] QCA 361[20]:

(a) The insured was covered for:

> "*loss directly resulting from interruption or interference with the business… in consequence of:*
>
> *(i) Closing of the whole or part of the premises by order of a Public Authority as a result of an outbreak of a notifiable human infectious or contagious disease or consequent upon defects in the drains and/or other sanitary arrangements at the premises;*
>
> *(ii) …*
>
> *(iii) Injury, illness or disease arising from or likely to arise from or traceable to foreign or injurious matter in food or drink provided from or on the premises"*;

(b) Due to insanitary processes at its factory, the insured was required to suspend its operations following the involvement of the Queensland Department of

[20] **{K/102}**.

Health. The insured made a claim for business interruption losses consequent upon: (i) the cleaning of the plant and (ii) the subsequent testing regime;

(c) The decision of the Judge at first instance was that the clam for (i) should be permitted but not (ii) because (i) was proximately caused by the insured peril but (ii) was not. In the leading judgment of the Queensland Court of Appeal, which upheld Mullins J's decision, de Jersey CJ stated (with added emphasis):

> *"[9] …The challenge concerns Her Honour's limitation of the losses subject to the indemnity to those directly referable to the particular outbreak of contamination and the need to address its consequences. As Her Honour put it:*
>
> > *"The extension covers loss resulting from business interruption in consequence of a specified event. It does not relate to loss incurred in preventing a fresh outbreak of injury, illness or disease from contaminated food provided from the premises from occurring."*
>
> *[10] The appellant's contrary contention is that… there having been an interruption to the business "in consequence of" illness… it became a matter of identifying, or as it was put by Mr Gee QC in submissions, "measuring" losses "directly resulting from" that interruption. It was not appropriate at that stage of the enquiry, he submitted, to discriminate between losses referable to the immediate outbreak, and losses referable to accommodating the so-called new awareness of the risk of contamination: there having been a relevant interruption, all losses resulting from or connected with that interruption should be regarded as falling within the scope of the indemnity.*
>
> *[11] … Her Honour effectively found, as a matter of fact, that the only loss directly resulting from the interruption to the business in consequence of the contamination was loss referable to the outbreak alone. Her reasoning imported the stipulation that an insurer is ordinarily liable only for losses proximately caused by a relevant event (cf. Australian Casualty Co Ltd v Federico (1986) 160 CLR 513, 534-5), and she considered that the words "in consequence of" in the extension clause invited consideration of whether the cause of the interruption was proximate (cf. Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd [1918] AC 350).*

> *[12] That approach was to my mind unexceptionable, although one might ask whether it served no more than to bolster or reinforce what was in any case the clear interpretation of the words of the provision themselves. It is, I consider, compelling to conclude that losses "directly" resulting from interruption "in consequence of" the contamination should be limited to those particularly referable to the specific instance of contamination, and not extend more broadly to the cost of addressing possible further such outbreaks at another future time or elsewhere."*

31 ***PMB*** provides a helpful example of the requirement that the claimed losses in a non-damage business interruption case must be proximately caused by the insured peril. Given the presence of the causal link *"resulting from"*, use of the word "*directly*" merely emphasised but did not further narrow the scope of the causal nexus.

32 For the reasons set out in the Insurers' joint submission on causation:

(a) The policyholder must demonstrate that the relevant losses would not have been suffered *"but for"* the operation of the insured peril (assuming that the insured peril occurred at all);

(b) In any event, the requirement for a proximate causal relationship between the peril and the loss could not *pro tanto* be satisfied where, as here, much of the loss would have been sustained in any event.

33 RSA also relies on the definition of *"Loss of Gross Revenue"* in RSA1 as limiting RSA's liability under clause 2(A) of the Cottagesure BI Extensions to any loss of gross revenue occurring solely as a result of the peril insured under that extension,[21] thereby providing an alternative route to the same result. As to that:

[21] RSA's Amended Defence para 71(b) **{A/12/26}**. There can be no doubt that this paragraph was referring to the definition of Loss of Gross Profit as this is the only place in the wording where the quoted words appear.

(a) It is clear that the term *"**Damage**"* has to be construed – where, as here, the context requires – as encompassing non-damage perils insured under the extensions to the Business Interruption Insurance section:

(i) First, it would be commercially surprising if the parties intended (without such an intention being expressed) that:

(1) The provisions relating to causation and quantification of business interruption claims arising out of damage to insured property would not apply, with appropriate adjustments, to claims caused by non-damage perils insured under the Cottagesure BI Extensions;

(2) The parties should instead be left to debate what approach to take to causation and quantification of business interruption claims caused by non-damage perils insured under the Cottagesure BI Extensions;

(ii) Second, the only potentially relevant item insured in the Schedule is ***"Loss of Gross Revenue"*** **{B/16/82}**, the definition of which term is predicated upon *"**Damage** to **Buildings**"* **{B/16/73}**;

(iii) Third, if non-damage perils insured under the Cottagesure BI Extensions were not to be treated as constituting *"**Damage** at the **Premises** ..."* then the Material Damage Requirement **{B/16/23}** would not be satisfied;

(iv) Fourth, the reference to the *"**Indemnity Period**"* in the exclusions for Cottagesure BI Extensions 1 and 4 would only make sense if the perils insured by those non-damage extensions are to be treated as *"**Damage**"*, as the definition of ***"Indemnity Period"*** provides that it starts *"from the date of the **Damage**"* **{B/16/72}**;[22]

(v) Fifth, the words *"THIS INSURANCE"* in the introductory text under the heading *"Extensions to Cover"* **{B/16/16}** refer to the principal business interruption insurance, parasitic upon the occurrence of Damage and whose measure of indemnity was subject to the *"but for"* test imposed by the contractual definition of ***"Loss of Gross Revenue"***. It is <u>that</u> insurance, subject to such incidents, which was being extended to cover non-damage perils.

(b) Accordingly, the references to ***"Damage"*** should, in this context, be recognised as no more than a false description (*"falsa demonstratio non nocet"*) attributable to the fact that the primary business interruption cover under the policy is for losses arising from damage to the property insured. The parties' intent is clear and should be given effect: Extension 2(A) of the Cottagesure BI Extensions responds only to losses caused solely by the peril insured thereunder.

[22] There was no need for a reference to be included to the ***"Indemnity Period"*** in respect of Cottagesure BI Extension 2 since sub-exclusion 2 effectively applies a specific indemnity period of 12 months. There is no rational basis to suppose that non-damage perils 1 and 4 should be treated as *"Damage"* yet the other non-damage perils should not.

The FCA's Chesil Beach Scenario

34 For the purposes of RSA1, the FCA challenges RSA's causation position by reference to the beach pollution extension in RSA1 **{B/16/17}** which provides business interruption cover in respect of: "*Loss that is solely attributable to sudden or accidental pollution of any beach within a ten mile radius of the Premises"*[23]. The FCA posits a scenario in which the entirety of Chesil Beach is polluted which would include 3 miles falling within the 10 mile radius and 8 miles outside it.[24] In this scenario there would be cover for losses caused by the pollution within the 10 mile radius but if the same loss would have been suffered because of the pollution outside the radius then the loss claimed would not have been caused by the insured peril and would not be recoverable. The FCA describes this answer as "*patently absurd"*. It is anything but: it simply reflects the parties' bargain. Any other answer ignores the limits on the scope of cover which the parties had agreed.

35 By contrast, on the FCA's approach the insurer would be liable in full where:

(a) The closest part of a 5-mile beach is 9.95 miles from the insured property; or

(b) The closest part of a 5-mile beach is 9.95 miles from the insured property but the part of the beach polluted is 13-14 miles from the insured property; or

(c) The closest part of a 5-mile beach is 9.95 miles from the insured property. The whole beach is polluted and closed. Some customers cancel a booking of the

[23] FCA submissions paragraph 965 **{I/1/306-307}**. Extension 7 at **{B/16/17}**

[24] Doubtless the beach was selected because a Google search for "longest beach in England" yields the answer "Chesil Beach". The scenario betrays an ignorance both of the composition of Chesil Beach and the notoriously dangerous rip tides and currents just off it.

insured property because they had been planning to attend a music festival at a location on the beach 14 miles from the insured property.[25]

36 The uncommercial and anomalous results inherent to the FCA's approach can be avoided,[26] and the meaning of the word "*within*" and the parties' bargain can be respected, by:

(a) Correctly identifying that the pollution (of a beach) has to be within 10 miles of the insured premises;

(b) Alternatively, construing the word "*beach*" as "*beach or any part thereof*".

The Correct Counterfactual

37 When applying the *"but for"* test, the correct counterfactual is one in which the insured peril is absent but everything else remains the same. In the case of RSA1 the identification of the correct counterfactual depends in part on whether or not the Social Distancing Measures (either as advised on 16 March 2020 or as imposed on *people* with effect from 26 March 2020) are *"restrictions placed on the* ***Premises****"*. Thus:

(a) If the Social Distancing Measures do not form part of the peril insured, the correct counterfactual assumes that *"the Premises"* would not have been closed from 26 March 2020 but that customers would still have been prohibited (by regulation 6 of the 26 March Regulations) from travelling to or

[25] Contrast and compare with the position where a small beach 11 miles away from the insured property was polluted.

[26] And disputes about where one beach ends and another begins can also be avoided.

staying in *"the Premises"*. On this analysis, there could have been no difference in outcome: the policyholder's losses would still have been sustained in full;

(b) If the Social Distancing Measures (at least from 26 March 2020) do form part of the peril insured, alongside the Closure Measures, then:

(i) The correct counterfactual assumes, amongst other things, that:[27]

(1) The Premises could have remained open;

(2) There would have been no legal prohibition against customers travelling to or staying in *"the Premises"*; but

(3) There would still have been a COVID-19 epidemic throughout the country as a whole (albeit without manifestation within 25 miles of *"the Premises"*); and

(4) All other businesses in both the country and the vicinity of *"the Premises"* (such as pubs, restaurants, museums etc) whose closure was mandated by the 26 March Regulations would still have been required to stay closed;[28]

(ii) On this analysis, it would still be fanciful to suppose that there would have been any or any substantial difference in outcome.

[27] See also paragraph 17 of RSA's Amended Defence **{A/12/6-7}**, and Agreed Facts 8 **{C/14/1-2}**.

[28] This is effectively the position which prevailed (albeit briefly) for the period 21 to 26 March 2020 when The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020 (SI 2020/327) were in force **{J/15/1}**: they did not apply to holiday cottages or guesthouses.

APPLICATION TO ASSUMED FACTS

38 Taking the Assumed Facts for Category 6 **{E/7/2}** as an example:

(a) No indemnity would be available in respect of Cottage 1 for the reasons set out in paragraph 37 above. The reduction in sales and cancellations would have occurred in any event even if the insured peril had not occurred;

(b) Any loss attributable to the cancellation of the booking for Cottage 2 on 19 March was not as a result of *"closure [of] or restrictions placed on the Premises"*;

(c) The cancellation of Cottage 3 due to a customer's suspected COVID-19 does not fall within the insured peril because the Premises were not closed nor restrictions placed upon them, because of that customer's illness;

(d) The cancellation of bookings for Cottage 4 for the period 18 to 25 March may have been the *"result of a notifiable human disease manifesting itself at the* ***Premises****"*; but it was not caused by *"closure [of] or restrictions placed on the* ***Premises****"*. Accordingly, the peril insured did not eventuate;

(e) The cancellation of the booking for Cottage 5 was not caused by the peril insured, which had not eventuated. Even if the peril had eventuated (and the social distancing guidance is to be treated as amounting to *"closure [of] or restrictions placed on the Premises"*, there would be no basis for inferring that the particular cancellation was caused by the insured peril rather than a general apprehension of COVID-19 or some wholly extraneous reason;

(f) No indemnity would be available in respect of the booking for Cottage 6 cancelled by the client who lived in Italy who was prevented from travelling by the Italian regulations: any loss was attributable to restrictions on the movement of that particular individual and not to the *"closure [of] or restrictions placed on the **Premises**"*, still less *"as a result of a notifiable human disease manifesting itself ... within a radius of 25 miles of the **Premises**"*;

CONCLUSION

39 On the facts asserted by the FCA, there is no cover under Extension 2(A) to the Business Interruption Insurance section of RSA1:

(a) The Extension provides cover which is responsive, if at all, to:

(i) Events occurring within the prescribed locality rather than those occurring over a wider area; and

(ii) Losses which would not have been sustained *"but for"*, and which were proximately caused by, such events within the prescribed locality.

(b) The FCA cannot establish that the restrictions on which it relies were a result of a *"notifiable human disease manifesting itself ... within a radius of 25 miles of the **Premises**"*. The insured peril did not eventuate;

(c) Much, if not all, of the *"assumed losses"* would have been sustained in any event. Even if the insured peril did occur, its occurrence was not a cause in fact, still less a proximate cause, of such losses.

APPENDIX 2 TO RSA's SUBMISSIONS: RSA2.1 & 2.2

INTRODUCTION

The Eaton Gate Policies

1 RSA2.1 and RSA2.2, along with RSA3 were policies entered by Eaton Gate MGU Ltd ("**Eaton Gate**") as a Managing General Agent on behalf of RSA. Potential policyholders were required to transact via a broker rather than approach Eaton Gate directly.[1] The three Eaton Gate RSA Wordings are all headed "*EATON GATE – COMMERCIAL"* and are aimed at SMEs.

Policyholder Businesses

2 RSA2.1 is titled "*Restaurants, Wine Bars, Public Houses Policy"*, and was entered by policyholders carrying out such a business. RSA 2.2. is titled "*Shop Policy"* and was entered by policyholders with one or more shops.[2]

3 There is substantial overlap between RSA2.1 and 2.2 with respect to contractual terms relevant to this test case. Unless otherwise identified, policy terms quoted below appear in both Wordings. References in this section to "**the Wording(s)**" should be construed accordingly, and in respect of RSA2.1-2.2 only. Page references are (unless otherwise specified) for RSA2.1.

[1] Agreed Facts 9 **{C/15/1-2}.**

[2] RSA Amended Defence, paragraph 5(b)-(c) **{A/12/2}**.

THE POLICY WORDING

General Scheme

4 The Wordings provide cover under a series of Sections, which are followed by General Policy Conditions and Exclusions:

(a) RSA2.1 has four sections of cover. The Business Interruption cover is in Section 2 **{B/17/34-40}**;

(b) RSA2.2 has eleven Sections of cover. The Business Interruption cover is in Section 7 **{B/18/49-52}**.

Definitions

5 The general policy definitions **{B/17/9}** provide as follows:

> *"Each time **We** use one of the words or phrases listed below it will have the same meaning wherever it appears in **Your Policy** unless **We** state otherwise".*
>
> ...
>
> *Each Section of the **Policy** may contain additional Definitions which apply to that particular Section and they must be read in conjunction with the [general] [**Policy**] [3] Definitions.*
>
> ...
>
> ***Damage***
>
> *Material loss destruction or damage*[4].
>
> ..."

[3] RSA2.2 omits this word **{B/18/13}**.

[4] RSA2.2 uses "***Damage"*** (in bold and capitalised) rather than "*damage*" **{B/18/14}**.

Section 1 - Property

6 In RSA2.1, section 1 **{B/17/12-33}** provides cover for property damage. This encompasses cover for specified perils (fire, impact, riot, storm etc.). Under clause 8 there is also cover for "*Any other accidental* ***Damage****"* if shown on the schedule. In RSA2.2 the equivalent section is again section 1, but it is entitled *"The Buildings of the Premises"* **{B/18/17}**.

7 Both policies contain extensions to the property damage cover: there are 25 extensions for RSA2.1 **{B/17/19-24}** and 10 for RSA2.2 **{B/18/19-21}**. Many of the extensions:

(a) Provide additional heads of cover (e.g. professional fees) consequential upon damage to the insured property or damage to services for which the insured is responsible;

(b) Contain, in the column headed "*What is not Covered",* sub-limits which use the formulation *"Any amount [exceeding][in excess of] £x"*.

Section 2 - Business Interruption

8 The Business Interruption section for RSA2.1 provides as follows **{B/17/34-37}**:

> *"****Definitions***
>
> *Also refer to the* ***Policy*** *Definitions at the beginning of this* ***Policy***
>
> *The following additional Definitions apply to this Section and shall keep the same meaning wherever they appear in this Section*
>
> *…*
>
> ***Gross Profit***
>
> *The money paid or payable to* ***You*** *for goods sold or delivered and for services rendered in the course of the* ***Business*** *either at the* ***Premises*** *or elsewhere less the costs of purchases of* ***Stock***

…

Adjustments

*In adjusting the amount paid all variations or special circumstances affecting the **Business** shall be taken into account in order that the amount paid shall represent as nearly as practicable the results which would have been expected if the **Damage** had not occurred*.[5]

…

Sub-Section A – Gross Profit

Definitions

*Also refer to the **Policy** Definitions at the beginning of this **Policy***

The following additional Definitions apply to this Sub-Section and shall keep the same meaning wherever they appear in this Sub-Section

Indemnity Period

*The period during which the **Business** results are affected due to the **Damage** starting from the date of the **Damage** lasting no longer than the **Maximum Indemnity Period**.*

…

What is Covered

*In the event of **Damage** to **Property** used by **You** at the **Premises** occupied by **You** for the purposes of the **Business** for which **We** have admitted liability under Section 1[6] of this **Policy** causing an interruption or interference to the Business which results in a reduction in the **Gross Profit We** will indemnify **You** for*

*a) the amount by which the **Gross Profit** during the **Indemnity Period** as a result of the **Damage** falls short of the **Gross Profit** which would have been received during the **Indemnity Period** had no **Damage** occurred*

*b) the **Increased Cost of Working** for the sole purpose of avoiding or diminishing the reduction in **Gross Profit** during the **Indemnity Period** but not more than the loss avoided under (a)*

c) …

[5] In RSA2.1 this clause appears in the sectional definitions **{B/17/34}**. In RSA2.2 it appears in the special conditions applicable to the Business Interruption section **{B/18/52}**.

[6] RSA2.2 refers to Sections 1, 2 or 4 **{B/18/49}**.

*less any sum saved during the **Indemnity Period** in respect of charges or business expenses payable out of **Gross Profit** which cease or are reduced as a result of the **Damage***

Extensions

Cover provided by this Sub-Section is extended to include interruption or interference with the Business

A. Disease

[What is Covered][7]

The occurrence of

*a) [a list of nearly 30 specified diseases] sustained by any person at the **Premises***

…

*where use of the **Premises** is restricted on the order or advice of the competent authority*

e) …

[What is not Covered]

Any costs incurred in cleaning repair replacement recall or checking of property

Any loss arising from premises that are not directly subject to the occurrence

Any amount in excess of £25,000

B. Failure of Supply

…

F. Prevention of Access – Public Emergency

[What is Covered]

*The actions or advice of a competent Public Authority due to an emergency likely to endanger life or property in the vicinity of the **Premises** which prevents or hinders the use [of] or access to the **Premises***

[What is not Covered]

[7] In common with many contemporary forms of policy, the wording contains a "What is Covered" column and a "What is not Covered" column. For reasons of legibility, the columns are not replicated in these submissions but are instead indicated by use of appropriate sub-headings in square brackets.

Any loss

a) during the first four hours

*b) during any period other than the actual period when access to the **Premises** was prevented*

c) ...

d) ...

e) as a result of the diseases specified in Extension A(a) – Diseases

Any amount in excess of £10,000

...

Special Conditions Applicable to this Sub-Section

*1. **Alternative Trading***

*If during the **Indemnity Period** goods are sold or services rendered elsewhere than at the **Premises** for the benefit of the **Business** either by **You** or by others on **Your** behalf the money paid or payable in respect of such sales or services will be brought in to account in arriving at the reduction of sales during the **Indemnity Period***

..."

9 The Business Interruption section for RSA2.2 is in materially identical terms as that for RSA2.1, subject to the following:

(a) The "Adjustments" clause (which appears in the middle of the sectional definitions in RSA2.1) appears as item 4 of the Special Conditions applicable to the Business Interruption section **{B/18/52}**;

(b) The Disease extension is extension B **{B/18/50}**;

(c) The Public Emergency Extension is entitled "F. Public Emergency Extension" (only) **{B/18/51}**. Within the right hand column headed "*What is not covered"*, RSA2.2 stipulates that the following are not covered in respect of the extension:

"Any loss:

a) *During the first four hours;*

b) *During any period other than the actual period when access to the* ***Premises*** *was prevented;*

c) *As a result of labour disputes;*

d) *Occurring in Northern Ireland;*

e) *As a result of infectious or contagious diseases any amount in excess of £10,000."*

10 The Court is asked to note that Extensions B, C and G to the Business Interruption section in RSA2.2 **{B/18/50-51}** each contains (in the column headed *"What is not Covered"*) a free-standing inner limit in the following terms:

"*Any amount in excess of £[x]*".

THE INSURED PERIL

11 The FCA's Particulars of Claim focus on the Prevention of Access/Public Emergency Extensions to the Business Interruption sections in RSA2.1 and RSA2.2. It is striking that the FCA does not contend that there is cover under the Infectious Disease clauses which provide express cover for business interruption caused by disease. It cannot do so because Covid-19 is neither one of the named diseases nor a close equivalent to them: none of SARS, MERS and pneumonia is covered. This is an unpromising and unattractive background to the FCA's submissions. They are an attempt to find cover under a separate clause that was not intended to provide disease cover. An insured asking herself whether she was covered in respect of disease would look to the disease clause and say: *"I have business interruption cover in respect of these named diseases only"*.

12 So far as is relevant, RSA contends that the peril insured under the Prevention of Access / Public Emergency extension in each policy is [1] "*the actions or advice of a competent Public Authority*" [2] "*due to*" [3] "*an emergency likely to endanger life or property in the vicinity of the Premises*" [4] "*which prevents or hinders the use [of] or access to the Premises*" [5] excluding "a*ny period other than the actual period when access to the Premises was prevented*" [6] and also excluding (for RSA 2.2 only) any loss "*as a result of any infectious or contagious disease*".[8]

13 RSA does not dispute that:

(a) Actions or advice of the UK government on matters of public health would be actions or advice of a "*competent Public Authority"* ([1]);

(b) Actions or advice of the government directed at a business (or its owners) to close the business or premises would prevent or hinder their use (i.e. "**Closure Measures**") (however such actions or advice would not prevent *access* for the purposes of sub-exclusion (b)) ([5] in part);

(c) The COVID-19 pandemic was a general public health emergency.

14 However, and for the reasons set out below, the peril described above did not come into existence. RSA addresses the components of the insured peril in the sequence [4]-[5], [3] and [2], [6].

15 For the avoidance of doubt, the Social Distancing Measures (as defined in RSA's Defence at paragraph 49(b) **{A/12/19}**) did not prevent access to the Premises.

[8] In relation to RSA2.2 there is a dispute as to the correct construction of the exclusion which RSA sets out in [6].

Prevention and Hindrance ([4]-[5])

16 A policyholder must show that the public authority action "*prevents or hinders the use [of] or access to the Premises"*.

17 The words *"Prevent"* and *"hinder"* mean what they say, and the cases identified in paragraph 132 to 135 of the FCA's Skeleton Argument **{I/1/52-54}** are as relevant to the construction of policies of insurance as they are to other forms of contract. In summary, there is no basis for the FCA's submission that the English non-insurance cases are *"overly strict"*.[9]

18 It is accepted that the Closure Measures did, *pro tanto*, prevent the use of any Premises to which they applied (*a fortiori* "*hindered"*). It is denied that they at any point prevented or hindered *access* to the Premises. "*Access*", given its ordinary meaning, refers to the means of entry and egress to the location of the Premises. In the case of RSA2.1-2.2, it is concerned with whether persons can get to the bar, restaurant or shop in question. That is qualitatively different from an action requiring the Premises to be closed or the business to cease trading. RSA adopts the submissions of Hiscox on the question of 'Access'.

19 It is also denied that the Social Distancing Measures prevented access to the Premises. Rather, the restrictions were placed upon individuals, and prevented or hindered unnecessary travel and social contact. The access to the Premises remained clear, but it could or would not be used.

[9] The contorted arguments in paragraphs 137 to 141 of the FCA's Skeleton Argument **{I/1/54-55}** do nothing to illuminate, and everything to obscure, a very simple issue of construction.

20 However under the sub-exclusions, cover does not extend to "a*ny period other than the actual period when access to the Premises was prevented"*. RSA's position is that this specific sub-exclusion in both RSA2.1 and 2.2 is a paradigm example of an exclusion clause which, when read alongside the text of the extension, *"delimits"* or *"delineates"* the scope of the cover in the manner contemplated by Lords Hodge and Toulson in ***Impact Funding***,[10] and should therefore be given full effect. Accordingly, the sole relevant question is whether the assumed losses were incurred during a period when access to the Premises was prevented. As to that RSA relies upon the arguments advanced in Arch's Skeleton Argument under the heading "C3: The GLAA Extension (Construction)" **{I/7/12-18}** in addition to the points made above.

The Vicinity Requirement ([3]) and Actions "due to" the Emergency ([2])

21 RSA submits that the peril can be built up in stages:

(a) Stage 1: there must be an emergency;

(b) Stage 2: the emergency must have the quality of being likely to endanger life or property;

(c) Stage 3: the emergency must also have the quality of being in the vicinity of the premises (alternatively, as the FCA contends, the emergency must have the quality of endangering life or property in the vicinity of the Premises);

(d) Stage 4: the emergency with the prescribed qualities (on either basis) must be the operative cause of actions or advice of the public authority;

[10] **{J/122}**.

(e) Stage 5: the actions or advice of the public authority must prevent or hinder the use of or access to the Premises.

22 Stages 3 and 4 sit at the heart of the debate between the FCA and RSA: in particular, whether it is sufficient that the danger and/or the actions etc of the competent public authority are due to a wide area emergency which has local effects.

23 RSA's case is that the local aspect is integral to the insured peril and therefore also to the causal link between "*the emergency"* and the relevant "*actions or advice*" for the following reasons:

(a) First, a denial of access provision (such as the relevant extension in each of RSA2.1 and RSA2.2) necessarily contemplates something which happens close to the premises which prevents or hinders access to or use of the Premises;

(b) Second, RSA's proposed construction is consistent with the natural meaning of words of the extension, and in particular the words "*the actions or advice of a competent Public Authority due to an emergency… in the vicinity of the premises"*. This denotes a local emergency and a causal link ("*due to"*) not merely between an "*emergency"* and the "*actions or advice"*, but between the *requisite* emergency and the "*actions or advice"*;

(c) Third, the language used reads naturally as prescribing concurrent qualities to be applied to the "emergency", rather than prescribing a single quality applicable to the emergency (namely the likelihood of endangering life) which is itself then qualified;

(d) Fourth, the words "*in the vicinity of the Premises"* are plainly intended to be words of limitation which substantively tie the peril geographically to the Premises;

(e) Fifth, the alternative construction (by which the vicinity requirement applies only to the endangerment of life or property but not to the location of the emergency)[11] would make no commercial sense and is contrary to the intention of the policy, as the whole of the business interruption section provides property based cover and directed to perils which affect a particular premises in some physical way.[12]

24 The word "*vicinity"* should be given its natural meaning as indicating a high degree of spatial proximity.

25 Accordingly, where (as here) the relevant actions or advice of the competent Public Authority have nothing to do with the presence of a particular emergency operating in the particular vicinity of the *"Premises"* but are a consequence of the wider epidemic/pandemic, the FCA cannot prove the occurrence of the insured peril.

26 The FCA seeks to meet this analysis by alleging that it "*drives a conclusion that the emergency is nowhere"* (paragraph 610 of its Skeleton Argument **{I/1/209}**). This is not correct. The answer to the question posed in the penultimate line is that, where the emergency was 99% within and 1% outside the vicinity, the emergency within the vicinity would (plainly) be proximately causal of the actions or advice of the competent public authority.

[11] RSA accepts that often/usually the two will go together.

[12] See the analysis of Prevention or Hindrance of Access in ***Riley on Business Interruption*** (10th Edition) at §10.32 **{J/154/30-31}**.

27 The FCA's claim should therefore be rejected without the Court needing to consider the question of whether any occurrence of the insured peril was causative of the assumed losses.

The Disease Exclusion in the Public Emergency Extension in RSA2.2 ([6])

28 Sub-exclusion (e) to the POA/PE Extension in RSA 2.2 contains an obvious formatting error which can and should be corrected by construction through an application of the principles set out by Lord Hoffmann in ***Chartbrook*** at [25].[13]

29 As drafted, the *"What is not Covered"* column for the extension **{B/18/51}** reads as follows:

> *"Any loss:*
>
> *a) During the first four hours;*
>
> *b) During any period other than the actual period when access to the* ***Premises*** *was prevented;*
>
> *c) As a result of labour disputes;*
>
> *d) Occurring in Northern Ireland;*
>
> *e) As a result of infectious or contagious diseases any amount in excess of £10,000."*

30 There is a formatting error in (e) which is obvious for the following reasons:

(a) First, (e) does not read grammatically:[14] if it had been intended that the inner limit of £10,000 should apply only to diseases, then the clause should have been worded to read:

---

[13] **{J/103/14}**. See paragraph 26 of Insurers' joint submission on Principles of Contractual Construction **{I/5/11}**.

"In excess of £10,000 as a result of infectious or contagious diseases."

(b) Second, RSA2.2 is full of extensions which have grammatically coherent free-standing inner limits expressed using words such as *"Any amount [in excess of] [exceeding] £[x] ..."*.[15] See:

(i) Extensions B to H and J to Section 1 of the wording **{B/18/19-21}**;

(ii) Extensions 1 to 15 to Section 2 (Contents) **{B/18/25-28}**;

(iii) Extension A to Section 3 **{B/18/30}**;

(iv) Extensions A to C of Section 5 (Goods in Transit) **{B/18/36}**;

(c) The inner limits applicable to other extensions within the Business Interruption section are again grammatically coherent and free-standing – see extensions B, C and G **{B/18/50-51}**.

31 There is no obvious commercial reason why RSA would impose an inner limit (set at a low level) for a public emergency resulting from infectious or contagious diseases, but no inner limit at all for any other form of public emergency.

32 RSA contends that it is clear that a reasonable person would have understood that the inner limit for the Public Emergency Extension was intended to be free-standing, so that the *"What is not Covered"* column should be construed as if it read:

"Any loss:

a) During the first four hours;

---

[14] *cf* the FCA's case as set out in paragraph 617 of its Skeleton Argument **{I/1/211}**.

[15] Or as a specified percentage of a sum insured.

b) During any period other than the actual period when access to the Premises was prevented;

c) As a result of labour disputes;

d) Occurring in Northern Ireland;

e) As a result of infectious or contagious diseases.

Any amount in excess of £10,000."

33 It follows that there is no cover under the extension in respect of *"any loss"* which, as here, is *"as a result of infectious or contagious diseases"*. Such loss is excluded.

CAUSATION

Preliminary

34 If (contrary to the submissions set out above) the insured peril has occurred and – in respect of RSA2.2 – cover is not excluded, it would be necessary to address the question of causation.

35 Causation is expressly required to be proved under the main insuring clause for the business interruption section, which must have been intended to apply with appropriate adjustments to all of the extensions, so that a peril insured under an extension is to be treated *as if* it were damage for which liability has been admitted under section 1 of the policy; and

(a) Where such a peril "*[causes] an interruption or interference to the Business which results in a reduction in the* ***Gross Profit***", then the policy responds;

(b) Accordingly, the policyholder must establish that its loss was proximately caused by the relevant peril.

36 In any event, even if there were any difficulty about applying this general provision, the default position, codified in section 55(1) of the Marine Insurance Act 1906, applies so that the policy only responds to loss proximately caused by the peril insured. In ***PMB Australia v. MMI General Insurance Ltd*** [2000] QSC 329 at [60], upheld at [2002] QCA 361[16], the courts of Queensland reviewed English authorities and accepted rightly that a notifiable diseases clause had an implicit requirement that the disease must proximately cause the loss. This is correct.

37 For the reasons set out in Insurers' Joint Skeleton Argument on Causation:

(a) The policyholder must demonstrate that the relevant losses would not have been suffered *"but for"* the operation of the insured peril (assuming that the insured peril occurred at all);

(b) In any event, the requirement for a proximate causal relationship between the peril and the loss could not *pro tanto* be satisfied where, as here, much of the loss would have been sustained in any event.

38 RSA also relies on the adjustments clauses in each of RSA2.1 and RSA2.2 as limiting its liability under the relevant extensions to any loss of gross profit which would have been sustained if the insured peril had not occurred,[17] thereby providing an alternative route to the same result. As to that:

(a) It is clear that the term *"**Damage**"* has to be construed – where, as here, the context requires – as encompassing non-damage perils insured under the extensions:

[16] **{K/93/13}** and **{K/102}**.

[17] RSA Amended Defence, paragraph 77 **{A/12/27}**.

(i) First, it would be commercially surprising if the parties intended (without such an intention being expressed) that:

(1) The provisions relating to causation and quantification of business interruption claims arising out of damage to insured property would not apply, with appropriate adjustments, to claims caused by non-damage perils insured under the extensions;

(2) The parties should instead be left to debate what approach to take to causation and quantification of business interruption claims caused by non-damage perils insured under the extensions;[18]

(ii) Second, the introductory words to the extensions specifically extend the *"Cover provided by this Section"*: the words *"[cover] provided by this Section"* refer to the principal business interruption insurance, parasitic upon the occurrence of Damage and whose measure of indemnity was subject to the *"but for"* test imposed by the adjustments clause. The extended cover was therefore subject to such incidents which applied to the primary cover;

(b) Accordingly, and as with RSA1, the references to ***"Damage"*** should, in this context, be recognised as no more than a false description (*"falsa demonstratio non nocet"*) attributable to the fact that the primary business interruption cover under the policy is for losses arising from damage to the

[18] Notably, the FCA does not even attempt to provide a commercial rationale for the position which it has adopted – see paragraphs 628 to 630 of its Skeleton Argument **{I/1/214}**.

property insured.[19] The parties' intent is clear and should be given effect: the relevant non-damage extensions in RSA2.1 and RSA2.2 respond only to losses caused solely by the peril insured thereunder.

39 As previously noted, when applying the *"but for"* test, the correct counterfactual is one in which the insured peril is absent but everything else remains the same. In this context, it involves assuming that:

(a) There was no likelihood that life would be endangered in the vicinity of the premises but there was throughout the rest of the country. In such circumstances:

(i) The example of the Scilly Isles illustrates that the Closure and Social Distancing Measures would still have been imposed;

(ii) There would have been no difference in outcome;

(b) Alternatively, the premises were not in fact closed, but the Social Distancing Measures (including the prohibitions in Regulation 6 of the 26 March Regulations) remained the same and COVID-19 was still in widespread circulation. The possibility that a pub, restaurant or retail outlet for non-essential goods could have traded profitably in such circumstances is fanciful.

[19] See also ***Tektrol v Hanover*** [2005] EWCA Civ 845, [2005] 2 CLC 339, at [15] *per* Buxton LJ **{K/124/7}**. Attributing to the draftsman of an insurance contract too precise a use of language risks falling into error.

APPLICATION TO ASSUMED FACTS

RSA2.1

40 Taking the Assumed Facts for Category 1 (a restaurant in Central London) **{E/2/2}** as an example:

(a) No indemnity would be available in respect of the reduction in custom which would have occurred in any event even if the insured peril had not occurred;

(b) No indemnity would be available in respect of the general downturn in business from 1 March 2020 due to a reduction in tourist and other custom. Such loss was not suffered during a person when access to the premises was prevented. Further, even if there was prevention of access, it was not as a consequence of advice or actions of any competent Public Authority. Therefore, the peril did not occur;

(c) Even if (which is denied) there was necessary prevention and hindrance caused by the requisite actions or advice (for example if foreign government travel advice sufficed), the actions or advice were not due to a local occurrence of COVID-19 to the premises. Again, the peril did not occur;

(d) For the downturn in business on and after the social distancing guidelines of 16 March 2020, the position was the same;

(e) From the coming into effect of the Closure Measures issued on 20 March 2020, there was prevention of the use of the premises. However, there was no prevention of access, and moreover there was no insured peril because any prevention or hinderance of access or use did not arise from an emergency in

the vicinity of the restaurant, or from an emergency likely to endanger life in the vicinity of the restaurant;

(f) Even if, during any of that period, the peril had eventuated, the loss was not caused by the peril insured. Rather, it would have been suffered in any event;

(g) If those points are incorrect, the revenue earned from 28 March 2020, when the restaurant reopened as a takeaway, falls to be credited against any losses.

RSA2.2

41 As to RSA2.2, and taking the Assumed Facts for Category 4 (the chain of outdoor clothing outlets) with a branch at Location 1 (city centre), and Location 2 (country town) **{E/5/2}** as an example:

(a) There is no indemnity for the loss of profit at Location 1 from 17 March 2020, which closed on that date because of absence of footfall. While the closure of the store did prevent the use of the premises, this was not caused by the actions or advice of any relevant authority

(b) There is no indemnity for loss of profit at Location 2, which remained open until closure advice on 23 March 2020. While there was prevention of the use of the premises caused by actions of a competent authority (the same being true of Location 1 after that date), those actions were not due to an emergency within 25 miles of Location 2;

(c) There is no indemnity for general loss of profit across the group due to a general downturn, supply chain issues or decline in demand from 1 March 2020 until the stores closed. There was no insured peril during that period;

(d) There is no indemnity for a loss of profit from online trading as such loss does not arise from any prevention or hindrance of use or access of the insured premises. Even if there was an insured peril in respect of the insured premises, that was not the cause of such losses.

CONCLUSION

42 On the facts asserted by the FCA, there is no cover under RSA2.1 or RSA2.2, because the essential causal link between the components of the insured peril cannot be established.

43 On a proper construction of the Public Emergency extension in RSA2.2, all losses resulting from infectious or contagious diseases are excluded from cover.

44 Even if the insured peril did occur (and the relevant losses were not excluded from RSA2.2), the assumed losses (or much of them) would have occurred in any event and were therefore not caused by the insured peril.

45 Further, if the insured peril did occur, its occurrence was not a proximate cause of any such losses.

APPENDIX 3 to RSA's SUBMISSIONS: RSA3

INTRODUCTION

1 RSA3 is another Eaton Gate policy.[1] RSA3 was taken out by the owners of a variety of businesses, including building contractors, landscape gardeners and manufacturers and wholesalers of electronics, fabrics and metal goods.[2]

THE POLICY

General Scheme

2 The policy starts with a "welcome page" **{B/19/3}**, which includes the following:

> *"Each section of this **Policy**, the **Schedule**, any **Endorsements** and the Definitions, General terms and conditions and General exclusions shall be read as one document"*.

3 There are general policy definitions at the start which "*will have the same meaning wherever it appears in **Your Policy** unless **We** state otherwise"* **{B/19/12}**. In these general definitions "*Damage"* is defined as "*material loss destruction or **Damage**"*.

4 Section 1 of the policy concerns property damage **{B/19/16}**, along with extensions **{B/19/21}** and exclusions **{B/19/19}** applicable to that section. Section 2 of the policy concerns BI, **{B/19/32}** along with extensions **{B/19/37}** and exclusions **{B/19/41}** applicable to that section.

[1] See paragraph 1 of Appendix 2 for the role of Eaton Gate.

[2] RSA Defence at paragraph 5 **{A/12/2}**.

5 There are general policy exclusions which "*apply to all sections of the Policy unless stated otherwise"* **{B/19/91}**. These include General Exclusion L, as further described below.

Section 2 – Business Interruption

6 The preamble to the Business Interruption Section **{B/19/32}** states:

> *"Certain words have specific meanings for the purpose of this section, General exclusions also apply to this section".*

7 So far as is relevant, the sectional definitions **{B/19/32}** include the following:

> "…
>
> ***Business Interruption***
>
> ***Business Interruption*** *shall mean loss resulting from interruption of or interference with the* ***Business*** *carried on by* ***You*** *at the* ***Premises*** *in consequence of loss or destruction of or* ***Damage*** *insured under Section 1 to* ***Property*** *used by* ***You*** *at the* ***Premises*** *for the purpose of the* ***Business***
>
> *…*
>
> ***Incident***
>
> *a) Loss or destruction of or* ***Damage*** *to* ***Property*** *used by* ***You*** *at the* ***Premises*** *for the purpose of the* ***Business****; or*
>
> *b) Loss destruction of or* ***Damage*** *to* ***Your*** *books of account or other* ***Business*** *books or records at the* ***Premises*** *in respect of Book Debts.*
>
> ***Indemnity Period***
>
> *The period beginning with the occurrence of the* ***Incident*** *and ending not later than the* ***Maximum Indemnity Period*** *thereafter during which the results of the* ***Business*** *shall be affected in consequence thereof*
>
> ***Maximum Indemnity Period***
>
> *The Period as stated in the* ***Schedule***
>
> *…"*

8 The following trends clause appears immediately below the sectional definitions **{B/19/34}**:

> *"Special provision applicable to this section: Under **Rate of Gross Profit**, **Annual Turnover**, **Standard Turnover**, **Annual Rent Receivable**, **Standard Rent**, **Receivable Annual Gross Revenue and Standard Gross Revenue** adjustments shall be made as may be necessary to provide for the trend of the **Business** and for variations in or other circumstances affecting the **Business** either before or after the Incident or which would have affected the **Business** had the **Incident** not occurred so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the **Incident** would have been obtained during the relative Period after the **Incident**."*

9 The main insuring clause for the BI section **{B/19/34}** provides as follows:

> *"**Cover***
>
> *In the event of **Business Interruption We** will pay to **You** in respect of each item in the **Schedule** the amount of loss resulting from such interruption or interference provided that at the time of the happening of the loss destruction or **Damage** there is an insurance in force covering **Your** interest in the **Property** at the **Premises** against such loss destruction or **Damage** and that:*
>
> *a) payment shall have been made or liability admitted therefore; or*
>
> *b) payment would have been made or liability admitted therefore but for the operation of a proviso in such insurance excluding liability for losses below a specified amount".*

10 The basis of settlement clause provides as follows **{B/19/34}**:

> *"**Section 2 – Gross Profit/Estimated Gross Profit***
>
> ***(if shown as operative in the Schedule)***
>
> *The insurance is limited to loss of **Gross Profit** due to:*
>
> *a) reduction in **Turnover**; and*
>
> *b) increase in cost of working;*
>
> *and the amount payable as indemnity shall be*
>
> *a) in respect of a reduction in **Turnover**:*

*b) the sum produced by applying the Rate of **Gross Profit** to the amount by which the **Turnover** during the **Indemnity Period** shall fall short of the **Standard Turnover** in consequence of the **Incident**; and …*

…

Section 2 – Gross Revenue/Estimated Gross Revenue

(if shown as operative in the Schedule)

The insurance is limited to:

*a) loss of **Gross Revenue**;*

[…]

and the amount payable as indemnity shall be:

*a) in respect of loss of **Gross Revenue**: the amount by which the Gross Revenue during the **Indemnity Period** shall fall short of the **Standard Gross Revenue** in consequence of the **Incident**[…]*

…".

The Disease Extension

11 The "*Infectious Diseases"* extension is followed by a series of definitions and terms relating to that extension only (with emphasis added). RSA adopts the FCA's shorthand of 'disease clause' when referring to this provision below, without admission **{B/19/38}**:

> *"**vii. Infectious Diseases***
>
> *We shall indemnify **You** in respect of interruption of or interference with the **Business** during the **Indemnity Period** following:*
>
> *a) any:*
>
> *i. occurrence of a Notifiable Disease (as defined below) at the **Premises** or attributable to food or drink supplied from the **Premises**;*
>
> *ii. discovery of an organism at the **Premises** likely to result in the occurrence of a Notifiable Disease;*

iii. *occurrence of a Notifiable Disease within a radius of 25 miles of the* ***Premises;***

b) *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;*

c) *any 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; or*

d) *any occurrence of murder or suicide at the* ***Premises****.*

Additional Definition in respect of Notifiable Diseases

1. *Notifiable Disease shall mean illness sustained by any person resulting from:*

   i. *food or drink poisoning; or*

   ii. *any human infectious or human contagious disease excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition an outbreak of which the competent local authority has stipulated shall be notified to them*

2. *For the purposes of this clause:*

   Indemnity Period *shall mean the period during which the results of the Business shall be affected in consequence of the occurrence discovery or accident beginning:*

   i. *in the case of a) and d) above with the date of the occurrence or discovery; or*

   ii. *in the case of b) and c) above the date from which the restrictions on the* ***Premises*** *applied; and ending not later than the* ***Maximum Indemnity Period*** *thereafter shown below.*

   Premises *shall mean only those locations stated in the* ***Premises*** *definition. In the event that the section includes an extension which deems loss destruction or* ***Damage*** *at other locations to be an* ***Incident*** *such extension shall not apply to this clause.*

3. *We shall not be liable under this clause for any costs incurred in the cleaning repair replacement recall or checking of Property;*

4. *We shall only be liable for the loss arising at those* ***Premises*** *which are directly affected by the occurrence discovery or accident[.]* ***Maximum Indemnity Period*** *shall mean 3 months".*

The General Conditions

12 The General Terms and Conditions contain both numbered and unnumbered clauses, including the following **{B/19/86}**:

> *"**Interpretation***
>
> *In this **Policy**;*
>
> *...*
>
> *e) the headings are for reference only and shall not be considered when determining the meaning of this **Policy**".*

General Exclusion L

13 The general exclusions section states that the exclusions listed "*apply to all sections of the Policy unless stated otherwise"* **{B/19/91}**.

14 General Exclusion L **{B/19/93}** provides:

> *"**L Applicable to all sections other than Section 5 – Employers' Liability and Section 6 – Public Liability***
> ***Contamination or Pollution Clause***
>
> *a) The insurance by this **Policy** does not **Cover** any loss or **Damage** due to contamination pollution soot deposition impairment with dust chemical precipitation adulteration poisoning impurity epidemic and disease or due to any limitation or prevention of the use of objects because of hazards to health.*
>
> *b) This exclusion does not apply if such loss or **Damage** arises out of one or more of the following Perils:*
>
> - *Fire, Lightning, Explosion, Impact of Aircraft*
> - ***Vehicle** Impact Sonic Boom*
> - *Accidental Escape of Water from any tank apparatus or pipe Riot, Civil Commotion, Malicious **Damage***
> - *Storm, Hail Flood Inundation Earthquake*

- *Landslide **Subsidence** Pressure of Snow, Avalanche Volcanic Eruption*

a)[bis] *If a Peril not excluded from this **Policy** arises directly from **Pollution and/or Contamination** any loss or **Damage** arising directly from that Peril shall be covered.*

b)[bis] *all other terms and conditions of this **Policy** shall be unaltered and especially the exclusions shall not be superseded by this clause."*

THE INSURED PERIL

15 The FCA's case is based on the peril set out at extension (vii)(a)(ii), namely the "*occurrence of a Notifiable Disease within a radius of 25 miles of the Premises"*. This requires the demonstration of a specific instance of a person being infected with the disease inside, and not beyond,[3] the prescribed radius. How a policyholder might prove this, and the causal link required between a local occurrence of disease and insured loss, are addressed elsewhere.

NO COVER FOR EPIDEMICS

Losses Caused by Epidemic are Excluded

16 Certain losses are excluded from cover from RSA3. This is achieved by way of general exclusions. As set out above, these are:

(a) Referenced at the start of the Wording, providing that all cover under any section of the Wording will be subject to them. In addition the (inaptly named) "*Insuring Clause"* **{B/19/3}** states (with emphasis supplied):

[3] See https://dictionary.cambridge.org/dictionary/english/within. The ordinary meaning of the word "within" includes *"not beyond"* **{K/215/16-17}**.

> *"Each section of this **Policy**, the **Schedule**, any **Endorsements** and the Definitions, General terms and conditions and General Exclusions shall be read as one document"*

(b) Referred to at the start of the individual sections of cover, including at the start of Section 2 (business interruption) **{B/19/32}**;

(c) Referenced in the preamble to the general exclusions themselves **{B/19/91}**, to the same effect;

(d) In the case of General Exclusion L, the heading of the exclusion itself **{B/19/93}** states that it is "*Applicable to all sections"* of the policy other than sections 5 and 6 (respectively the employers' and public liability sections).

17 It is trite law, and not understood to be in dispute, that where a loss is caused by both insured and excluded causes, the loss is excluded (the '*Wayne Tank*' principle).[4] Accordingly the logical starting point is whether the assumed losses are caused by a peril excluded in sub-clause (a) of General Exclusion L. If so, that is both the beginning and the end, and the analysis need go no further.

18 RSA's case is straightforward:

(a) General Exclusion L excludes losses "*due to"* the perils listed in clause L(a);[5]

(b) After the words "*due to"* there are a list of perils, which include "*epidemic and disease"*;

---

[4] ***Wayne Tank & Pump Co v. Employers Liability Assurance Corporation*** [1974] 1 QB 57 **{J/58}**. This continues to be the state of the law; see e.g. ***Atlasnavios-Navegacao v Navigators Insurance Co Ltd*** [2017] 1 W.L.R. 1303 at [26]: "*if the matter is excluded is a cause, liability does not arise even if the insured peril is one"* **{J/130/10-11}**.

[5] It is not understood to be in dispute that this language connotes a factual and proximate/effective cause, but for authority in support of that conclusion see ***The Kamilla*** [2006] 2 Lloyd's Rep 238 at [16]-[18] **{K/128/6}**.

(c) COVID-19 in the UK is, on any basis, an epidemic;[6]

(d) There is no dispute that COVID-19 was "the" or "a" proximate cause of the assumed losses.[7]

(e) Accordingly, losses caused by COVID-19 are excluded.

19 The FCA's pleaded response to this is two-fold:[8]

(a) The occurrence of the disease arose directly from "*the pollution and/or contamination"* and therefore the exclusion is inapplicable given the terms of sub-clause *(a)[bis]*;

(b) Alternatively, on its true construction General Exclusion L is "*not applicable to the disease clause as otherwise that clause would have no or little operative scope, which cannot have been intended"*.

20 It is logical to take these arguments in reverse order, since the proper construction of sub-clause (a) informs the answer to the FCA's reliance on sub-clause *(a)[bis]*.

[6] This is a word in common parlance but RSA notes (for example) the Cambridge University Dictionary online definition: *"the appearance of a particular disease in a large number of people at the same time"* https://dictionary.cambridge.org/dictionary/english/epidemic **{K/215/3}**.

[7] See paragraph 53.1 of the Amended Particulars of Claim **{A/2/35}** and paragraph 9(a)(i) of RSA's Amended Defence **{A/12/3}**.

[8] Both points are articulated in paragraph 52 of the Amended Particulars of Claim **{A/2/34}**.

The proper construction of sub-clause (a)

21 The FCA's argument that General Exclusion L should be construed so as not to refer to the Disease Clause should be rejected:

(a) There is clear *express* wording in the policy that General Exclusion L applies to all sections of cover, stated on at least four separate occasions in the Wording, as identified above. The General Exclusions are also expressly incorporated in the Business Interruption section. The use of general exclusions in this way is of course very common: see ***Midland Mainline Ltd v. Eagle Star Limited*** [2004] 2 Lloyd's Rep 604[9] for an example in the context of business interruption insurance (the Court of Appeal accepted at [17] that exclusions of general application meant that a wear and tear exclusion applied to a Denial of Access clause)[10]. The FCA's interpretation requires this express wording to be ignored in respect of General Exclusion L;

(b) The wording should be construed as a whole and so that each provision may be given effect. The FCA's construction amounts to treating General Exclusion L as repugnant to the disease extension, and assumes what it seeks to prove.[11] The exclusion should instead be construed with a predisposition towards resolving (rather than increasing) apparent inconsistencies;[12]

---

[9] **{J/94}**.

[10] **{J/94/4-5}**.

[11] Even if the exclusion could only be construed in a manner repugnant to the disease extension, it would not be permissible simply to disregard the exclusion clause: ***Great North Eastern Railway v Avon Insurance plc*** [2001] 2 Lloyd's Rep 649 at [31] *per* Longmore LJ **{K/96/7}**.

[12] See paragraph 29 of Insurers' joint submissions on the Principles of Contractual construction **{I/5/12}**, ***Yien Yieh Commercial Bank v Kwai Chung Cold Storage*** [1989] 2 HKLR 639 at pp.646G-647C *per* Lord Goff **{K/37/8-9}**, applied by the Court of Appeal in ***Yarm Road Ltd v Hewden Tower Cranes*** [2003] EWCA Civ

(c) Any potential inconsistency arises only out of the word "*disease"* which appears in the list of perils excluded by General Exclusion L. In those circumstances, the highest that the FCA's case might properly be put is that the word "*disease"* as a standalone peril in the list of excluded perils should not be given effect to. This would be the minimum 'deletion' necessary to avoid the conflict and therefore the maximum deletion which could be justified;

(d) There is no justification for refusing to give effect to the word "*epidemic":*

(i) Instances of a "*Notifiable Disease*" occurring at or within 25 miles from the Premises, may or may not be part of an epidemic;

(ii) By confining the operation of the exclusion to cases of disease amounting to an epidemic, both the extension and the words exclusion can be reconciled;

(iii) Such a construction is consistent with the use of the word *"within"*:

(1) The word suggests a requirement for the disease to occur inside, but not beyond, the specified radius;[13]

(2) Obviously an epidemic is more likely to cover a wider area than an outbreak of disease falling short of an epidemic;

1127 (2003) 90 Con LR 1 at [41] **{K/112/17}**, and ***Trust Risk Group v AmTrust Europe*** [2015] 2 Lloyd's Rep 154 at [69] **{K/161/16}**.

[13] See https://dictionary.cambridge.org/dictionary/english/within **{K/215/16-17}**. The New Oxford English Dictionary definition of *"within"* likewise includes *"not further off than (used with distances): he lives within a few miles of Oxford"* **{K/219/3}**.

(e) Due to the juxtaposition of the words "*epidemic and disease"* in the list of excluded perils, the Court could – if necessary – construe the relevant part of the exclusion as one relating to a "*disease epidemic"*: it does less violence to the language to adopt a construction which involves surplusage/tautology than one which requires the deletion of words within the exclusion;

(f) The FCA's approach in paragraph 973 of its Skeleton Argument **{I/1/309-310}** is wrong. It takes the words "*disease and epidemic"* as a single unit in order to manufacture a conclusion that an exclusion for "*disease and epidemic"* is repugnant to the disease clause. But the Court is required to find a construction which maximises consistency and minimise conflict. There is no reason to read "*disease and epidemic"* in that way. They are different, though potentially overlapping, perils in a list. A reasonable reader would conclude that epidemics were excluded.

22 Finally, and as set out below, this reconciliation of the disease clause and the exclusion gains support from the disease clause itself, which is directed at individual occurrences of disease taking place at a particular place and time, or limited to a particular area, rather than epidemics in the general population.

The FCA's Case under Clause L(a)[bis]

23 The pleaded basis for the FCA's suggestion that sub-clause *(a)[bis]*, which refers to "Pollution and/or Contamination", might apply to an exclusion for epidemics is opaque. The FCA's written submissions are no more helpful, simply asserting (without explanation) that *"it is clear from the context what [the terms "Peril" and*

Pollution and/or Contamination" are intended to be".[14] RSA assumes that the FCA seeks to construe "*the pollution or contamination"* words as taking their meaning from the heading of General Exclusion L, namely "*Contamination or Pollution Clause"*, so as to include all of the perils listed in sub-clause (a) even though those perils go far beyond *"contamination"* and *"pollution"*.

24 The excluded peril of 'epidemic' (or *"epidemic and disease"*) is neither "*contamination*" nor "*pollution*". Nor can it be treated as falling within "*Pollution and/or Contamination*" for the purposes of sub-clause *(a)[bis]* simply because of the heading *"**Contamination or Pollution Clause**"*:

(a) The parties have agreed (by sub-clause (e) of the Interpretation General Condition **{B/19/86}**) that headings cannot be used as an aid to construction.

(b) Neither "Pollution" nor "Contamination" is a defined term within the policy, notwithstanding the capitalisation and emboldening of each within sub-clause *(a)[bis]*. Despite this, the words appear in both capitalised/emboldened and uncapitalised/unemboldened form in different places throughout the policy. There is no rhyme or reason for the use of capitalisation and emboldening (and thus no significance to be attached to its use in sub-clause *(a)[bis]*). See:[15]

(i) Exclusion 17 of section 1: capital "P" due to position at start of a sub-paragraph, but no capital "C" and no emboldening **{B/19/20}**;

[14] See paragraph 973.3 of the FCA's submissions **{I/1/310}**.

[15] Arch has an "Axiom" wording which so closely tracks the text of RSA3 that it would qualify as an [RSA3] "Other Representative Policy" wording if only it bore the RSA moniker. The equivalent exclusion (C4) is worded identically (subject to sub-clause (a) being punctuated!), but the words *"pollution and/or contamination"* in sub-clause (c) (the equivalent of *(a)[bis]*) are neither capitalised nor emboldened. The FCA has refused to allow the Axiom wording to be included in the Trial Bundle as an "Other Representative Policy".

(ii) Extension (xxiii) of section 1: not emboldened or capitalised **{B/19/24}**;

(iii) Clause 6.10(f): both uncapitalised and capitalised, emboldened and unemboldened **{B/19/62}**;

(iv) Clause 6(b).8(e): capitalised and emboldened **{B/19/66}**;

(v) Extension C to section 7: uncapitalised and unemboldened **{B/19/69}**;

(c) The relevant words in sub-clause *(a)[bis]* are arranged differently from the heading to General Exclusion L.

(d) Accordingly, the words should be given their ordinary meaning.

25 It is possible that a policyholder might accept that the words *"pollution"* and *"contamination"* should be given their ordinary meaning, but nevertheless contend that the transmission of COVID-19 from one person to another involves the intermediate contamination of a surface or air with the SARS-COV-2 coronavirus, so that the peril of disease could be said to *"arise directly"* from pollution or contamination. Such a submission is (rightly) not advanced by the FCA, since there would be two insuperable answers to it:

(a) First, the words *"arises directly"* involve both legal and factual causation. It would be wholly artificial to describe the acquisition of the disease by the second person in the ordinary course of events as one involving, still less *"[arising] directly from pollution and/or contamination"*;

(b) Second, sub-clause *(a)[bis]* requires the reader to identify the *"peril not excluded"*. So far as is relevant, *"the peril not excluded"* is *"disease not amounting to an epidemic"*.[16]

Conclusion

26 Losses attributable to epidemics such as COVID-19 are excluded from cover.

27 It would only be necessary to consider the following parts of RSA's submissions if the Court were to accept that General Exclusion L has no application.

CAUSATION

The requirements: Interruption "following" the occurrence

28 The FCA asserts that the word *"following"* imports a "*looser causal connection than* '*resulting from' or similar"*.[17] This is wrong, but even if there were anything in the point it should be common ground that the word *"following"* does impose at least a test of causation in fact. The FCA's case on RSA3 is not particularly clear. However, RSA notes that the FCA now suggests, in contradiction of its own pleaded case,[18] that the word "*following"* in MSAmlin1-2 "*makes clear that a 'but for' test is not required in this case"* (FCA's Skeleton Argument para 899) **{I/1/289}**.[19]

---

[16] Any other construction of the phrase *"peril not excluded"* would involve drawing a red line through the word *"epidemic"* in sub-clause (a) and thus offend the principles identified by Lord Goff in the ***Yien Yieh Commercial Bank*** case.

[17] Paragraph 60 of the Amended Particulars of Claim **{A/2/40}**.

[18] RSA simply does not understand how the FCA can accept that the word indicates a requirement for a *"causal connection"*, while denying that there is a requirement for – at least – causation in fact. The FCA seems to be dancing on an imaginary pinhead.

[19] In ordinary usage the word can have either a hybrid (temporal/causative) meaning or a purely temporal meaning. An example of the first would be *"Following the death of King George VI, his daughter became Head*

29 When the word *"following"* in RSA3 is construed (as it must be) in the context of the relevant extension and the policy wording as a whole, there can be no doubt that it imposes a requirement that the relevant *"occurrence"* or *"discovery"* must be both a 'but for' and the proximate cause of the interruption:[20]

(a) First, sub-clause 2 of the so-called *"Additional Definition in respect of Notifiable Diseases"*[21] clearly indicates that the results of the business must *"be affected in consequence of the occurrence discovery or accident"* (emphasis supplied);

(b) Second, sub-clause 4 confirms that Insurers' liability is restricted to the loss arising at *"those Premises which are directly affected by the occurrence discovery or accident"* (emphasis supplied). Not only does this again confirm that a *"but for"* relationship is required between the relevant occurrence or discovery and the interruption, but use of the word *"directly"* indicates that the causal relationship must be proximate (see ***PMB Australia Limited v MMI General Insurance Limited & ors*** [2002] QCA 361 at [9]-[12] *per* de Jersey CJ **{K/102/5}**.

---

of State for the United Kingdom"; an example of the second would be *"Following the turn of the 21st Century, Manchester United have become Premier League champions on 8 occasions"*. It would plainly be inconsistent with commercial common sense for the parties to have intended that the word be construed as importing a purely temporal requirement, since it would result in the operation of the extension being triggered by the prior happening of an entirely extraneous event.

[20] Tellingly, not only do the FCA's submissions on RSA3 not address the meaning of the word "following", but they do not engage with sub-clauses 2 and 4 of the so-called *"Additional Definition in respect of Notifiable Diseases"*.

[21] The heading is inapt. In Arch's axiom wording the relevant heading is *"Special Conditions applicable to this clause"*.

30 In paragraphs 931-935 of its Skeleton Argument **{I/1/97-98}**, the FCA contends (in the context of a similar but not identical clause in Argenta1) that its purpose is to exclude losses suffered at premises which were remote from the relevant occurrence. That is not what the words say: in effect, they require the "*occurrence"* (which is a reference back to the "*occurrence…within a radius of 25 miles"*) to be the proximate cause of the relevant losses.

31 Accordingly:

(a) The policyholder must (for the reasons set out above, and in the Defendants' Joint Skeleton Argument on Causation,) demonstrate that:

(i) The relevant losses would not have been suffered *"but for"* the operation of the insured peril (assuming that the insured peril occurred at all); and

(ii) The relevant occurrence "*directly affects*" the insured business (for example, because staff are infected and (1) they have to self-isolate and (2) the premises have to have a precautionary deep clean);

(b) In any event, the requirement for a proximate causal relationship between the peril and the loss could not *pro tanto* be satisfied where, as here, much of the loss would have been sustained in any event on account of the Closure Measures and/or the Social Distancing Measures and/or the presence of COVID-19 throughout the country beyond the prescribed distance of 25 miles.

32 RSA also relies on the trends clause in the business interruption section **{B/19/34}** as limiting its liability under the relevant extension to any loss which would have been

sustained if the insured peril had not occurred,[22] thereby providing an alternative route to the same result. The term *"**Incident**"* is integral to the trends clause, but requires (so far as is relevant) *"Loss or destruction of or **Damage** to **Property** used by **You** at the **Premises**"*. As to that:

(a) It is clear that the term *"**Incident**"* has to be construed – where, as here, the context requires – as encompassing perils insured under the extensions which do not involve damage to the property used by the policyholder:

(i) First, it would be commercially surprising if the parties intended (without such an intention being expressed) that:

(1) The provisions relating to causation and quantification of business interruption claims arising out of damage to insured property would not apply, with appropriate adjustments, to claims caused by non-damage perils insured under the extensions;

(2) The parties should instead be left to debate what approach to take to causation and quantification of business interruption claims caused by non-damage perils insured under the extensions;

(ii) Second, the introductory words to the extensions specifically extend the *"Cover provided by this Section"*: the words *"[cover] provided by this Section"* refer to the principal business interruption insurance, parasitic upon the occurrence of Damage and whose measure of

[22] RSA Amended Defence, paragraph 85 **{A/12/29}**.

indemnity was subject to the *"but for"* test imposed by the adjustments clause. The extended cover was therefore subject to such incidents which applied to the primary cover;

(iii) Third, Extension (vi) **{B/19/38}** (which is a non-damage extension) redefines the start point for the "Indemnity Period" but does not otherwise depart from the contractual definition of that term **{B/19/33}**, which provides that the *Indemnity Period* is the period (ending not later than the "*Maximum Indemnity Period*") *"during which the results of the Business shall be affected in consequence [of the **Incident**]*;

(iv) Extensions (ix), (x), (xi) and (xii) **{B/19/39}** do not require damage to the property used by the policyholder, but none of them makes separate provision as to the applicable *"Indemnity Period"*;

(b) Accordingly, and consistently with the position relating to *"**Damage**"* under RSA1, RSA2.1 and RSA2.2, the references to *"**Incident**"* in the trends clause and associated definitions should, in this context, be recognised as no more than a false description (*"falsa demonstratio non nocet"*) attributable to the fact that the primary business interruption cover under the policy is for losses arising from damage to the property insured.[23] The parties' intent is clear and should be given effect: so far as is relevant, the disease extension in RSA3 responds only to losses caused solely by the occurrence of a notifiable disease within 25 miles and not beyond.

[23] See also ***Tektrol v Hanover*** [2005] EWCA Civ 845, [2005] 2 CLC 339, at [15] *per* Buxton LJ **{K/124/7}**. Attributing to the draftsman of an insurance contract too precise a use of language risks falling into error.

APPLICATION TO ASSUMED FACTS

33 RSA3 policyholders included wholesalers and manufacturers. There are no Assumed Facts which illustrate the experiences of such businesses. An illustrative scenario applicable to such a business might be as follows:

(a) Business "**GCW**" was a greeting card wholesaler operating from a warehouse and adjacent office on an out of town industrial estate, with six full time employees;

(b) From 1 March 2020 GCW saw a reduction in orders placed by its usual customers, who were high street and online greeting card retailers;

(c) From 16 March and then from 23 March 2020 GCW saw a more significant reduction in orders, including a cessation of orders being placed by a number of its customers which were subject to Closure Measures;

(d) GCW was not required to, and did not, close its premises. It furloughed 4 employees and remained operational, making reduced purchases and sales to online businesses.

34 In relation to this business:

(a) There is no indemnity for any of the losses described, which are losses caused by the COVID-19 epidemic and therefore excluded under General Exclusion L;

(b) No indemnity would be available in respect of the reduction in custom which would have occurred in any event even if the insured peril had not occurred;

(c) Had there been no occurrence of COVID-19 within the 25 miles of the premises, B will still have suffered from the general reduction in demand after 1 March 2010;

(d) Further, had there been no occurrence of COVID-19 within 25 miles of the premises:

(i) GCW's business would still have suffered from the impact of the Social Distancing Measures on its customers' customers from 16 March 2020. The Social Distancing Measures were not part of, or caused by, the insured peril;

(ii) GCW would still have suffered from the impact of the Closure Measures on its customers from 23 March 2020. The Closure Measures were not part of, or caused by, the insured peril.

CONCLUSION

35 On the facts asserted by the FCA, there is no cover under RSA3: the assumed losses were caused by an excluded peril, namely an epidemic.

36 Even if the insured peril, in the form of an occurrence of COVID-19 within 25 miles of the insured premises, can be shown to have occurred:

(a) The assumed losses would have been sustained in any event;

(b) The peril was not a cause in fact, still less a proximate cause, of such losses.

APPENDIX 4 to RSA'S SUBMISSIONS: RSA4

INTRODUCTION

1 RSA4 involves two wordings both of which are titled "*Material Damage and Business Interruption Policy"* and branded "*Resilience"*. Both policies are in materially the same terms. The most noticeable difference between the policies is that the lead wording bears the branding of Marsh Limited ("**Marsh"**) while the other bears the branding of Jelf Insurance Brokers Limited ("**Jelf**"), an entity in the Marsh & McLennan group of companies (as evidenced by the Marsh & McLennan logo on the first page of the Jelf wording **{B/78/1}**).[1]

2 Marsh and Jelf were and are insurance brokers which acted at all material times on behalf of insureds. The RSA4 wording is one which was provided to RSA (and other insurers) by Jelf/Marsh,[2] although a general condition stipulates that the wording is *"accepted and adopted as [that] of the Insurer"* **{B/20/20}**.

3 Cover on RSA4 terms was placed by Marsh/Jelf acting for and on behalf of the policyholder – see paragraph 5 of Agreed Facts 9 **{C/15/2}**.

4 RSA4 was used for both SMEs and wholesale insureds. All had insurance brokers acting for them as set out above.

[1] There is no need for the Court to refer to the Jelf Resilience wording, and RSA does not understand why there was thought to be any need for it to be included in the trial bundle.

[2] See Agreed Facts 9, paragraph 5 **{C/15/2}**.

THE POLICY

5 RSA4 provides Material Damage **{B/20/6}** and Business Interruption Insurance **{B/20/7}**.

6 The wording provides **{B/20/2}** that:

> "*This policy wording and its Schedule and any appendices or endorsements are one contract…".*

7 The policy is structured so that it sets out, the perils insured (both Material Damage and Business Interruption), followed by Extensions, Exclusions, Claims Conditions, General Conditions and then a lengthy, and detailed, definitions section within which the basis of settlement provisions are located.

8 Clause 2.1 deals with business interruption in the event of Damage to Property Insured and Clause 2.2 with business interruption in the event of Damage to Property Insured as a result of an Act of UK Terrorism. At clause 2.3, under the heading "*BUSINESS INTERRUPTION - SPECIFIED CAUSES*", RSA4 provides as follows:

> "*In the event of interruption or interference to the **Insured's Business** as a result of:…*
>
> *viii.* ***Notifiable Diseases & Other Incidents:***
>
> *…*
>
> *d. occurring within the **Vicinity** of an **Insured Location,***
>
> *during the **Period of Insurance**…*
>
> *xii.* ***Prevention of Access – Non Damage** during the **Period of Insurance** where such interruption or interference is for more than eight (8) consecutive hours…*
>
> *within the **Territorial Limits**, the **Insurer** agrees to pay the **Insured** the resulting **Business Interruption Loss.**"*

9 The definition of ***"Notifiable Diseases & Other Incidents"*** (see definition 69) **{B/20/29}** has five sub-clauses: the first two relate to notifiable diseases in humans and the third to notifiable diseases in animals; the fourth relates to potential chemical, biological and radiological hazards, and the fifth to enforced closure due to defective sanitation or health concerns. Thus the first three sub-clauses relate to notifiable diseases and the last two to *"Other Incidents"*. The second and fifth sub-clauses are relied upon by the FCA and are in the following terms:

> "*69.* ***Notifiable Diseases and Other Incidents*** *means:*
>
> *...*
>
> *ii. any... diseases notifiable under the Health Protection Regulations (2010), where a disease occurs and is subsequently classified under the Health Protection Regulations (2010) such disease will be deemed to be notifiable from its initial outbreak*
>
> *....*
>
> *v. defective sanitation or any other enforced closure of an* ***Insured Location*** *by any governmental authority or agency or a competent local authority for health reasons or concerns…*
>
> *..."*

10 The term ***"Prevention of Access – Non Damage"*** (see definition 87) **{B/20/30}** includes:

> *"i. the discovery of a bomb or similar suspect device or the threat, hoax or deceptive information of a bomb or similar suspect device ... in the* ***Vicinity*** *of the* ***Insured Locations****;*
>
> *ii. the actions or advice of the police, other law enforcement agency... governmental authority or agency in the* ***Vicinity*** *of the* ***Insured Locations****... and/or*
>
> *iii. the unlawful occupation of ... other property in the* ***Vicinity*** *of the* ***Insured Locations*** *by any individuals ...*
>
> *which prevents or hinders the use of or access to* ***Insured Locations*** *during the* ***Period of Insurance****."*

11 The term "***Vicinity***" therefore features in each of the potentially relevant insured perils. It is defined (see definition number 120 **{B/20/35}**) as:

> "*…an area surrounding or adjacent to an **Insured Location** in which events that occur within such area would be reasonably expected to have an impact on an **Insured** or the **Insured's Business".***

12 The term *"Business Interruption Loss"* includes, so far as is relevant, *"Reduction in Turnover"* (see definition number 9 **{B/20/23}**) which in turn is defined to comprise, so far as is material, "*the amount by which the **Turnover** during the **Indemnity Period** falls short of the **Standard Turnover**".*

13 The term *"Standard Turnover"* is defined as:[3]

> *"…the **Turnover** during that equivalent period before the date of any **Covered Event** which corresponds with the **Indemnity Period** to which adjustments have been made to take into account the trend of the **Insured's Business** and for variations in or other circumstances affecting the **Insured's Business** either before or after the **Covered Event** or which would have affected the **Insured's Business** had the **Covered Event** not occurred so that the figures thus adjusted will represent as nearly as may be reasonably practicable the results which but for the Covered Event would have been obtained during the **Indemnity Period**.*"

14 The term "*Covered Event*" includes the Notifiable Disease & Other Incidents, and Prevention of Access – Non Damage, perils set out above: see definition number 17 **{B/20/23}**.

15 Limits of indemnity in relation to different business interruption insuring provisions are expressed in the policy Schedule as being for *"any one **Single Business Interruption Loss**"* **{B/20/33}**.

16 The term ***"Single Business Interruption Loss"*** is defined as being:[4]

[3] See definition number 107 **{B/20/34}**.

*"i. all **Business Interruption Loss** and **Business Interruption Costs & Expenses** (...) and any amounts payable under Extensions that arise from, are attributable to or are in connection with a single occurrence, except in respect of **Cyber Events, Earthquakes, Floods, Storms** and riots, civil commotion and acts of malicious persons;*

*ii. in respect of **Cyber Events**, all **Business Interruption Loss** and **Business Interruption Costs & Expenses** (...) and any amounts payable under Extensions that arise from, are attributable to or are in connection with a single originating cause;*

*iii. in respect of **Earthquakes, Floods, Storms** and/or riots, civil commotion and acts of malicious persons, all **Business Interruption Loss** and **Business Interruption Costs & Expenses** (...) and any amounts payable under Extensions that arises as a consequence of **Damage** to **Property Insured** occurring during any one period of seventy two (72) consecutive hours of such **Earthquakes, Floods, Storms** and/or riots, civil commotion and acts of malicious persons and which will be deemed to have arisen from a single occurrence.*

..."

THE INSURED PERILS

Covered Event 2.3 (viii) – Notifiable Diseases & Other Incidents

17 The peril insured against is [1] *"Notifiable Diseases & Other Incidents"* [2] *"occurring within the Vicinity of an insured location"*.

18 In the context of the Test Case, this can be broken down into two potential perils:

(a) The first is: *"An additional disease[..] notifiable under the Health Protection Regulations (2010) [which is] deemed to [have been] notifiable from its initial outbreak ... occurring within the **Vicinity** of an **Insured Location**"*. RSA refers to this as the *"*Notifiable Diseases Peril*"*;

(b) The second is: *"... enforced closure of an **Insured Location** by any governmental authority or agency or a competent local authority for health*

[4] See definition number 105 **{B/20/33}**.

reasons or concerns … occurring within the ***Vicinity*** *of an* ***Insured Location****"*. RSA refers to this as the *"*Enforced Closure Peril*"*.

19 The requirement (contained within both the Notifiable Diseases Peril and the Enforced Closure Peril) that the peril *"[occur] within the Vicinity of an insured location"* is referred to as the "Vicinity Requirement". Therefore, whether the trigger is the notifiable disease or the enforced closure by a governmental authority for health reasons or concerns, the notifiable disease or the health reasons or concerns (respectively) have to occur within the "Vicinity" of the Premises. This leads to two questions:

(a) First, as to the proper construction of the term *"Vicinity"*; and

(b) Second, whether the relevant insured event must be one specific to the *"Vicinity"* or can be something which takes place over a wide area which encompasses the *"Vicinity"*.

The Notifiable Diseases Peril

20 In England, COVID-19 is a notifiable disease pursuant to the *Health Protection (Notification) Regulations (2010).* Under RSA4, a disease required to be notified pursuant to these Regulations is a notifiable disease under the policy not from the date that the disease is listed as notifiable, but from its initial outbreak. The initial outbreak should be dated from when the first positive test for COVID-19 occurred in England, on 31 January 2020 (see Agreed Facts 1 **{C/1/3}**). The FCA's suggestion that the relevant date should be 31 December 2019[5] is:

[5] Amended Particulars of Claim, paragraph 40 **{A/2/25}**.

(a) Plainly wrong, given the overarching requirement for the disease to occur within the territorial limits;

(b) At best academic, given the Vicinity Requirement.[6]

21 The FCA and HIGA seek to draw a wider point from this retrospectivity aspect of the clause. Namely that it shows that RSA4 "*treats an 'outbreak' of the disease as a unitary phenomenon"*,[7] or that RSA require the policyholder to (with emphasis as per the original) "*identify the outbreak of the new disease wherever that occurred"*.[8] RSA infers that this point is an attempt to undermine RSA's case that the only causally relevant incidences of notifiable disease are those within the Vicinity of the Premises. If so, then the point made by the FCA and HIGA is a bad one. The retrospective element:

(a) Was plainly intended to deal with a case where there is an outbreak of disease and a short delay whilst it is deemed notifiable, to avoid the sort of problem which arose in ***New World Harbourview Hotel v ACE Insurance*** [2011] Lloyd's Rep IR 230, where there had been a delay of just over a month between the first occurrence of SARS in Hong Kong and its designation as a notifiable disease;[9]

(b) Is irrelevant to the geographic scope of the insured peril.

---

[6] As the FCA has now accepted at paragraph 127 of its Skeleton Argument **{I/1/50}**.

[7] FCA submission paragraph 980 **{I/1/312}**

[8] HIGA submission paragraph 50 **{I/2/15}**

[9] Reyes J held (at [50]-[54] that cover for SARS under a notifiable disease clause ran only from the date on which it became notifiable **{J/110/5}**.

The Enforced Closure Peril

22 The alternative peril under Covered Event 2.3 requires "*enforced closure of an Insured Location by any governmental authority or agency or a competent local authority for health reasons or concerns"*.

23 The FCA's case is that the "*enforced closure*" requirement is satisfied by either or both of the Closure and the Social Distancing Measures.[10]

24 RSA:

(a) Accepts that if and to the extent that Premises insured under RSA4 were ordered to close in full or in part that this could amount to "*enforced closure"*. Given the range of potential insureds the circumstances of each would need to be considered against the relevant legislation in order to determine whether the Premises (that is to say the physical premises rather than the insured's business) was in fact forced to close. Take, for example, a restaurant which has space for around 10 diners to eat in but is predominantly used as a takeaway:

(i) Other than at the weekend those seats are solely used by takeaway/collection customers to wait for their food;

(ii) The 21 and 26 March Regulations required the dining/waiting area to be shut, but customers could enter the premises one by one to collect their takeaways. The 21 and 26 March Regulations permitted the chefs to continue cooking the food in the kitchen, as before;

[10] Amended Particulars of Claim, paragraph 46.5 **{A/2/31}** and 47.5 **{A/2/33}**.

(iii) Even if the FCA were to maintain that there is some form of 'enforced closure' in relation to premises which were palpably not closed, the fact that chefs can work in the kitchen and the public can come into the same (closed) dining area to pick up their food, contradicts the possibility that it could be for "*health reasons or concerns*";[11]

(b) Does not accept that the Social Distancing Measures could or did amount to "*enforced closure".* The wording of the peril requires nothing less than some form of legal compulsion to close the Premises. Anything less would not be sufficient to trigger the cover because such measures would not be ones which:

(i) Forced the Premises to close (as opposed to, for example, reduced footfall to the Premises);

(ii) Were capable of being *"enforced"*, because there was no obligation of compliance, no penalty for non-compliance and no mechanism for enforcing compliance.[12].

25 The FCA submits that "*health reasons or concerns*" is "*very broad indeed",* does not require there to be a case of COVID-19 in the *"Vicinity"* and extended to health reasons or concerns relating to the national position that led to nationwide action (affecting areas such as the Scilly Isles where there was no identified presence of

[11] Alternative the point can be taken at the causation stage: if the takeaway business is interrupted because of (1) a lack of a waiting area, or (2) general concerns over COVID19, then any interference with that part of the business was not as a result of "enforced closure".

[12] FCA submission paragraph 123 **{I/1/48}**.

COVID-19).[13] RSA does not accept this proposition. The phrase takes its colour from the remainder of the clause. The health reasons or concerns must not be of a general global or national nature but must arise from matters *"occurring in the Vicinity*".

The Vicinity Requirement – Construction of "Vicinity"

26 The following points of general application can be made:

(a) To borrow from Christopher Clarke LJ's judgment in ***Astrazeneca Insurance Co Ltd* v *XL Insurance (Bermuda) Ltd*** [2014] Lloyd's Rep. I.R. 509 at [32],[14] *"the shell within which the pearl of [the insured peril] must be found"* is an "*event*" – see the contractual definition of "***Covered Event***" **{B/20/23}**. The word "*event*" is to be construed as something happening *"at a particular time, at a particular place, in a particular way"*, and is to be contrasted with a continuing state of affairs – see ***Axa Reinsurance v Field*** [1996] 1 WLR 1026 *per* Lord Mustill at p.1035G;[15]

(b) The requirement that the notifiable disease, or health reasons or concerns, have to occur within the *"Vicinity"* of an Insured Location is plainly intended to operate as a factor which limits the application of the relevant Covered Event;

(c) The ordinary meaning of "vicinity" is *"an area around"* a place.[16] Although the *"Vicinity"* is a defined term, it is permissible to have regard to its ordinary

[13] FCA Submission paragraph 575 **{I/1/200}**.

[14] **{K/154/8-9}**

[15] **{J/74/10}**

[16] See, by way of example, https://dictionary.cambridge.org/dictionary/english/vicinity **{K/215.1/2}**.

meaning in order to construe the definition – see ***Birmingham City Council v Walker*** [2007] 2 WLR 1057 *per* Lord Hoffmann at [11];[17]

(d) The meaning of "*Vicinity*" must be determined as at the date of inception.[18] Accordingly, the interpretation of this phrase cannot be informed by hindsight and must instead be construed prospectively; and

(e) The policy wording requires a single meaning of "*Vicinity*" for each insured location, albeit one that is fact-sensitive to the nature of both the locality and the business carried on from the "*Insured Location*" – to that extent there is flexibility in the meaning. The FCA submits that it is a "*deliberately variable rather than an absolute limit, that allowed for different events to have a different range for their possible effects".*[19] No basis or reasoning is given for this contention, presumably because there is none. The FCA's submission would require the impermissible rewriting of the definition (for example by the inclusion of specific reference to *"the Covered Events"* rather than the clearly non-specific *"events"*) to permit of multiple rather than (as drafted) a single meaning.

27 "*Vicinity"* is defined as [1] "*an area surrounding or adjacent to an Insured Location"* [2] "*in which events that occur within such area would be reasonable expected to have an impact on an* ***Insured*** *or the* ***Insured's Business***".

[17] **{K/129/5}**

[18] ***Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The 'Ocean Neptune')*** [2018] 1 Lloyd's Rep 654: *"The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract, would have understood the parties to have meant"* **{K/176/7}**.

[19] FCA submission paragraph 984 **{I/1/313}**.

28 So far as [1] is concerned, the words used in the definition, particularly when seen in context, indicate a physically circumscribed (as opposed to an expansive) meaning of vicinity, because:

(a) Since any *"health reasons or concerns" "in the Vicinity"* had to result in closure of the Insured Location, it is natural to suppose that the health reasons or concerns had to relate to some event or condition in an area which was close to the Insured Location;

(b) The words "*area surrounding or adjacent to"* suggests close spatial proximity to the Premises. There can be no doubt that the phrase *"adjacent to"* means just what it says on the tin and provides a clear guide to the construction of *"surrounding"* – plainly the parties could not have intended that the two alternatives would produce results so different as to stand the meaning of the clause on its head according to which was selected.[20] If and to the extent that it is necessary to do so RSA submits that an application of the *noscitur a sociis* maxim leads to the conclusion that "*surrounding*" has to be construed in a manner which is consistent with the use of the phrase *"adjacent to"*. [21] The FCA's and HIGA's contention that because the UK "surrounds" the Premises it can comprise the Vicinity should be rejected;[22]

[20] *cf* ***Lloyds TSB General Insurance v Lloyds Bank Group Insurance*** [2003] 4 All ER 43 (HL) *per* Lord Hoffmann at [25] **{K/108/8}**.

[21] ***Chitty on Contracts*** (33rd Edition), paragraph 13-100 **{J/145/45}**.

[22] FCA submission paragraph 985 **{I/1/313}**. HIGA submission paragraph 60 **{I/2/17}**.

(c) The other perils insured under Covered Event 2.3(viii)(a)-(c) **{B/20/7}** involve events at the Premises[23], making it implausible that the geographical ambit in (d) should effectively be unlimited.

29 So far as [2] is concerned:

(a) "Events" (plural) is not to be construed by reference to a particular event (singular) which supports the submission that there is one geographic area comprising the "*Vicinity*" for each insured location;

(b) "Events" is not even to be construed by reference to the specific insured perils. If that had been the parties' intention then they could have used the defined term "Covered Events" but they did not;

(c) The word "*events*" is to be construed as set out above; and

(d) It must be "*reasonably expected*" that (non-specific) events in the relevant area would have an impact on an insured or its business at the time the policy incepted. As to that:

(i) The words "*reasonably expected*" require something much more than a mere possibility;[24] and

(ii) "Impact" suggests having a strong or powerful effect.[25]

---

[23] "*Notifiable Diseases & Other Incidents: (a) discovered at an* ***Insured Location****; (b) attributable to food or beverages supplied at or from the* ***Insured Locations****; (c) which are reasonably likely to result from an organism discovered at an* ***Insured Location****…".*

[24] See https://dictionary.cambridge.org/dictionary/english/expected: *"believed to be going to happen"* **{K/215/5}**.

[25] https://dictionary.cambridge.org/dictionary/english/impact **{K/215/7}**.

30 When considered against this background, the FCA's primary and secondary case on "Vicinity" should be rejected.

31 The FCA's primary case is that the "Vicinity" comprises the entirety of the UK. The reason given for this is that COVID-19 was a national epidemic requiring a national response and affecting business on a national basis.[26] This case fails at all levels of analysis:

(a) It ignores, and makes redundant, the intention that the word should impose a geographical limitation;[27]

(b) It proceeds on the premise that the COVID-19 national pandemic is the "*event*" which determines the meaning of the definition of *"Vicinity"*. This is wrong because:

(i) It involves construing the policy through the prism of hindsight (which is plainly not what is contemplated by the relevant definition);

(ii) It impermissibly conflates the faintest possibility that something unprecedented *might* happen with an expectation that it *would*;

(iii) It ignores that the definition involves "events" plural and focuses upon only one event;

[26] Amended Particulars of Claim, paragraph 41.5(a) **{A/2/27}**.

[27] Indeed, if the FCA were correct as a matter of principle there would be no obvious reason (but for the Territorial Limits) why the *"Vicinity"* of an Insured Location of a business engaged in international trade would not extend to anywhere in the world with which the policyholder did business.

(iv) COVID-19 was and is an enduring public health emergency. That is a continuing state of affairs, not an "event" for the purposes of the Vicinity definition (or otherwise), [28] and

(v) The COVID-19 pandemic, and the response of national governments to it is wholly unprecedented and cannot sensibly be said to fall within the category of events which would be reasonably expected. Both the FCA and HIGA seek to refute this by praying in aid the existence of previous global pandemics such as SARS.[29] This bears no comparison. They each involved localised, rather than national, shutdowns in countries on different continents to the UK.[30] They provide no basis for the creation of a (prospective) "reasonable expectation" that events in the UK as a whole would have an impact upon the premises. As the FCA sets out in its own submissions, until 22 January 2020 the UK Government was still designating the UK wide risk level as "*very low*".[31]

---

[28] A point supported by the FCA in paragraph 183.2 of its submission which states "*The suggested division approach is even weaker in the case of something, such as a disease, which is not an event but is a long term occurrence"* **{I/1/69}.**

[29] FCA submission paragraph 986 **{I/1/313}** and HIGA submission paragraph 41**{I/2/13}**. In a similar vein, HIGA prays in aid Exclusion 5 in RSA4 which excludes from the BI cover for cyber events loss "*arising directly from a failure of any core element of the internet infrastructure that results in a countrywide or global outage of the internet"* **{B/20/12}** and says, at paragraphs 73 and 77 of its skeleton that it is significant that no pandemic exclusion was included in RSA4 **{I/2/20}**. This is misconceived. As set out in the submissions on construction at paragraph 5, the absence of an exclusion cannot be used as an aid to assist in the construction of what is in the policy **{I/5/3}**.

[30] FCA submission paragraph 28 **{I/1/16}.**

[31] FCA submissions paragraph 34 **{I/1/19}.**

32 The FCA's secondary case is that the meaning of "*Vicinity*" is a question of fact to be determined in each case save that "*the occurrence within at least the same city, town, village or other development is always occurrence within the Vicinity"*.[32] RSA accepts that each case is fact specific but denies that "*Vicinity*" will always include "*at least the same city, town, village or other development"* because:

(a) The FCA's assertion in relation to cities/towns/villages etc contradicts its acceptance that each case is fact specific. On the FCA's interpretation, the vicinity for a small convenience store in Marylebone (serving the people who live and work close by) and a high fashion retailer located on Oxford Street would be the same - London. Further the use of the term "*city, town, village or other development*" is itself inherently uncertain. Greater London, for example, may embrace a very large area indeed;[33]

(b) Whilst it does ascribe some meaning to Vicinity it does not do so in a way which takes account of the nature of the business insured, the particular nature of the locality or the restrictive language used.

[32] Amended Particulars of Claim, paragraph 41.5(b) **{A/2/27}** albeit RSA notes that this has been watered down in the FCA's Skeleton Argument so that it is now said (at paragraph 988 **{I/1/314}**) that "*an occurrence of COVID-19 within at least the same city, town, village or other development is always likely to be an occurrence within the Vicinity*".

[33] *Riley on Business Interruption Insurance 10th Edition, para 10.32,* states in relation to the word "Vicinity" (absent a policy definition) "*In practice, much depends on the locality in which the insured business is located. In the centre of London, vicinity may be only a matter of a few hundred metres, yet in more remote, rural areas a road closed 10 miles away due to damage to a building could require a significant detour"* **{J/154/31}**.

Application of the "Vicinity" Requirement

33 As to whether the relevant insured event must be one specific to the *"Vicinity"* or can be something which takes place over a wide area which encompasses the *"Vicinity"*, the following all militate in favour of the former and against the latter construction:

(a) The use of the word *"events"* in the definition of *"Vicinity"* **{B/20/35}**;[34]

(b) The use of the word *"events"* in the definition of *"Covered Event"* **{B/20/23}**;[35]

(c) The relevant limit of indemnity is set by reference to *"a single occurrence"* – see the Schedule **{B/20/}** and the applicable definition of "***Single Business Interruption Loss"*** **{B/20/33-34}** (compare and contrast with the definition of "***Single Business Interruption Loss"*** applicable to *"Cyber Events"*). The term "occurrence" is to be construed in like manner to "event" – see ***Countrywide v Marshall*** [2003] Lloyd's Rep IR 195 *per* Morison J at [15] **{K/104/6-7}**;

(d) The use of the verb *"occurring"* in Covered Event 2.3(viii)(d) again suggests the need for an *"occurrence"*;

(e) The "*Notifiable Disease*" or "*Other Incident*" must happen *"within"* the "*Vicinity*" of an Insured Location. This means that what falls within the

[34] See ***Axa Reinsurance v Field*** at p.1035G **{J/74/10}**.

[35] Ibid.

insured peril (and proximately causes the relevant interruption) must happen inside, and not beyond, the "*Vicinity*";[36]

(f) The latter construction would render the Vicinity Requirement nugatory because it would mean that an occurrence within the Vicinity would then trigger insurance cover for losses consequent upon the event over a wider area and not confined to the Vicinity of the Premises.

Prevention of Access – Non Damage

34 The peril insured against is [1] "*the actions or advice of the police, other law enforcement agency, military authority, governmental authority or agency in the **Vicinity** of the **Insured Locations**"* [2] "*which prevents or hinders the use of or access to **Insured Locations** during the **Period of Insurance.**"*

"[A]ctions or advice of the… governmental authority or agency in the Vicinity of the Insured Locations" (requirement [1])

35 Paragraphs 26 to 32 above are repeated in relation to the meaning of "*Vicinity*"[37].

36 RSA accepts that the Closure and Social Distancing Measures constituted advice or actions of central Government on a nationwide scale. However, and for the same reasons as those set out in paragraph 33 above, the clause requires and only provides

[36] See https://dictionary.cambridge.org/dictionary/english/within. The ordinary meaning of the word "within" includes *"not beyond"* **{K/215/16-17}**.

[37] For the purpose of this clause, the point in paragraph 28(c) remains a good one when the other perils included within the definition of "*Prevention of Access – Non Damage*" are taken into account. They comprise: "*(i) the discovery of a bomb or similar suspect device… at the **Insured Locations** or in the **Vicinity** of the **Insured Locations"*** and *"(iii) the unlawful occupation of the **Insured Locations** or other property in the **Vicinity** of the **Insured Locations** by any individuals…"*. Again, when these are considered, it is implausible that the geographical ambit in (ii) should effectively be unlimited.

insurance against actions or advice which are specific to the Vicinity of the Premises (even if they also impact a wider area).

"*Which prevents or hinders the use of or access to [the Premises]" (requirement [2])*

37 RSA accepts that, insofar as Premises were subject to Closure Measures this constituted a prevention or hindrance to the *use* of those Premises. It is therefore not necessary, in the context of this Covered Event, to debate whether the Closure Measures prevented or hindered *access* to the Premises.

38 So far as the Social Distancing Measures (in isolation) are concerned:

(a) They did not physically stop anyone from entering or exiting the property concerned and consequently cannot comprise something which prevented or hindered *access* to the Premises;

(b) Nor did they prevent or hinder the *use* of the Premises. The Premises remained available to be used by the insured for the purposes of the insured business and could be visited by (potential) customers. By way of example, the Social Distancing Measures did not stop clothes shops from opening to sell clothes: the prevention or hindrance on the use of such premises arose from the Closure Measures.

39 When the prevention or hindrance to the use of or access to the Premises is identified then the use of the connecting word "*which*" means that the prevention or hindrance must be as a direct consequence of the action of the governmental authority (etc) <u>in the Vicinity of the Premises</u>. However, in the context of COVID19, the necessary linkage is absent: the prevention or hindrance etc was attributable to <u>national</u> measures imposed to mitigate the spread of COVID19.

CAUSATION

Overlapping Perils

40 At paragraphs 593 and 594 of its Skeleton Argument **{I/1/205}**, the FCA asserts that RSA cannot have intended that the causation consequences pleaded in its defence should apply because the effect would be that when more than one of the clauses was engaged they would cancel each other out.

41 This issue was considered in *Orient Express* as follows **{J/106/7-8}**:

> *"28. OEH submits that the logical consequence of the application of the "but for" test in the present case would be that it would recover neither under the main insuring clause (because "but for" the damage the loss would still have occurred due to the vicinity damage or its consequences) nor under the POA or LOA (because "but for" the prevention of access and/or loss of attraction the loss would still have occurred due to the damage to the hotel)."*

42 The position was, therefore, stark in *Orient Express*, because it was said that*:*

(a) Under the main insuring clause, business interruption loss to the hotel was not recoverable because the correct counterfactual assumed that the hotel was undamaged but the loss was suffered in any event because of the wider damage;

(b) Under the POA/LOA clauses, business interruption loss to the hotel was not recoverable because the correct counterfactual assumed that there was no wider damage but the loss was suffered in any event because of the damage to the hotel.

43 The answer given by Hamblen J. to this point was as follows (<u>emphasis</u> supplied) **{J/106/9}**:

> *"39. Further, it is not the case that the application of the "but for" test means that there can be no recovery under either the main insuring clause or the POA or LOA. If, for the purpose of resisting the claim under the main insuring clause, Generali asserts that the loss has not been caused by the damage to the hotel because it would in any event have resulted from the damage to the vicinity or its consequences, it has to accept the causal effect of that damage for the POA or LOA, as indeed it has done. It cannot have it both ways. The "but for" test does not therefore have the consequence that there is no cause and no recoverable loss, but rather a different (albeit on the facts, more limited) recoverable loss."*

44 The POA clause in *Orient Express* responded whether or not the property insured was damaged, so the issue which is said to have caused concern may not in fact have arisen.[38] So far as this case is concerned, where more than one peril in RSA4 is engaged (which RSA say it is not) then RSA submits that the issue is essentially a question of policy construction, which would only arise if the Court were to find that more than one insured peril might have occurred.

Application

45 The correct identification of the appropriate counterfactual depends upon the Court's findings in relation to which, if any, insured perils have occurred.

46 Any interruption or interference with the Insured's Business would have been caused either by the general presence of COVID-19 in the country as a whole or by the Closure Measures and/or Social Distancing Measures.

47 Neither the general presence of COVID-19 in the country nor the Closure Measures nor the Social Distancing Measures were caused by:

(a) The occurrence of a notifiable disease within the "Vicinity" of an Insured Location;

[38] Paragraph 14 **{J/106/4}**

(b) Health reasons or concerns within the "Vicinity" of an Insured Location.

48 Further, as above, any prevention of access to an Insured Location was attributable to national measures imposed to mitigate the spread of COVID-19 and not to *"actions or advice of the police, other law enforcement agency ... governmental authority or agency in the **Vicinity** of the **Insured Locations**"*. Accordingly, the FCA cannot establish that any "*interruption or interference to the **Insured's Business**"* was "*as a result of*" the occurrence of any of the perils insured under RSA4.

49 Pursuant to RSA4, RSA agreed to pay the insured "*the resulting Business Interruption Loss"*. The word *"resulting"* is equivalent to the use of the phrase "*resulting from"* and indicates a requirement for a "*but for*" and a proximate causal relationship between the peril and the loss.

50 RSA also relies on the definition of "*Standard Turnover*" in RSA4 as limiting RSA's liability under clause 2.3 of the BI Cover to any loss of Turnover occurring solely as a result of the Covered Event by making adjustments to the loss so as to strip out of the analysis "*circumstances affecting the Insured's business"*, whether before or after the Covered Event which "*would have affected the Insured's Business"* had the Covered Event not occurred. The Covered Event is defined to mean the particular matters described in, inter alia, Insuring Clause 2.3, not some different or wider circumstances. This provides an alternative route to the same result as the standard causation analysis. In short, the assumed losses would be recoverable only if the insured could establish that but for the Covered Event they would not have suffered all (or part of) the assumed loss.

51 As set out in the context of RSA1, the correct counterfactual is one in which the insured peril is absent but otherwise matters remain the same. In the case of RSA4,

this means that the Court must consider the position of the insured if the relevant insured peril (as construed by the Court) had not occurred.

52 The Notifiable Diseases Peril. If there had not been an occurrence of COVID-19 within the Vicinity of the Premises then COVID-19 would still have been present elsewhere in the country and the Closure and Social Distancing Measures would all still have been in place and the assumed losses would still have been suffered.

53 The Enforced Closure Peril:

(a) If the Social Distancing Measures do not form part of the peril insured, then the correct counterfactual assumes that the Premises would not have been closed by the Closure Measures but that the Closure Measures (insofar as they applied to other premises) and Social Distancing measures would otherwise have remained in place. In this scenario, any assumed losses which would still have been suffered (whether in whole or in part) due to the application of the Closure Measures other than at the Premises, the Social Distancing Measures generally and/or the facts and matters set out in paragraph 17 of RSA'S Defence **{A/12/6-7}** and/or in Agreed Facts 8 **{C/14/1-2}** would be irrecoverable;

(b) If the Social Distancing Measures do form part of the peril insured then the correct counterfactual assumes that the Premises would not have been closed by the Closure or Social Distancing Measures but that those measures would otherwise have remained in place. In this scenario, depending upon the nature of the business, any assumed losses which would still have been suffered (whether in whole or in part) due to the application of the Closure and Social Distancing Measures other than at the Premises and/or the facts and matters

set out in paragraph 17 of the RSA Defence and/or Agreed Facts 8 would be irrecoverable.

54 Prevention of Access-Non Damage. If the government actions which prevented/hindered the use of or access to the Premises had not occurred then the insured's business would still have been impacted by the Closure and/or Social Distancing Measures (depending upon what the Court finds falls within the peril insured) and/or the facts and matters set out in paragraph 17 of the RSA Defence and/or Agreed Facts 8. Any losses which would still have been suffered (whether in whole or in part) due to such matters would be irrecoverable.

55 Alternative Counterfactual. The alternative counterfactual is one in which there is no disease in the "Vicinity" of the Insured Location and no Social Distancing or Closure Measures in place; but everything else (including the presence of COVID19 within the UK generally) remained the same. Any resultant economic impact (as to which, see Agreed Facts 8) would not be the result of the Social Distancing or Closure Measures, but would have happened anyway, irrespective of (or but for) those Measures. Accordingly, such impact could not proximately have been caused by any of the insured perils, and, as a result, would be irrecoverable.

APPLICATION TO ASSUMED FACTS

56 Taking the Assumed Facts for Category 1 **{E/2/2}** as an example. Category 1 businesses included restaurants which were required to close, save for the sale of food or beverages for consumption off the Premises:

(a) From 1 March 2020 Business AA began to experience a downturn in trade because of increasing concern about COVID-19. As the Social Distancing Measures were not put in place until 16 March 2020, the fact of this downturn in itself establishes that, on a "*but for*" analysis, if one of the insured perils *did* subsequently eventuate then Business AA would still have suffered some or all of the assumed loss in any event;

(b) From 17 March 2020, when the Social Distancing Measures were in place, Business AA suffered a further downturn in trade but did not close. However, none of the insured perils have eventuated or loss been suffered as a result of those perils because the loss of revenue: is not a consequence of an occurrence of a notifiable disease in the vicinity and the Social Distancing Measures comprise neither "*enforced closure*" nor prevention or hindrance to the use or access to the Premises;

(c) In accordance with the 21 March Regulations, Business AA did not open on 21 March 2020. Whilst it is accepted that this closure constituted an "*enforced closure*" it was not as a consequence of health reasons or concerns in the "*Vicinity*". Further, it is accepted that this constituted prevention or hindrance of use or access to the Premises but not which was as a consequence of governmental action in the "*Vicinity*" of the Premises;

(d) Business AA reopened on 1 May 2020 to operate a takeaway food and drink service. From that date while the dining room may still have been subject to enforced closure the remainder of the Premises was not.

57 Further, taking the Assumed Facts for Category 3 **{E/4/2}** as an example. Category 3 businesses were ones which were not impacted by the Closure Measures because they were permitted to stay open. Consequently, only the Social Distancing Measures could be said to give rise to one of the insured perils if (contrary to RSA's case) the Social Distancing Measures can comprise "*enforced closure"* for the purpose of the "Other Incidents" clause or hindrance to "*the use of or access to"* the Premises for the purposes of the Prevention of Access-Non Damage clause. Considering the time periods set out in the summary table **{E/1/2}**:

(a) From 1 March 2020, Business CC experienced a downturn in business due to COVID-19. As the Social Distancing Measures were not put in place until 16 March 2020, the fact of this downturn in itself establishes that on a "*but for*" analysis if one of the insured perils did then eventuate Business CC would still have suffered some or all of the assumed loss in any event;

(b) On 3 and 10 March 2020 there were incidences of COVID-19 within 25 miles and 1 mile of the Premises respectively. The assumed facts contain insufficient information to enable a determination to be made as to whether "the Vicinity" of the Premises extends to these geographical locations. However, even if it did, so far as the Notifiable Disease provision is concerned (which is the only peril to which the fact of the incidences of COVID-19 could be relevant) these were of no causal relevance to the Social Distancing Measures which, on this hypothesis, caused Business CC the assumed loss;

(c) The downturn in business from 21 March 2020, which led to closure from 13 April 2020 to 11 May 2020, may have been impacted by the Social Distancing Measures but, as Business CC's experience from 1 March 2020 shows, were not caused entirely by those measures.

CONCLUSION

58 The term *"Vicinity"* is to be construed as being fact sensitive to the nature of the insured business and its location, but as requiring close spatial proximity.

59 The relevant insured perils are all events specific to the *"Vicinity"* of an "*Insured Location"*. Events affecting a wide area which happens to encompass an Insured Location do not fall within the insured perils. Further, and as the FCA rightly accepts,[39] the COVID-19 epidemic is not an event.

60 The FCA cannot establish the necessary causal link between the relevant events and any *"interruption or interference to the Insured's Business"*. It follows that the FCA cannot establish the occurrence of any insured peril.

61 Even if the FCA could establish the occurrence of any insured peril, RSA4 will not respond to business interruption losses which would have been sustained in any event as a result of the wider impact of the Closure and/or Social Distancing Measures or the impact of the facts and matters set out in paragraph 17 of the RSA Defence and/or Agreed Facts 8.

[39] FCA Skeleton Argument, paragraph 183.2 **{I/1/70}**.