Claim No. FL-2020-000018

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS

COMMERCIAL COURT (QBD)

FINANCIAL LIST

FINANCIAL MARKETS TEST CASE SCHEME

Before: The Honourable Lord Justice Flaux and the Honourable Mr Justice Butcher

BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Claimant ("FCA")

-and-

(1) ARCH INSURANCE (UK) LTD

(2) ARGENTA SYNDICATE MANAGEMENT LTD

(3) ECCLESIASTICAL INSURANCE OFFICE PLC

(4) HISCOX INSURANCE COMPANY LTD

(5) MS AMLIN UNDERWRITING LTD

(6) QBE UK LTD

(7) ROYAL & SUN ALLIANCE INSURANCE PLC

(8) ZURICH INSURANCE PLC

Defendants ("Insurers")

-and-

(1) MURRAY & EMILY PULMAN T/A THE POSH PARTRIDGE

(2) BLUEBERRY ENTERPRISES LTD

(3) OTHERS INSURED BY QBE UK LTD OR AVIVA INSURANCE LTD

First Interveners ("HIGA")

-and-

(1) COMFOMATIC LTD

(2) 368 OTHERS INSURED BY HISCOX INSURANCE COMPANY LTD

Second Interveners ("HAG")

HIGA'S SKELETON ARGUMENT FOR TRIAL

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PART I: INTRODUCTION

A. THE STRUCTURE OF THIS SKELETON ARGUMENT

1. This skeleton addresses the policy wordings relevant to the HIGA Interveners; RSA4, QBE1, QBE2 and QBE3. Brief details of the HIGA Interveners are first set out at Section B below. Each of the relevant policies is then considered in turn, with the analysis following the structure of the List of Issues but insured peril by insured peril, so (at a headline level in relation to each peril):

   (1) Was there an insured peril?

   (2) If so, was the insured peril proximately causative of the assumed loss?

   (3) If so, and in so far as relevant (whether under any applicable trends clause or at common law), would the insured's recovery of its assumed loss fall to be reduced for any of the reasons suggested by Insurers?

2. In practice, for reasons which will become apparent, it is likely to be the first of those questions which is key, and it is on that issue that this document chiefly focusses.

3. All of the arguments that the FCA makes in relation to the wordings considered in this document are adopted by the HIGA Interveners. As far as possible, this skeleton argument seeks to avoid unnecessary duplication with the FCA's submissions, with the more general arguments on, for example, proof of prevalence, *Orient-Express Hotels*, and trends clauses being left entirely to the FCA.

B. THE HIGA INTERVENERS

4. The HIGA Interveners are from the hospitality and retail sectors. They range from small family businesses to larger groups employing over 500 people. However, whether they are small or large, whether they were founded with loans from grandparents[1] or from venture capital, each business has, in 2020, suffered devastating losses.

5. Many HIGA Interveners have had no income at all since lockdown. They have had to ransack personal pensions and/or take on new debt to cover fixed costs and where feasible, to be able to re-open.

[1] As "The Posh Partridge" café was (Witness Statement of Sonia Campbell ("**SC1**") §8 **[G/2/4]**).

6. The focus of these businesses has had to flip from revenue generation to survival, with an immense human impact. HIGA Interveners have already started making employees redundant, with further job losses likely, including of "lifers", employees who have given their heart and soul to the business for many years.

7. Going forward, the challenges faced are enormous. Even where the businesses have now been able to re-open they are struggling to survive. The HIGA Interveners' claims against their insurers have huge significance to the ongoing health and, in some cases, existence, of their businesses.[2]

8. To not just survive, but to restructure and thrive in this "new normal" they need the lifeline of cash. That is exactly what this insurance should have provided, including through the interim payment / payment on account mechanism.

9. The Court is not, of course, being asked to make any findings of fact in relation to any one individual insured or their specific policy. However, these are the human stories behind this test case.

10. This is not a purely intellectual analytical exercise on fascinating and complex legal points. It is a case of the utmost importance to individuals nationwide, whose livelihoods may well depend on whether their employer or their business has the lifeline of cash to survive through these incredibly difficult times.

[2] SC1 §7 **[G/2/4]**.

PART II: OVERVIEW

11. Subject to one point (see below), RSA4, and QBE1-3 all provide cover for losses caused by: (this being the relevant insured peril) interruption or interference to the business linked (to use a neutral term for present purposes) to, amongst other things, notifiable diseases (to use a convenient shorthand).

12. The notifiable disease regime was introduced to control epidemic, endemic and infectious disease. As at the date the policies were written, one such notifiable disease was SARS. It will be obvious that the way in which a notifiable disease will typically (if not invariably) be linked to interruption or interference to a business is through the response of individuals or some authority to the "notifiable disease" (the clue is in the name and the reason for notification).

13. Accordingly, any suggestion (such as is made by QBE) that, in this context, the response of individuals or authorities to the notifiable disease and the impact thereof is to be treated as breaking the necessary link between the notifiable disease and the interruption / interference or being some separate cause to be considered is untenable.

14. It is common ground that Covid-19 became a notifiable disease under the relevant definition in each of RSA4 and QBE1-3 across the four nations of the UK over the last week of February and the first week of March 2020. Its characterization as a "pandemic" does not in any way alter that.

15. The UK government's response to the large, and rapidly growing number of cases across the whole of the UK of Covid-19 included (i) on 16 March 2020, announcing social distancing measures which would, self-evidently, have directly affected the sort of businesses operated by the HIGA Interveners; and (ii) on subsequent dates between 20-26 March 2020, requiring all of the HIGA Interveners to entirely close their businesses (subject to limited and, for present purposes, irrelevant exceptions).

16. It is common ground that those businesses were, at least by the second means, thereby interrupted or interfered with; and it is obvious in the case of the HIGA Interveners that their businesses were at least interfered with (which is enough) by the first means.

17. Establishing the insured peril ought therefore to be straightforward, subject only to the one

point referred to above, namely the policy requirement that:

(1) in the case of QBE1, Covid-19 must have been manifested by any person within a 25-mile radius of the insured premises;

(2) in the case of QBE2, Covid-19 must have occurred within a 25-mile radius of the insured premises;

(3) in the case of QBE3, Covid-19 must have occurred within a 1-mile radius of the insured premises; and

(4) in the case of RSA4, Covid-19 must have occurred in the "Vicinity" (as defined) of the insured premises.

18. It is essentially only upon the basis of that "area" requirement (or *"criterion of proximity"* as it was described at first instance in *New World Harbourview Hotel Co. v Ace* [2010] HKCU 792 at [27]) that, in each case, Insurers seek to evade liability:

(1) The argument, in a nutshell, is that as a result of that requirement, even on the assumption that the insured can establish that there was one or more cases of Covid-19 in the relevant area at a time that Covid-19 interrupted / interfered with his business there will be no cover if the notifiable disease, and therefore the response to it, is more wide-spread.

(2) That is because, so RSA/QBE say, any insured who can prove the assumption to be true[3], will run immediately into a brick wall on causation on the basis that there would have been, so it is said, the same wide-spread response even if there had been no cases within the relevant radius because of cases outside that radius.

(3) The only possible way over or through that brick wall will, it is said, be for an insured to somehow prove that the interference or interruption to their business was caused only by the fact of Covid-19 in the relevant area as distinct from the presence of Covid-19 outside that area. But the huge difficulties of that will be self-evident.

19. On the true construction of the policies, in the context of the highly contagious diseases covered by the policies, which would be very likely, if not bound, to move beyond some

[3] About which they have, regrettably, made it plain that they intend to be as difficult as possible. It is not even accepted for example, that a business in central London, within a mile of Guy's Hospital will satisfy the area requirement at any relevant time - this is filibustering of the first order.

neat boundary, that cannot possibly be what was intended:

(1) On Insurers' case, they must accept that if the government had decided to lock down just one area of the relevant size because of cases of Covid-19 only up the boundary of the relevant policy area (Wuhan-style), there would be cover in relation to the resulting interruption / interference with the insured's business. They must also accept, and indeed appear to do so, that cover is not, per se, lost simply because there is one case (or more) outside of the relevant area.

(2) It is then commercially absurd to suggest, as is required by Insurers' case, that if Covid-19 had, before any such area wide lockdown, spread 100m further from the Insured Location, the insured would have no cover if at that stage lockdown was imposed on that wider area save to the extent it was able to prove that the resulting interruption / interference did not result from the cases in and lockdown of the "extra" area.

(3) It is equally absurd, but a necessary part of Insurers' argument, to treat cases of a highly contagious notifiable disease within a given area as independent of and as a separate cause to cases outside of that area. The very nature of highly contagious notifiable diseases is that cases in all areas will be related to each other having spread from one source to multiple individuals in multiple locales. Infected individuals are not fixed in stone in one geographical location in the way in which Insurers' case requires them to be. They move, and the disease moves with them.

(4) The obvious intent is, even where the relevant area is defined in terms of a specified radius from the Insured Location (QBE1-3), that if there is a case of Covid-19 in the relevant area and that was a part of the wider Covid-19 picture which caused the government to act as it did (i.e. nationally <u>including in relation to the relevant area</u>), that is enough for the causal "link" required between the instance(s) of Covid-19 in the area and the interruption / interference.

20. Further, in the context of RSA4, Insurers' argument also relies on a fundamental misapplication of the definition of "Vicinity", ignoring its wide / flexible language and the importance, to the scope of the area, of the nature of the relevant event which must take place in that area.

21. Once the area requirement and the insured peril is so established, it can scarcely be doubted

that the relevant interruption / interference experienced by the business proximately caused the assumed loss and indeed QBE at least appears to accept that.[4]

22. The only question that would then remain relates to quantum: whether the same loss or any part of it would in any event have been suffered if the insured peril (the interruption / interference which is linked (in the required way) to the presence of Covid-19 in the relevant area) had not occurred.

23. But once the insured peril (as properly understood) has been established, the answer to the quantum question will generally be "no" (subject only to Insurers establishing otherwise on the specific facts of any case - the burden being on them).

24. Under RSA4, there is also cover on two further bases. Again, the only point of substance taken by RSA depends on its misapplication of the Vicinity requirement.

25. Stepping back, the HIGA Interveners do say that any insured buying cover under QBE1-3 or RSA4, not simply without any relevant exclusion relating to pandemics but with cover provided for e.g. SARS as at the date they bought the policy and for Covid-19 as a result of it becoming notifiable thereafter, would naturally and reasonably expect it to respond in the present circumstances – indeed obviously to do so.

26. The cleverness and no doubt beguiling advocacy of the army of lawyers being deployed to try to persuade this Court otherwise, so that Insurers can walk away unscathed from the devastation wrought by Covid-19 on the HIGA Interveners' businesses and those of others like them, should not obscure that basic, key point.

27. The phalanx of causation arguments being advanced should also not be permitted to obfuscate the proper approach to that question. The guiding principle here should be as follows: *"Causation is not a philosophical question but a question of fact to be determined in accordance with common sense and the understanding of the man in the street, and it is not something which is amenable to microscopic analysis of the incidents of a casualty."* Colinvaux's Law of Insurance (12th ed) at 5-069.

[4] QBE Defence at 68.1 **[A/11/23]**.

PART III: RSA4

A. INTRODUCTION

(1) RSA4 Insureds

28. By way of example, the HIGA Interveners insured on the RSA4 wording (albeit by Aviva rather than RSA) include Laddie Topco Ltd, the holding company of the well-known brand and retailer Radley, whose products bear the iconic Scottie Dog. Founded and headquartered in central London, until this crisis, Radley employed almost 500 people, with 40 company owned stores across the UK, an online business and its products also sold in approximately 300 additional UK locations. Now, store closures have already begun and 40 people have already been made redundant, with significant additional redundancies under consideration.

29. On 21 March 2020, Radley had c.£16 million in stock at cost (equivalent to c.£50 million at net retail price) which was ample stock to sell for the next few months of trading; it has, on average, 24 weeks (5.5 months) forward cover in stock at any time. In addition, stock for summer trade with a cost price (not retail price) of £3.7 million was in transit and was delivered during lockdown. An additional c.£5 million (cost price) of stock from pre-existing orders has also reached the UK during lockdown; freight has not stopped moving. Where suppliers in India or China have been affected, Radley is in the process of exploring new sourcing of supply from factories elsewhere in the world and closer to UK shores.

30. The business is trying desperately to reposition and pivot into a faster digital growth strategy. To achieve this Radley needs time, which requires the essential lifeblood of cashflow. If cover had not been denied, this is exactly what its business interruption insurance would have provided.

(2) RSA4

31. As will be apparent from the List of Issues, RSA4 is, in a number of respects, markedly different to many or all of the other sample wordings in this test case. In particular:

    (1) RSA4 contains three potential bases of overlapping cover.

    (2) None of those bases require anything to have happened in an area defined in terms of a radius a number of miles from the Insured Location.

(3) Rather, the area within which the relevant thing must have happened in each case (the "Vicinity") is flexibly defined in terms limited only by what might reasonably be expected of that thing in terms of an impact on the insured.

(4) Where a new disease is made a notifiable disease, cover applies retrospectively from the date of its initial outbreak.

(5) RSA4 also contains a government action / advice wording which does not require that action or advice to relate to any particular underlying matter.

32. As a result of these differences, even if, contrary to the HIGA Interveners' case, there is no cover under the QBE policies, there will be cover under RSA4.

33. Conversely, if there is cover under any or all of the QBE policies, it is very likely that there will be cover under RSA4 under at least its notifiable diseases provision.

B. THE THREE BASES OF COVER

34. The three bases of cover under which the relevant HIGA Interveners say they are entitled to recover are:

(1) Notifiable Diseases (Clause 2.3.viii and Definition 69.ii);

(2) Other Incident: Enforced Closure (Clause 2.3.viii and Definition 69.v);

(3) Prevention of Access – Non Damage (Clause 2.3.xii and Definition 87).

35. The relevant terms underpinning those bases of cover provide, in so far as is material, as follows:

(1) By Clause 2.3 **[B/20/7]**, RSA agreed to indemnify the Insured in respect of its losses resulting from interruption or interference to the Insured's Business "*as a result of*":

(a) (under sub-paragraph viii) "*Notifiable Diseases & Other Incidents"* either (in so far as is presently material) discovered at an Insured Location ((a)) or occurring within the Vicinity of an Insured Location ((d)); and

(b) (under sub-paragraph xii.) "*Prevention of Access – Non Damage*".

(2) "*Notifiable Diseases & Other Incidents*" are defined at Definition 69 **[B/20/29]**. Two parts of that definition here apply:

(a) **First**, sub-clause ii, which refers to "*any additional diseases notifiable under the Health Protection Regulations (2010)*". The reason for the inclusion of the word "additional" is that sub-clause i. refers to a list of diseases and/or illnesses, many, but not quite all of which, were notifiable diseases under the 2010 Regulations.

(b) **Second**, sub-clause v, which refers to "*defective sanitation or any other enforced closure of an Insured Location by any governmental authority or agency… for health reasons or concerns.*"

(3) Sub-paragraph ii. of Definition 87: "*Prevention of Access – Non Damage*" **[B/20/30]** is the **third** basis of cover: "*the actions or advice of the police, other law enforcement agency, military authority, governmental authority or agency in the Vicinity of the Insured Locations…which prevents or hinders the use of or access to Insured Locations during the Period of Insurance.*"[5]

36. It is the reference to "*Vicinity"* in Clause 2.3.viii and in the definition of "*Prevention of Access – Non Damage*" that gives rise to the central issue in this case. "*Vicinity*" is the subject of an agreed definition **[B/20/35]**:

*"**Vicinity** means 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**."*

37. As indicated, RSA4 is unique in this respect: in the other policies within this test case, if the term *"Vicinity"* is used and defined, it is always defined as a fixed, measurable distance (a 25 or 1-mile radius from the location). This definition, and the flexibility with which it was obviously intended to operate (crucially – and a point ignored by RSA - taking into account the relevant insured event), are addressed at Section C(4) below.

38. This single definition cannot, of course, be construed in isolation. It is just one of a range of provisions which demonstrate that RSA's denial of cover, essentially on the basis that the policy does not respond to interruption or interference to a business caused by wide-

[5] The FCA sometimes refers to this as the "second denial of access [DoA] clause" in RSA4 and refers to the "enforced closure" provision above as the "first denial of access [DoA] clause".

spread notifiable diseases / the response thereto, cannot be right. This Skeleton will therefore now proceed to:

(1) Identify and consider, at Section C below, the key parts of RSA4 which the HIGA Interveners say are relevant.

(2) At Section D below, take each of the three potential insured perils in turn, showing why each is established here.

(3) Consider, at Section E below, the issue of whether each of the relevant insured perils proximately caused the assumed loss.

(4) At Section F below, address the definition of *"Standard Turnover"*.

39. Before that, however, it is necessary to say something briefly about the factual matrix on which RSA relies[6]:

(1) It is common ground that the subjective intention of the parties is irrelevant to the proper construction of the policies. Assertions that Insurers would not have wanted to do this or that are completely irrelevant (as well as being difficult to fathom) and should cease.

(2) In relation to RSA's suggestion that the parties are to be taken to have contracted against a background which included (a) previous decisions as to the construction of similar contracts, including in particular *Orient-Express Hotels* and (b) the availability of specific pandemic cover and/or wordings which sought to nullify or alter the reasoning expressed in *Orient-Express Hotels*:

(a) It is accepted that, in broad terms, parties are to be taken to have contracted against the background of settled meanings previously given to phrases by the courts in cases involving materially indistinguishable contexts. However, that takes RSA nowhere here. There are no cases helpful to RSA of that sort. In particular, *Orient-Express Hotels* is not close to be being a case of that sort for all the reasons given by the FCA.

[6] At §30(b) and §31(d) **[A/12/13]** and §33(b) **[A/12/14]** of RSA's Amended Defence ("**RSA's Defence**").

(b) RSA's allegations as to the availability of alternative cover are irrelevant and inadmissible, as was held in §2 and §3 of Ruling 1 at the Second CMC **[A/21/2]**. As Lord Justice Flaux commented at the Second CMC **[12:2-6]**:

"The fact that there's another wording out there which deals with the Orient Express point, which isn't a wording we actually have to construe, doesn't seem to me to be of very much assistance to the Court in the task that we face."

(c) The policy contained three perils which on their face could plainly apply in relation to pandemics and the response of government thereto, including specific notifiable disease cover, subject only to the effect of the Vicinity requirement. Unless the Vicinity requirement removed the cover that would otherwise undoubtedly be there simply because the diseases (and the response to them) were wide-spread, there was no need at all for specific pandemic cover.

(3) RSA seeks to rely on the government's after-the-event statement (on 18 March 2020) that business interruption insurance does not generally provide cover for losses consequent on pandemics.[7] The development of that point is awaited with interest. In any event, the government's statement recognises that, while many policies do not provide cover, some do. RSA4 (and QBE1-3) are amongst those that do, for the reasons given herein.

C. RSA4 - THE RESILIENCE POLICY WORDING

40. This section seeks to highlight the key words and phrases used in RSA4 which are relevant to the construction of the insured perils and the causation issues they raise.

(1) SARS

41. The policy definition of *"Notifiable Diseases & Other Incidents"* includes at sub-paragraph i. a list of 33 diseases/illnesses **[B/20/29]**. The list very largely, but not entirely, mirrors the list of notifiable diseases in Schedule 1 to the 2010 Regulations as it stood prior to the addition of Covid-19[8]. One of the diseases specifically included in the list in sub-paragraph i. is SARS.

[7] RSA's Defence §33(b) **[A/12/14]**.
[8] There are two diseases / illnesses specified in the policy which are not notifiable under Schedule 1: meningitis and viral hepatitis. In addition, hameolytic uraemic syndrome (HUS) is in Schedule 1 but not in the policy list.

42. SARS is a viral respiratory illness caused by the SARS-associated coronavirus for which there is no vaccine. It emerged in China and spread to many countries around the world. It was, at least, an epidemic. Control measures were implemented as a result, the most stringent of which were in Beijing where bars, gyms, theatres and other sites of public entertainment were closed.[9]

43. Accordingly, the policy would cover loss caused by interruption / interference to the insured business as a result of SARS, a disease capable of causing an epidemic or pandemic, occurring in the Vicinity of an Insured Location. The difference between an epidemic and a pandemic is, of course, simply one of degree not principle: a pandemic is an even wider-scale epidemic which in turn could relate to a notifiable disease.

(2) Cover For Any New Notifiable Disease

44. Following on from the list of specified diseases, as already indicated, the next part of the definition of *"Notifiable Diseases & Other Incidents"* brings within the triggers for cover **[B/20/29]**:

> *"ii. any additional diseases notifiable under the Health Protection Regulations (2010)…"*

45. The effect is obvious and unarguable: subject to the Vicinity requirement, there will be cover for interruption / interference as a result of any additional disease which is, or may become, notifiable under the 2010 Regulations, whatever that disease is and whatever its potential for spreading widely.

46. As the Explanatory Notes to the 2010 Regulations state, the purpose of the disclosure of information which the Regulations require is *"preventing, protecting against, controlling or* ***providing a public health response to*** *the incidence or spread of infection or contamination"* (emphasis added). The Regulations were enacted pursuant to powers to control *"epidemic, endemic or infectious diseases"* **[C/9/2]** at §2.1 and §3.

47. The Regulations covered a group of just 31 diseases (now 32 with the addition of Covid-19). Only diseases with some particular significance for public health would need to be added to such a list. The far-reaching powers under the Regulations would not need to be deployed for a new strain of athlete's foot.

[9] Agreed Facts Document 7 at §9-§10(b) **[C/12/4-6]**.

48. Essentially, if a new disease is elevated to the status of a Notifiable Disease, it may well be because it is highly contagious and has the potential to cause an epidemic or pandemic. Put the other way, a highly contagious, fast-spreading, serious disease is exactly the sort of disease one would expect to be made notifiable. That was exactly the situation in which the Regulations were in fact used for Covid-19.

(3) Retrospective Cover For New Notifiable Diseases

49. The final words of definition 69(ii) contain a further indication that the cover was intended to extend to a disease that had spread widely (emphasis added) **[B/20/29]**:

> *"69. Notifiable Diseases & Other Incidents means:…*
>
> *ii. any additional 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****…"*

50. The retrospective deeming effect of the final words of definition 69(ii) are, as indicated, unique amongst the sample policies in this test case. They are telling, because:

(1) On RSA's own case they require one to identify the outbreak of the new disease wherever that occurred.

(2) Put differently, there is no requirement that the initial "outbreak" is anywhere close to the Insured Location.

(4) Enforced Closure By The Government For Health Reasons

51. The "Other Incidents" part of definition 69 of *"Notifiable Diseases & Other Incidents"* includes the following **[B/20/29]**:

> *"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."*

52. As to this clause, first, it is strikingly wide:

(1) It relates to an *"enforced closure"* by a relevant authority where it is *"for health reasons or concerns"*. The clause does not even require a focused, rational *"reason"*, a mere *"concern"* will suffice.

(2) The clause therefore expands what are potentially relevant health matters well beyond the specific matters to do with health that are identified in sub-paragraphs i. (specific list) and ii. (new notifiable diseases) of the definition, provided those health matters cause enforced closure.

(3) Nothing in this wording indicates any intention to exclude closures because of health reasons or concerns associated with pandemics. To the contrary, they clearly fall within this wording (and RSA has admitted this in the case of the Covid-19 closure measures[10]).

53. Secondly, the closure can be *"by any governmental authority or agency"*. The fact that this clause expressly encompasses enforced closure by the government (in addition to and as distinct from by the local authority) strongly indicates that the policy was intended to respond in the case of health reasons or concerns that extend to an area wider, potentially much wider (including nationwide), than any given local authority would respond to, involving similarly wide area closures by way of response.

(5) Actions Or Advice Of The Government Which Prevent Access

54. Definition 87(ii) **[B/20/30]** states:

> *"**Prevention of Access – Non-Damage** means: …*
>
> *ii. the actions or advice of the police, other law enforcement agency, military authority, governmental authority or agency in the **Vicinity** of the **Insured Locations** … which prevents or hinders the use of or access to **Insured Locations** …"*

55. RSA expressly accepts that the phrase *"governmental authority or agency"* includes both local and national government (RSA's Defence §96(b) **[A/12/33]**). Once again, use of this phrase indicates an intention to encompass actions taken and advice given on a national level, with effects felt nationwide.

56. Subject to the effect of (a) any exclusions; and (b) the Vicinity requirement, there is no limit to the nature of what the government's (or other authority's) actions or advice must relate to. This is another striking feature of RSA4; all other sample wordings in this test case include phrases which qualify the basis of or motivation behind the authority's action or

[10] RSA's Defence at §50(d) **[A/12/21]**.

advice.[11] Again, the cover offered in RSA4 is particularly broad.

57. However, by reason of express exclusions elsewhere, action or advice by a relevant authority in response to certain situations will not be covered:

(1) The clause covers the actions or advice of military authorities which prevent or hinder use or access. However, Exclusion 10 seeks to exclude Business Interruption Loss which is *"directly or indirectly caused by or contributed to by or arising from"* a host of situations in the context of which the military authorities might take action or give advice **[B/20/13]**.

(2) Likewise, the prevention/hindrance of use or access by the government will always be in response to an underlying factual situation, some of which are excluded e.g. where related to radioactive contamination, riot/civil commotion in Northern Ireland and terrorism (Exclusions 7 to 9 **[B/20/12-13]**), which is likely to exclude cover for some actions or advice which would otherwise fall within this cover.

58. What is nowhere expressly excluded is interruption or interference as a result of the government's (or other authority's) action or advice in response to an epidemic or pandemic. For that, RSA relies on the Vicinity requirement even where the government action is specifically directed at the Insured Location and its immediate environs (as well as everywhere else nationwide).

(6) The Definition Of *"Vicinity"*

59. Every other policy in the test case which contains an insured peril that has a definition of a "Vicinity" requirement, defines it by reference to a fixed, measurable distance from the insured location. As indicated, RSA4 is different **[B/20/35]**:

> *"120. **Vicinity** means 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**."*

60. The relevant area has, of course, to be a *"surrounding"* area or an area *"adjacent"* to the insured location. However:

[11] E.g. actions *"due to an emergency which is likely to endanger life or property"* (Arch1) or *"interruption … caused by .. an incident … which results in denial of access … imposed by"* the authority (Hiscox1).

(1) The definition does not place any fixed, measurable limit on the size of that area.

(2) As a matter of natural meaning, an area *"surrounding"* a location can be large (extending to the entire country) or more localised. Nothing in the word *"surrounding"* itself limits the size of the relevant area.

61. Accordingly, in order to establish the size of the relevant area, the rest of the definition comes into play. Indeed, that is the only way in which the words beginning *"in which events…"* can be given a meaning.

62. Therefore, the question for the Court is to identify the area surrounding (or adjacent to) the location *"in which events that occur within such area would be reasonably expected to have an impact"* on the insured or its business.

63. Put the other way, the limit of the relevant area is determined by asking how far from the Insured Location would a relevant event have to occur before one would no longer reasonably expect it to have an impact on the insured or its business.

64. "Impact" is a broad concept. It certainly covers interruption or interference (which an insured will always need to establish as part of the insured peril) but is not confined to such, particularly if (contrary to the FCA's case, which the HIGA Interveners adopt) those terms have the narrow meaning suggested by RSA.

65. The "events" referred to can only be a reference to the relevant "trigger" within the insured peril (necessarily leaving to one side its Vicinity requirement), catering for the fact that the Vicinity requirement appears in a number of places in the policy in relation to a number of different perils.

66. So understood, three things become clear:

(1) First, the effect of the Vicinity requirement, where there is one, is simply to weed out what would otherwise be insured perils but for the fact that they occur a distance from the Insured Location where one would not reasonably expect them to have any impact (even if in fact they do so).

(2) Second, conversely, if the Vicinity requirement is met, that will be because the relevant peril has occurred in a place where it would reasonably be expected to have

an impact on the insured or its business. In those circumstances, it will not be remotely surprising to find that it does in fact have such an impact.

(3) Third, the relevant area could potentially depend on three things:

(a) The nature of the "events" in question.

(b) The nature of the insured's business.

(c) The location of the Insured Location.

67. RSA accepts that (b) and (c) are relevant[12] but ignores (a). While plainly unjustifiable on the wording of the clause, it is not hard to see why it takes that approach: it is only by ignoring the nature of the relevant "event" that RSA can suggest, as it does at Defence §43(c) **[A/12/17]**, that "Vicinity" has an apparently fixed meaning which:

(1) requires a close spatial proximity to the Insured Location; and

(2) cannot include the whole of the United Kingdom.

68. Properly read, there is nothing at all in the definition of "Vicinity" to support any such fixed notion of the area it will (or will not) cover. Indeed, such a fixed notion is anathema to the inherently, and deliberately, flexible definition adopted. RSA has effectively just written in an entirely new definition of "Vicinity".

69. Moreover, RSA's "construction" would render the words *"in which events … Insured Business"* in the definition of *"Vicinity"* nugatory:

(1) Events in an area surrounding or adjacent to the insured location within a close spatial proximity to it would always reasonably be expected to have an impact on the insured's business.

(2) The obvious reason therefore for the relevant words is precisely to avoid limiting the relevant area in the narrow and inflexible way suggested and to ensure that the area is appropriate for the relevant event.

70. The nature of the relevant event will therefore be absolutely critical; and the area within the "Vicinity" will vary accordingly.

[12] RSA's Defence §43(c)(i) **[A/12/17]**.

71. So, for a new notifiable disease, the area covered by the definition of Vicinity in relation to such would depend entirely on its nature which could plainly include a highly contagious and deadly disease which had become or would become an epidemic or even pandemic.

72. By way of example, it would reasonably be expected that a seaside hotel in Devon which caters to domestic tourists would be impacted if a notifiable disease occurs in London, Bristol, Cardiff and/or Manchester. "Vicinity" would therefore be so read.

(7) Absence Of Epidemic Or Pandemic Exclusion

73. It is against all of the above background, rather than as a starting point, that the absence of an exclusion in RSA4 in respect of interruption or interference linked to epidemics or pandemics is so striking and revealing.

74. RSA's case is, to all practical intent, that it did not need any such exclusion or rather that the Vicinity requirement had the same effect as such an exclusion because if a new notifiable disease was more wide-spread requiring a wider response or even turned into an epidemic / pandemic, requiring a nationwide response, the effect of the Vicinity requirement was that there was no cover for the consequences of that wider (or even nationwide) response even if the Insured Location was locally completely surrounded by cases of the new disease. Its case is to similar effect in relation to the other two perils.

75. However, to use the Vicinity requirement to seek to achieve that exclusionary effect would (at the very least) be a truly bizarre way of going about things and one that no reasonable person reading the policy would have understood to be intended. The obvious, simple and only clear thing to do would be to include an express exclusion in respect of epidemics and/or pandemics (depending on what it wanted to achieve).

76. That indeed, is RSA's case (disputed by the FCA), as to what it did in RSA3 where it <u>did</u> include an exclusion expressly referring to "epidemic" (Exclusion L[13]) which it says applied in relation to the notifiable disease cover which already contained a far less flexible 25-mile radius requirement. Yet, on its case in relation to RSA4, that exclusion in RSA3 would have been redundant by reason of the 25-mile radius requirement.

77. Similarly, in relation to the BI Cyber-Event cover at Clause 2.4 of this policy, RSA4, RSA <u>did</u> expressly include, at Exclusion 5, the equivalent of a cyber epidemic / pandemic

[13] RSA's Defence at §55 **[A/12/22]**.

exclusion in order to avoid covering loss resulting from interruption or interference to the business as a result of a cyber event that results in a countrywide or global outage of the internet **[B/20/12]**:

"This policy does not cover: …

*Any **Business Interruption Loss** under Insuring Clause 2.4 **Business Interruption – Cyber Event** arising directly from a failure of any core element of the internet infrastructure that results in a countrywide or global outage of the internet, including a failure of the core DNS root servers or the IP addressing system."*

78. Indeed, given the definition of Vicinity, using it to try to seek to exclude cover for interruption / interference resulting from a pandemic could not possibly work since the area covered by the Vicinity requirement would be as wide as the area in which occurrences of the pandemic might reasonably be expected to have an impact on the insured or its business. That could, indeed almost inevitably would, readily encompass the whole country.

(8) Contra Proferentem

79. Finally, insofar as the Court considers that there is any ambiguity in the definition of "Vicinity" or of other parts of the insured peril, it should construe the policy *contra proferentem*, the *proferens* being RSA by virtue of General Condition 7 **[B/20/20]**:

> *"ix. this policy wording is accepted by and adopted as the wording of the **Insurer**, notwithstanding that the policy or part thereof, may in fact, have been put forward in part or full by the **Insured** and/or its brokers or other representatives."*

80. RSA now appears implicitly to accept this. While ambitiously asserting that the policy unambiguously does not cover pandemics, it has rightly abandoned, in its recently served Amended Defence, an attempt to rely on the *contra proferentem* principle of construction against its insured, which ignored General Condition 7 **[A/12/15]**. As to *contra proferentem* more generally, the FCA's submissions are adopted.

D. THE THREE RELEVANT INSURED PERILS

81. Each of the three potentially relevant perils is now taken in turn.

(1) Notifiable Diseases (Clause 2.3.viii and Definition 69.ii)

82. For there to be cover under this clause, it is common ground (see RSA Defence, §86 **[A/12/29]**) that there must be (and this is the insured peril):

(1) a notifiable disease

(2) occurring within the Vicinity of an Insured Location

(3) as a result of which

(4) there is interruption or interference to the Insured's Business.

(i) Notifiable disease

83. It is common ground that Covid-19 is a notifiable disease in the sense set out in Definition 69(ii) and is deemed to have been so since its *"initial outbreak"*.[14]

84. The relevant deemed date (for each country in the UK) is in issue. The HIGA Interveners adopt what the FCA says about that, though it seems doubtful that it will matter in practice. Even on RSA's case, the deemed date for England is 31 January 2020, the date of the initial outbreak in England.[15]

(ii) Occurring within the Vicinity

85. There are two issues here, (1) first, what, in this context is the area covered by "Vicinity" and (2) second, did Covid-19 occur in that area?

86. As to the area covered by Vicinity, the principles are addressed above. Further:

(1) Given the nature of the relevant event, namely the occurrence of Covid-19, a highly contagious, often fatal disease, the relevant area is the entirety of the UK: one would reasonably expect that the occurrence of Covid-19 anywhere in the UK could have an impact on the business of the HIGA Interveners (such as cafés, shops and hotels), including by reason of the response to that occurrence which cannot sensibly be separated from the disease, wherever they are.

(2) RSA's case that the relevant area must be one with a close spatial proximity to the Insured Location and cannot include the entirety of the UK has been addressed at Section C(6) above and is wrong. No explanation is given as to why that test is appropriate on the wording here and there is none: fundamentally, it ignores the relevant, flexible, test laid down by the policy as to what constitutes "Vicinity" and

[14] RSA's Defence §38-39 **[A/12/15]**.
[15] RSA's Defence §39(c) **[A/12/15]**.

in particular it pays no regard to the relevant "events" or what could reasonably be expected.

(3) Indeed, RSA's own case, at Defence §90(b) and §92(a)(ii) **[A/12/30-31]**, is that the proximate cause of any insured's loss was the presence of Covid-19 in the UK and the responsive national measures. It is hard to see how RSA can square that case with any suggestion that one would not reasonably have expected the presence of Covid-19 in the UK and the responsive measures to it to have impacted the insureds or their businesses; and no such suggestion is pleaded.

(4) Any suggestion that reading Vicinity in the way in which the HIGA Interveners do deprives it of meaningful effect[16] would be misplaced. So read, the Vicinity requirement serves the important purpose of filtering out claims where there is no occurrence of the notifiable disease within a distance of the Insured Location where it would reasonably be expected to have an impact. It should be given no greater role than that. The fact that in the particular circumstances of this case the filter does not exclude the claims is beside the point.

87. If that is right, and the Vicinity is, here, the entire UK, the second question (did Covid-19 occur in the relevant area) answers itself: plainly yes.

88. But if Vicinity covers a narrower area than the area in which Covid-19 occurred and (through individuals' or the government's response to such) impacted the insured or its business, the Court will have to determine what that narrower area is[17] and consider whether Covid-19 occurred in it. In that event, the HIGA Interveners will adopt the FCA's alternative case at §41.5(b) of the Amended Particulars of Claim ("**PoC**") **[A/2/27]**; and its case as to how the presence of Covid-19 in any given area has to be proven.

(iii) As a result of which

89. If the HIGA Interveners are right on what is meant by Vicinity, it will necessarily follow that any interruption or interference which resulted from the presence of Covid-19 and the national response thereto (including natural individual behavioural responses to the

[16] As RSA do suggest at §46(b)(1) Defence **[A/12/18]**, albeit in the context of a different insured peril.
[17] RSA has not pleaded any case as to the area encompassed within the definition of "Vicinity" on the facts of this case other than its untenable "close spatial proximity" and "not the whole UK" case. It has no fall-back. That is striking.

occurrence of Covid-19 and both the social distancing measures and the closure measures taken by the government) will be a result of a notifiable disease in the Vicinity.

90. If the HIGA Interveners are wrong about what by Vicinity, and it means what RSA says it means but the HIGA Interveners can prove that there was Covid-19 in the relevant area, then their case is as summarised at §88 above and they adopt the detail of the case advanced by the FCA as to the nature and satisfaction of the facts of the causal link required between any interruption / interference and the occurrence of Covid-19 in the relevant area. They would also (on this hypothesis) rely on what they say in the context of the equivalent causal link issue in relation to the QBE wordings considered below (see §161 below).

91. In short, the required causal link is satisfied here because:

(1) The reason the entire country was subjected to the relevant national social-distancing and closure measures was precisely because Covid-19 had by that point occurred across the UK, including, it must be assumed for present purposes, within the Vicinity of the Insured Location.

(2) That "local" occurrence was a piece of the picture, as important as every other piece. The occurrence within that Vicinity was therefore proximately causative of the measures and the resulting interference / interruption. The fact that the occurrence of the disease was (inevitably) more wide-spread and that was also a piece of the picture is neither here nor there.

(3) The position before the government's national response is, if anything, even more obvious: if there was any response of individuals to Covid-19 unprompted by the government's nationwide response, common sense says it was based on the local presence of the disease.

92. The only additional points the HIGA Interveners would add to what the FCA says are these:

(1) RSA's Defence, at §86 and §88 **[A/12/29]** correctly identifies the insured peril as the interruption / interference to the insured's business as a result of a notifiable disease occurring in the Vicinity.

(2) As RSA also rightly accepts, at §90 **[A/12/30]**, the orthodox proximate cause test arises in relation to the link between that insured peril and the losses suffered by the insured.

(3) By contrast, the proximate cause test has no necessary application when considering the link required in identifying the insured between the interruption / interference and the occurrence of the notifiable disease in the Vicinity.

(4) In that context, there is in fact no good reason to import the proximate cause test; and on the contrary, every good reason not to if (contrary to the FCA's case, which is adopted) importing it has the effects inherent in RSA's case.

(iv) Interference or interruption

93. RSA accepts that regulations made by the government requiring a business to close (or to close the premises) are likely to have resulted from the date such regulations came into force in interruption of or interference with the business: Defence, at §64(c) **[A/12/24]**.

94. That is mealy-mouthed, certainly as it relates to the types of business operated by the HIGA Interveners: unless a particular business which was required to close did not do so, there was interruption of or interference with it by reason of the closure regulations.

95. The only remaining issue is as to whether there was any interruption or interference prior to the closure measures by reason of (a) the national social distancing measures introduced as a result of Covid-19; and (b) individuals' behavioural response to the occurrence of Covid-19, prior to the social distancing measures.

96. It is hard to understand on what possible basis RSA has not accepted at least that there was interference with the insured business by reason of both of those matters, particularly given its own case at Defence §17 [**A/12/6]**, and none has been identified in its Defence. The FCA's detailed submissions on "interference" are adopted.

97. If there was such interference, as there obviously was, the question of whether there was also interruption by reason of the same matters is moot.

(2) "Other Incident": Enforced Closure (Clause 2.3.viii and Definition 69.v)

98. For there to be cover under this clause there must be (and this is the insured peril):

(1) an "Other Incident" which requires:
   (a) enforced closure of an Insured Location
   (b) by any governmental authority
   (c) for health reasons or concerns

(2) discovered at an Insured Location or within the Vicinity of an Insured Location

(3) as a result of which

(4) there is interruption or interference to the Insured's Business.

(i) Enforced closure; *and*

(ii) By any governmental authority

99. It is common ground that where a business was legally required, between 20 and 26 March 2020, to close its premises in whole or part[18] this amounted to an enforced closure by a governmental authority[19].

100. There remain issues as to (1) whether the social distancing measures also amount to enforced closure; and (2) whether government advice to close, prior to the legal requirement to do so, amounts to enforced closure. On those issues, the HIGA Interveners need add nothing to what is said by the FCA.

(iii) For health reasons or concerns

(iv) Within the Vicinity

101. Although the wording is not clear as to what has to be within the Vicinity, the HIGA Interveners are prepared to accept that the *"health reasons or concerns"* must extend to the Insured Location or the Vicinity.

102. As to whether they did so, that issue turns on:

(1) what is meant by health reasons or concerns;

(2) if necessary, what area is covered by the Vicinity in this context;

(3) whether there were health reasons or concerns in that area.

103. As to (1), there were health reasons or concerns everywhere in relation to Covid-19, including within whatever area on this basis constitutes the "Vicinity". That is so whether or not there were confirmed (or even no reported) cases in that area. There is no requirement for the health reasons or concerns to relate to *"an event"* in the Vicinity as RSA suggests

[18] Or otherwise ordered as set out at PoC §47 **[A/2/32]**.
[19] RSA's Defence at §46(a) **[A/12/18]**, §50(d) **[A/12/21]** and §96(b) **[A/12/33]**.

(again re-writing the clause). The HIGA Interveners adopt what is said by the FCA in relation to this.

104. If that is right, then (2) above will not arise, since (3) will necessarily require a positive answer irrespective of the answer to (2): no matter how wide or narrow Vicinity is in this context, there were health reasons or concerns in relation to it, and indeed in relation to each and every Insured Location the subject of enforced closure. That, after all, is the reason they were the subject of enforced closure.

105. If, however, in relation to (1) above, it was for some reason necessary to show actual cases of Covid-19 within the "Vicinity" then, in relation to (2) above, "Vicinity" must on this hypothesis cover the same area as is covered by that term in the context of the notifiable disease peril as it relates to Covid-19, namely the entire UK. On that basis, the answer to (3) will again necessarily be yes.

106. But if "Vicinity" is some narrower area than the UK and it is necessary to show actual cases of Covid-19 within it, then the arguments will be the same as in relation to the previous basis of cover under RSA4 considered above (notifiable diseases).

107. The final question is whether any enforced closure pursuant to the closure measures was *"for health reasons or concerns within the Vicinity"*. The analysis will vary depending on which of the above routes to this point has been taken:

(1) If the route taken is either of those set out in §103 or §105 above, then it will be self-evident that the enforced closure was *"for health reasons within the Vicinity"*.

(2) If however, the route taken is that set out in §106 above, the answer to this question should still be "yes", again for essentially the same reasons as are given above in the context of the notifiable disease cover, as to why the interruption resulting from the closure measures was caused by cases of Covid-19 within, on this hypothesis, some narrow meaning of Vicinity.

(v) As a result of which

(vi) Interruption or interference

108. There can be no doubt that any enforced closure caused interruption or interference to the business.

109. On the other hand, the HIGA Interveners accept that any interruption or interference before any enforced closure is not within this insured peril.

(3) Prevention Of Access – Non Damage (Clause 2.3.xii and Definition 87)

110. For there to be cover under this clause there must be:

(1) "Prevention of Access – Non Damage" which requires:
  (a) actions or advice of a governmental authority
  (b) in the Vicinity of an Insured Location
  (c) which prevents or hinders the use of or access to Insured Locations
(2) as a result of which
(3) there is interruption or interference to the Insured's Business.

(i) Actions or advice of a governmental authority

111. It is common ground that the social distancing measures announced by the government on and after 16 March 2020 and the requirement (whether advisory or legal) from 20 March for businesses to close were all actions or advice of a governmental authority for the purposes of this peril (RSA Defence §§47, 50, 52 **[A/12/19-21]**).

(ii) In the Vicinity of an Insured Location

112. No matter what the area covered by Vicinity in this context (i.e. no matter how narrow), the relevant social distancing and closure measures were obviously, as a matter of the natural meaning of the clause, all *"in the Vicinity"* of every Insured Location since they applied throughout the UK.

113. RSA's only answer to that is to suggest that government action or advice will only be within the Vicinity where it is "*operative within (and specific to) the 'Vicinity'"* of the insured location (§46(b)(2) Defence **[A/12/19]**, emphasis added).[20] That is wrong:

(1) There is no language in RSA4 which indicates any intention to exclude action or advice which occurs both within and outside the *"Vicinity"*. The very need for RSA to read in the words "*and specific to*" for the purposes of its case tells the Court everything.

[20] The rather opaque §45(c) **[A/12/18]** may be an attempt to run the same point in the context of *"enforced closures"*. If so, it fails for the same reasons.

(2) Indeed, given that the clause specifically covers action or advice of the government (and not only of some more local authority) it would be particularly surprising for it to cover only actions or advice that were purely local to the Insured Location.

(3) As to RSA's suggestion that including national action or advice within this insured peril renders its Vicinity requirement redundant (Defence §46(b)(1) **[A/12/18]**), that is simply not so:

(a) Rather all it means is that on the facts here, the test is satisfied by the national actions and advice of the government, because they applied as much to the Insured Location and the area immediately adjacent and surrounding it as to the rest of the country.

(b) That fact does not mean that, in all situations that might fall within this clause (particularly actions by local government which are restricted to one particular local authority), the Vicinity requirement might not play an important exclusionary role where the relevant action or advice was not directed at the Insured Location and its immediate surrounds (even if also elsewhere).

(iii) Prevents or hinders use of or access to Insured Locations

114. It is common ground that the UK government's closure measures amounted in principle to a *pro tanto* hindrance to the use of the Insured Locations for any business ordered to close in full or in part[21] (which applies to all of the HIGA Interveners).

115. Again, however, there is an issue as to whether social-distancing measures prevent or hinder use of or access to the Insured Location[22]. The HIGA Interveners adopt what the FCA says about that. In short:

(1) By way of example, the social distancing measures introduced from 16 March 2020 included an instruction to the whole population to avoid all unnecessary contact with others, avoid all unnecessary travel and to avoid pubs, clubs, restaurants and other social venues.

(2) It is difficult to understand and RSA does not identify on what basis it does not accept that such measures would prevent or hinder use of or access in the case of

[21] RSA's Defence §50(d) **[A/12/21]**.
[22] RSA's Defence §49(c)(iii)(2), referring back to §49(c)(ii) **[A/12/20]**.

any shop selling only non-essential goods or any hospitality sector business (unless, possibly, it was a hotel that had exclusively work-related guests).

(3) For any such business (which all of the HIGA Interveners are), when customers were told not to go to the business, use of the Insured Location was at the very least hindered, if not prevented entirely; and access to the business for those customers was also hindered or even prevented.

(iv) As a result of which; and

(v) Interruption or interference

116. If the HIGA Interveners are right this far, then this answers itself: there will inevitably be interruption or interference with the insured's business as a result of the relevant prevention or hindrance of access to or use of the Insured Location. The contrary is not arguable.

(4) Conclusion On RSA Insured Perils

117. All three or at least one of the potential insured perils under RSA4 apply here in relation to the HIGA Interveners.

118. It should be noted that the conclusion that more than one insured peril applies is one specifically contemplated by General Condition 8.iii **[B/20/20]**:

> *"Where a **Single Business Interruption Loss** is covered under more than one Insuring Clause only one **Limit of Liability**, being the largest applicable, will apply to such **Single Business Interruption Loss**."*[23]

E. CAUSATION

119. If one or more insured perils has been established, then the HIGA Interveners adopt the FCA's submissions as to causation of loss thereby.

120. The key points to note, specific to RSA, are as follows:

(1) If Vicinity has the meaning the HIGA Interveners say it does, the majority of the arguments run by RSA on causation simply fall away without even needing to consider the joys of *Orient-Express Hotels*. That is because Vicinity will be wide

[23] See also exclusions 2.x and 6 **[B/20/11]** & **[B/20/12]**.

enough here to embrace a national notifiable disease or closure for health concerns and the response to that disease.

(2) Indeed, on this hypothesis, in relation to at least the first and third perils it must be common ground that they proximately caused the insured's loss given RSA's own case, at Defence §90(b) and §92(a)(ii) **[A/12/30-31]**, that the proximate cause of the loss was the presence of Covid-19 in the UK and the responsive national measures.

(3) If RSA then wishes to say that some part (or even all) of the losses suffered as a result of the relevant insured peril would have been suffered in any event because of some matter not embraced within the relevant insured peril (or another applicable insured peril), it will be for it to establish that: *BHP v Dalmine* [2003] EWCA Civ 170 (CA) at [33] & [36]. However, with the possible exception of (i) any proven reduction in international demand (in relation to a business that relies on such) due solely to the presence of Covid-19 overseas rather than in the UK, and (ii) any proven supply side issues due solely to the presence of Covid-19 overseas rather than in the UK, none of the matters referred to in the Defence at §17 would, even if applicable, reduce the Insured's recoverable loss in relation to at least the first peril (notifiable diseases).

(4) Finally, the provision quoted at §D(v)118 above puts paid to any suggestion (which would in any event be bad as a matter of law, as the FCA sets out) that any of the insured perils can be used to deny cover in respect of another insured peril on the basis that even "but for" the former, loss would still have been suffered due to the latter; and even "but for" the latter, loss would still have been suffered due to the former.

F. DEFINITION 107: STANDARD TURNOVER

121. RSA relies on Definition 107 **[B/20/34]**, as a trends clause which limits any indemnity payable to loss arising solely in consequence of an insured peril. The clause reads:

> "***Standard Turnover*** *means 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*** *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****."*

122. If and to the extent that the HIGA Interveners' / FCA's case on insured peril and causation has succeeded so far, then no further Covid-19-related adjustments will be required under this clause.

123. In particular, because of the retrospective provision in RSA4, there is here no question of needing to adjust the standard turnover (and thereby reduce the recoverable loss) to reflect any impact of Covid-19 prior to it becoming a notifiable disease.

124. The FCA's case on this clause is otherwise adopted.

PART IV: QBE1-3

A. INTRODUCTION

(1) QBE Insureds

125. The HIGA Interveners who have cover under QBE1 to 3 include, for example:

(1) **The Posh Partridge**: a café in Dorchester, which has cover under **QBE1**. It is on the same road as, and approximately half a mile from, the Dorset County Hospital. A 25-mile radius from Dorchester (which is a c.2000 square mile area) encompasses almost all of Dorset, which is a county of c. 1000 square miles (see Appendix 1). On 5 March, Covid-19 became a notifiable disease. On 9 March, the local Dorset press reported 3 confirmed cases of Covid-19 in Dorset, as well as 3 confirmed deaths in the UK. From 9 March onwards, the Posh Partridge saw a significant downturn in its trade with cancellations of bookings for Mother's Day, a funeral and other catering events; from 16 March, its passing lunch-time trade disappeared. As a result of the collapse in its trade, it fully closed on 17 March. On 21 March, the first death from Covid-19 at Dorset County Hospital was reported.

(2) **Signature Pubs Ltd:** which owns and operates a chain of pubs in Glasgow, Edinburgh, Aberdeen, Dundee, Stirling, and St Andrews and has cover under **QBE2**. Taking the Glasgow pubs as an example, the Glasgow Times reported the first confirmed case of Covid-19 in Greater Glasgow on 5 March. From 13 March onwards, the NHS Board of Greater Glasgow and Clyde had the highest number of cases of Covid-19 of all the 14 NHS Boards in Scotland by a substantial margin. On 17 March, The Glasgow Times published an article under the headline "*Coronavirus: Greater Glasgow patient dies from COVID-19 as Scotland cases jumps to 195*". On the same day, the first 2 Covid-19 deaths were registered in Scotland. The Glasgow pubs, and all of Signature Pubs Ltd's pubs, closed on 20 March, having experienced a downturn in sales beginning in the week commencing 9 March, with like for like sales dropping by around 85% in the week commencing 16 March. All the pubs remain closed, save for 3 pubs which re-opened in May offering a take-out service during significantly reduced hours.

(3) **The Dixon Hotel**: a hotel just off Tower Bridge in London, which has cover under **QBE3**. A 1-mile radius encompasses most of the City, Southwark, St Katherine's

& Wapping, and Whitechapel (see Appendix 2). Within this area are both London Bridge Hospital and Guy's Hospital. Guy's and St Thomas' is one of the UK's specialist infectious disease centres, and many patients were transferred there at the start of the outbreak. Based on the government's figures, the first 2 confirmed cases of Covid-19 in Southwark were on 25 February; by 5 March, there had been 6 confirmed cases in Southwark, rising to 9 the next day; by 16 March, 91 confirmed cases; and by 19 March, 145 confirmed cases. On 21 March, the local press reported that Southwark had more Covid-19 cases than any other borough with 134 people in hospitals in Southwark having tested positive. During the week of 3 March, The Dixon Hotel lost more revenue in cancelled bookings than it received from bookings; that pattern worsened during the subsequent weeks commencing 10 and 17 March. The Hotel closed on 25 March and reopened only on 4 July. Overall £1.8 million of room bookings have been lost.

(2) QBE1-3

126. Each of QBE1-3 contain an insuring clause by which QBE agrees to indemnify the insured in respect of loss resulting from interruption of or interference with the business linked (to use a neutral word for the moment) to a manifestation by a person (QBE1) or an occurrence (QBE2-3) of a notifiable disease within a defined radius of the insured premises.

127. In the case of QBE1 and 2, that defined radius is 25 miles; and in the case of QBE3, it is 1 mile. That difference in radius will make a material difference to an insured in this obvious sense: an insured with a 25-mile radius clause may, depending on where its premises are, find it easier to show that there was an occurrence of the notifiable disease within that radius than an insured with a 1-mile radius clause.

128. However, assuming that an insured can establish that there is indeed a manifestation or occurrence (as applicable) of the disease within the relevant radius[24] the critical question that arises in relation to all of these QBE wordings is this:

> "In the context of the notifiable disease cover undoubtedly provided by the policy, is the effect of the radius requirement also that where the notifiable disease is present beyond that radius, and there is a single response to the presence of the notifiable disease in that wider area which applies to that wider area (within which, of course,

[24] The HIGA Interveners accept they will, if it comes to it, establish the assumption as a matter of fact as a necessary element of the insured peril. It adopts what the FCA says about the means by which that might be done.

the insured premises sits), the cover that would otherwise have existed had the response been confined to the relevant radius vanishes unless the insured is somehow and highly improbably able to divide up the effect of the single response as between its effect within the radius and outside it?"

129. The HIGA Interveners say that the obvious answer to that question is no.

130. The HIGA Interveners focus their analysis below on QBE1, again starting by looking at the key parts of QBE1 which the HIGA Interveners say are relevant. On the facts of this case it is unlikely that anything will turn on the differences between the QBE wordings, including the narrower radius under QBE3. However, where potentially relevant, any points of difference are identified and addressed as necessary.

B. QBE1

(1) The BI Cover As A Whole

131. One point can be immediately disposed of. QBE pleads that the policies were sold through brokers, whose duty it was to advise on the suitability of the insurance being sold.[25] It is not clear how, if at all, it is said by QBE that this affects the proper construction of the policies. Plainly, it does not.

132. The business interruption cover is provided by Section 7 of the QBE1 Wording **[B/13/27]**. Section 7.1 is headed "Business interruption coverage", and the insuring clause in Clause 7.1.1 provides[26]:

> "***We*** *will indemnify* ***you*** *in accordance with each item of business interruption insurance described below… for loss caused by the interruption of or interference with the* ***business*** *resulting directly from* ***damage*** *to property used by* ***you*** *at the* ***premises****…*" [27]

133. Section 7.3, headed "Extensions applicable to this section", then provides:

> "*This* ***section*** *is extended to include the following additional coverages, provided that our liability shall not exceed any applicable* ***sub-limit****... We will indemnify* ***you*** *for:…*".

[25] QBE's Defence, §41.2 **[A/11/10].**

[26] In this and all subsequent quotations, the emboldened emphasis is in the original (and denotes defined terms); the emphasis by way of underlying has been added.

[27] This clause in QBE1 does not, as QBE wrongly asserts in §3 of its Defence **[A/11/2],** provide cover for loss caused by business interruption arising from / caused by or in consequence of damage to property. The QBE1 and QBE3 policies provide cover for loss for business interruption "*resulting directly from*" damage to property in the "primary" insuring clause (as QBE terms it). However, QBE2 does use the phrase "in consequence" to link the damage to the interruption / interference.

134. The Court is asked to read these "*additional coverages*" in Section 7.3 in full **[B/13/29-32]**. It will become quickly apparent that QBE's schema in its Defence at §4 **[A/11/2]** does not reflect the structure, nature or breadth of coverage provided; to the contrary, it is a transparently artificial and inaccurate construct created by QBE in this litigation for the purposes of trying to frame its construction of the key provision in a way that it thinks assists.

135. In particular:

(1) The additional coverages in Section 7.3 do not "remove" restrictions or requirements in the "primary" insuring clause as QBE asserts. Rather, they provide a variety of different forms of business interruption cover, which are additional to, not variants of, the coverage provided by Clause 7.1.1.

(2) They cannot be bifurcated into "damage extensions" being clauses which "remove" the requirement for damage to happen at the insured premises but still require damage, or "non-damage" extensions which remove the requirement for damage but require that the insured event still occurs at or within a specified distance of the premises. See e.g. the lottery winners increased costs additional cover (Clause 7.3.8).

(3) There is therefore no general intention that can be derived from these clauses to limit cover for events occurring at the premises or within the relevant radius, to exclude events that *also* extend beyond the premises or the relevant radius, or to exclude losses caused by a single response to events at the premises or within the relevant radius and *also* outside thereof.

(4) The Court should also resist QBE's invitation in its Defence[28] to approach these additional coverages as limited "extensions" to the "primary" insuring clause which are thus to be read restrictively. The additional coverages provide cover on their own terms, and the scope of the cover must be discerned from the terms of those clauses themselves (read, of course, in the context of the section and the policy as a whole).

[28] In the Summary of QBE's Defence and passim, see e.g. §57.3.2 and §57.3.3 [**A/11/17**].

(2) The Relevant Insuring Clause In QBE1

136. The relevant clause which provides cover to the HIGA Interveners is Clause 7.3.9 **[B/13/31]**. It provides cover for:

> "*interruption of or interference with the business arising from:*
>
> *a) any human infectious or human contagious disease (excluding …[AIDS] or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the* ***premises*** *or within a twenty five (25) mile radius of it*."

137. Nine points about this insuring clause are made at this stage:

138. First, as part of what it says is the "correct approach" to the issue of causation (Defence, §12, upon which much of what follows in the Defence is built), QBE appears not to treat the interruption / interference as part of the insured peril and to assume that the proximate cause test applies as between the manifestation by a person of Covid-19 within the relevant policy area and the interference / interruption. That is wrong (though the HIGA Interveners' case does not depend on that). The correct analysis is that:

    (1) Just as RSA rightly accepts under its wordings (see above), the insured peril is the interruption / interference arising from etc.

    (2) Absent contrary agreement, the usual proximate cause test comes in at the stage of asking, in a BI policy, whether the insured peril (including the interruption / interference) has caused the loss in respect of which the insurer promises to indemnify the insured.

    (3) By contrast, the proximate cause test does not necessarily come into any causal link required as part of the description of the insured peril. That required causal link will depend on what has been agreed.

139. Second, it appears (rightly) to be common ground that the clause is referring to (or at least includes) human infectious and contagious diseases which are notifiable diseases under the 2010 Regulations. It follows that QBE, like RSA, was willing to provide cover in respect of (i) existing notifiable diseases such as SARS, which (as explained in the context of RSA4) had once been an epidemic; and (ii) any new notifiable disease, no matter what its nature (subject, of course, to the area requirement).

140. Third, the loaded description by QBE in its Defence of this coverage as an "*insured premises-related extension*"[29] is particularly inapposite given that a 25-mile radius encompasses an area of c. 2,000 square miles, an area over 3 times as big as Surrey, and roughly the size of Oxfordshire[30] Buckinghamshire[31] and Berkshire[32] combined.

141. Fourth, the otherwise somewhat tortured structure of the clause suggests that what was intended was that the required causal link is between (i) the interruption of or interference with the business and (ii) the notifiable disease *simpliciter*; and that the requirement that a person has manifested the disease at the premises or within 25 miles is a necessary but separate requirement.[33] If that is right, then much of the debate falls away.

142. Fifth:

(1) The causal link required as part of this insured peril (*"arising from"*) is different to the *"resulting from"* link which the policy requires between the insured peril (*"the interruption of or interference to the business…"*) and the loss.

(2) Although in QBE1 the relevant words have curiously, but obviously inadvertently, been omitted from the "disease" insuring clause, it is plain from all of the other insuring clauses that the relevant required causal link between the insured peril and the loss is *"resulting from"*.[34]

(3) That latter link requires, in the usual way, the insured peril to proximately cause the insured's loss. The fact that a different phrase is used to describe the causal link required within the insured peril is significant.

143. Sixth:

(1) The phrase "*arising from*" within the definition of the insured peril is also to be contrasted with the causal link within the insured peril in what QBE describes as the "primary" insuring clause, Clause 7.1.1. As set out above, in Clause 7.1.1 the

[29] QBE's Defence, §6, §8 and §57.3.2 **[A/11/3]** & **[A/11/17]**.
[30] 1,006 square miles.
[31] 732 square miles.
[32] 487 square miles.
[33] The point about the structure of the insuring clause does not arise in QBE3. It does arise in QBE2 by reason of the incorporation into the insuring clause of the definition of "notifiable disease" at 18.67.2 which is in the same terms as the relevant part of the insuring clause in QBE1.
[34] This point also arises in QBE2 and QBE3, though the causal link within the insured peril in QBE2 is "in consequence" again in contrast to "resulting from".

interruption of / interference with the business must "*result… directly from*" the property damage **[B/13/27].**

(2) In light of that distinction, QBE's assertion[35] that the QBE Wordings "*cover and are intended to cover only such interruption or interference as is directly caused*" by a "*particular, local insured premises-related occurrence or manifestation*" can be quickly dismissed. If that was what was intended, that is what the wording would have said, using words such as *"result… directly from"* as are found in Clause 7.1.1.

(3) To the contrary, given the clear contrast between the phrase *"result…directly from"* in Clause 7.1.1 and the words "*arising from*" here, the latter words can and in context here do require a less direct and immediate connection. Any suggestion (for example by reference to MacGillivray §21-004) that "*arising from*" does not usually displace the usual test of proximate causation would be misplaced since the meaning of the phrase must depend on its context:

(a) As indicated, here the words are not a description of the required causal link between insured peril and loss (or in property insurance, damage; and in liability insurance, liability), where the default is the proximate cause test, but within the description of the insured peril where there is no such default.

(b) Many of the cases that hold that the words "*arising from*" do not displace the default required causal link between excluded peril and loss / damage / liability relate to exclusion clauses where different considerations will arise and/or were cases in which the particular context, or other language used, led to the conclusion that the words must be understood in that way.[36]

(c) There are numerous cases in which "*arising out of*" has, in context, been held to permit of a wider causal link than the proximate cause test.[37] Here that

[35] QBE's Defence, §57.2 **[A/11/16]**.

[36] *Coxe v Employers' Liability Assurance Corporation* [1916] 2 KB 629 and *Bell v Lothiansure* 1993 SLT 421 (referred to by MacGillivray) involved exclusion clauses, and the meaning of these words was apparently not argued in either case. In *ARC Capital Partners Ltd v Brit Syndicates* [2016] 4 WLR 18, Cooke J held that in an exclusion clause the words "*arising from"* did denote proximate cause, in the context of a phrase which excluded loss *"arising from or in any way involving*", on the basis that if meaning was to be given to both phrases the words "*arising from*" must be narrower than "*in any way involving*". In *Sutherland Professional Funding Ltd v Bakewells* [2013] Lloyd's Rep 93, the expression "*arising from*" was construed as meaning proximate causation: that was a case where these words 'stood on their own' rather than in contradistinction to any other words, and that was evidently essential to the Judge's conclusion: see [94].

[37] See *Dunthorne v Bentley* [1999] Lloyd's Rep IR 560, recently approved by the Supreme Court in *R&S Pilling* v *UK*

context includes the different phrases used to describe the required link between insured peril and loss; and between interference / interruption and damage in Clause 7.1.1.

144. Seventh, in relation to the 25-mile radius:

(1) QBE asserts[38] that the fact that cover is limited by reference to geographically defined areas of within 25 miles of the insured premises demonstrates an objective intention (i) to provide cover in respect of losses caused by notifiable disease within the policy area, and (ii) not to provide cover for losses caused by other matters including nationwide epidemics and the responses to such matters.

(2) But infectious and contagious diseases spread. That is their very nature. It cannot sensibly be contended that if a notifiable disease was manifest within a 25-mile radius, i.e. a 2000 square mile area surrounding the insured premises (an area the size of Oxfordshire, Berkshire and Buckinghamshire combined), the fact that the disease was also manifest outside that area, or the fact that it was manifest nationwide (or worldwide), deprives the insured of cover. That would be a nonsense. It appears that much is common ground.[39]

(3) What the 25-mile radius requirement was intended to do was require that the infectious disease had come within a specified distance of the insured premises.[40] Its inclusion evinces an objective intention not to provide cover for entirely remote outbreaks of infectious diseases in a wholly different geographical area which might still impact on the business of an insured. But it does not, contrary to QBE's assertion,[41] demonstrate an objective intention not to provide cover for losses caused by nationwide pandemics and the responses to such matters.

145. Eighth, there is nothing in the language of the clause (or elsewhere) which provides any support for QBE's case that the interruption / interference must arise solely or directly from

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Insurance Limited [2019] 2 WLR 1015 where Lord Hodge, giving the judgment of the Court, accepted (at [42] to [45]) that "*arising out of*" encompasses more remote consequences although "*there must be a reasonable limit to the length of the relevant causal chain*". See too *AXN v Worboys* [2012] EWHC 1730 (QB), in which Silber J held that "*arising out of*" contemplated more remote consequences than "*caused by"* at [38]; and *Beazley Underwriting Ltd v The Travelers Companies Incorporated* [2012] Lloyd's Rep IR 78, per Christopher Clarke J at [120] to [128].

[38] QBE's Defence, §43 **[A/11/12].**

[39] That much, at least, appears to be accepted by QBE: QBE's Defence §65.5 **[A/11/22]** pleads that the question of whether or not the disease also occurred outside the policy area is irrelevant.

[40] PoC §4.5 **[A/2/5].**

[41] QBE's Defence, §43 **[A/11/12].**

the disease in the relevant policy area. By contrast, elsewhere in QBE1, the parties use the language *"directly"*[42] to indicate such a connection is required, and express wording is used to make clear that there is no cover even if an insured peril or cause *"contribut[es] currently or in sequence*" to the loss[43], or *"regardless of any other cause or event contributing concurrently or in any other sequence*"[44].

146. Lastly, there is a 3-month maximum indemnity period, which in itself indicates that it was contemplated that the interruption or interference might last longer, which would only be the case for serious outbreaks of infectious diseases.

(3) Exclusions To The Business Interruption Cover In QBE1

147. In construing the scope of the cover provided by Clause 7.3.9, it is relevant to have regard to the Exclusions in Section 7.4, all of which are specific to the business interruption cover: as Christopher Clarke LJ emphasised in *Atlasnavios-Navegação, LDA v Navigators Insurance Co Ltd* [2017] 1 WLR 1303, at [34], "[*t*]*he perils and exclusions together express the ambit of the cover and they have to be construed together, each of them being looked at in the light of the other; you do not start from the premise that one has primacy over the other.*"[45]

148. Section 7.4 sets out exclusions to the business interruption cover, in addition to those applicable to the property damage cover. Clause 7.4.3 **[B/13/33]** excludes:

"*any loss caused by:*
(a) *acts of any civil, government or military authority caused by or following:*
i) *conflagration; or*
ii) ***storm****; or*
iii) *earthquake; or*
iv) *explosion; or*
v) *impact by aircraft or other spatial device or;*
vi) ***flood****; or*
vii) *actual or suspected presence of any radioactive or toxic material (including "dirty bombs"); or*
viii) *suspect packages;…*

[42] Not only in Clause 7.1.1 itself, but also in e.g. Clause 4.4.4(c) **[B/13/14]**, and Clause 23.12 [**B/13/91**].
[43] The Micro-organism Exclusion Clause 12.11 [**B/13/47].**
[44] The War and Terrorism Exclusion Clause 21.4.1 **[B/13/84].**
[45] To similar effect, Lord Hodge stated in *Impact Funding Solutions Ltd v Barrington Services Ltd* [2017] AC 73, at [7], that the extent of an insurer's liability "*is ascertained by reading together the statement of cover and the exclusions in the policy."*

*other than to the extent provided in the various extensions contained in this **section** or as may be added by endorsement."*

149. The (no doubt obvious) relevance of that is as follows[46]:

(1) Human infectious/contagious diseases of themselves will never directly cause interruption or interference with business; it is the human responses, reactions to or interventions following those diseases, including the actions of relevant authorities, that will do so.

(2) Further, the possibility of a wide-ranging, even national response to a notifiable disease is inherent in the very nature of notifiable diseases and the ever-present possibility that a new one might become an epidemic (as had SARS, even if not in this country) or even pandemic (as in fact did occur with Covid-19) or even become notifiable precisely because it had become an epidemic or pandemic.

(3) Given that context, it is obvious that the response of the authorities (or individuals) to a notifiable disease cannot be a cause separate to or independent from the disease itself. But if there was otherwise any doubt about that, the fact that Clause 7.4.3 does not, against that background, exclude the actions of civil, governmental or military authorities caused by or following notifiable diseases, would be fatal to any suggestion that, properly construed, the cover does not respond to the acts of any such authorities following notifiable diseases.

(4) But once it is accepted, as it therefore must be, that the notifiable disease clause provides, in principle, cover for loss resulting from interruption or interference arising from a national government's response to a notifiable disease, which might be an epidemic or pandemic, the use of the radius to achieve what QBE says it is intended to achieve is baffling. Rather, the obvious way in which that would be done would be by inclusion of notifiable diseases (or, if only this was intended, notifiable diseases which become epidemics or pandemics) in Clause 7.4.3(a) or an exclusion like it.

(5) QBE's mantra in its Defence[47], that the absence of a pandemic exclusion does not mean that pandemics are covered, is therefore true only if taken in isolation, out of

[46] There is an identical exclusion in QBE3, but not in QBE2.
[47] See e.g. QBE's Defence, §§9 **[A/11/3]**, 42 **[A/11/11]**, 57.6 **[A/11/18]** and 65.6 **[A/11/22].**

the policy context and ignoring the nature of notifiable diseases. In its proper context, the absence of a pandemic exclusion in this policy is striking; and the suggestion that the radius is the intended (back-door) way of reaching the same end is wrong.

(4) The Insured Peril

150. In order to prove the insured peril in Clause 7.3.9, the insured must show:

(1) a human infectious or human contagious disease an outbreak of which the local authority has stipulated shall be notified to them

(2) manifested by any person

(3) whilst at the premises or within a 25-mile radius of it

(4) from which has arisen interruption of or interference with the business.

151. Each is taken in turn.

(i) Notifiable disease

152. QBE admits, as it must:

(1) that Covid-19 is a human infectious or human contagious disease: Defence, §45 **[A/11/12]**.

(2) that Covid-19 was, from 5 March 2020 (in England) a disease which had to be notified to a local authority: Defence, §46 **[A/11/12]**.

(ii) Manifested by any person

153. It seems to be common ground that at least where a person has been diagnosed with Covid-19, Covid-19 has been manifested by that person. As to what else it embraces, the FCA's submissions are adopted.

(iii) Whilst at the premises or within a 25-mile radius of it

154. The HIGA Interveners accept that they will have to establish, on the facts, that there was, at the relevant time, a person who had manifested Covid-19 either at the premises or within 25 miles of it.

155. Regrettably, QBE, like RSA and most of the other Insurers, is being remarkably difficult about how an insured might do that. The HIGA Interveners adopt what the FCA says about that.

(ii) Interruption of or interference with the business arising out of

156. It is common ground that human action and/or intervention including the social-distancing measures and closure measures identified by the FCA could in principle cause interference[48] with the insured's business (QBE Defence §51.1 **[A/11/13]**).

157. While apparently not common ground, it is difficult to see how at least the closure measures would not also cause interruption to the insured business.

158. So, the debate comes down, critically, to the nature and proof of the required causal link between any such interruption or interference (the first part of the insured peril) and the rest of the insured peril.

159. The HIGA Interveners adopt what the FCA says on this issue even assuming, as the FCA does, contrary to the HIGA Interveners' primary case, that the link required between the interruption / interference and the rest of the clause is the proximate cause test.

160. But if the HIGA Interveners are right that a looser causal link is, for the reasons given at §136 to §149 above, intended between interruption / interference and the notifiable disease etc., then that is an alternative route home.

161. To what the FCA says applying the proximate cause test, the HIGA Interveners add only the following. If common sense is applied, as it is rightly often said it should be in the context of causation[49], this issue is nothing like as difficult as QBE's labyrinthine case would have the Court believe:

    (1) Although remarkably QBE does not accept as much (QBE Defence, §58.1 [**A/11/18**]), it must be obvious, as already indicated, that the response of individuals or authorities to a notifiable disease are not independent or separate and distinct causes to the notifiable disease itself. If they were, then it is almost impossible to see how the notifiable disease cover would ever bite: the response to the disease

[48] It is notable that the wording elsewhere restricts the cover to damage which "interrupts" the business e.g. Clause 7.3.12 [**B/13/32**]. Plainly "interference" is intended to have a wider and different meaning from "interruption".
[49] E.g., *Tate Gallery (Board of Trustees) v Duffy Construction Ltd* [2007] 1 All ER (Comm) 1004 at 1021, [42].

would always be said to be a separate independent cause. The fact that any particular response is not "inevitable" (QBE Defence, §58.3 [**A/11/18**]) is nothing to the point. The conclusion is reinforced by the Exclusion referred to at Section (3). It follows that, subject to the radius requirement, there is cover for interruption or interference arising from the response of individuals or authorities to notifiable diseases, including Covid-19.

(2) QBE's apparent case that there is only cover if the response of the authorities is to the particular "local" part of the disease (i.e. that part within a 25-mile radius) can be tested in this way:

(a) If a particular insured (X) can establish the presence of individuals with Covid-19 within the 25-mile radius of its premises at (or before) the relevant time and assuming such cases are the only cases in the country, it should then be common ground that if, in response, the government had taken the approach taken in, say, Wuhan or Lombardy, and shut down a circular area which happened to coincide precisely with a 25-mile circle around the insured premises, X would have been entitled to claim under QBE1 for all the interruption / interference which arose.

(b) Assume then that before any lockdown has taken place, there is another insured under QBE1 (Y) whose premises are 15 miles from the premises of X. Y too can show that there are cases of Covid-19 within 25 miles of its premises, although these emerge a week after the cases within the 25-mile radius of X's premises and do not overlap geographically with those cases (though they were probably caught from them). At this point, the government decides to lockdown an area including within it the two overlapping circles, each with a 25-mile radius, around X's premises and Y's premises.

(c) It is very hard to see why, as a matter of common/commercial sense, it would have been intended that X should now have lost the cover he would have had in the previous scenario, simply because here there were also cases outside his radius and the government response embraced the entire affected area. Yet that is precisely the effect of QBE's case. Y too would also have no cover.

(3) QBE suggests[50] that "*if an event occurs inside that 'local area', but also extends outside of it, then cover will apply only insofar as interruption or interference is caused by the 'local' part of the event*". But in practice, it is unclear how QBE says an insured could do that in the example just given. Even without any wider area government action, in any case of wider area notifiable disease it is likely to be an extremely difficult, if not impossible, task, to untangle the potentially many different reasons why each customer did not come into, say, its pub and establishing whether each was local or "external". That cannot be what was intended.

(4) If it is very hard to understand the commercial sense in such an outcome, it is impossible to see that if that outcome was really what was intended, QBE would have tried to achieve it by the sole means of including the radius requirement, in the context of cover for infectious or contagious diseases of a seriousness to warrant notifiable disease status. No reasonable insured looking at the policy would possibly have appreciated that that was the intention and that the notifiable disease cover was thereby rendered essentially worthless in many, indeed most, likely scenarios.

(5) The common-sense approach is this. Here, the government's nationwide response - in the form of its social distancing measures from 16 March 2020; and its closure measures from 20 March 2020 - was to the fact of cases of Covid-19 throughout the country, including, necessarily, anywhere there were cases within a 25-mile radius of the relevant insured premises. The cases in that area were a part of the overall picture and just as important a part as the fact of cases in any other area, overlapping or otherwise. Provided therefore, the threshold of showing cases within the area is overcome by any insured, there is cover for the interruption and interference caused by those measures.

(6) Likewise, it is a logical nonsense to argue that because the governmental measures were taken because of the presence of the disease throughout the country, they were not taken because of the presence of the disease in any particular geographical area. To the contrary, they were taken because of the presence of the disease in **all** geographical areas, including the relevant area. The idea that the fact of cases in any and every area were not a real cause of the decision to act nationally is unreal.

[50] QBE's Defence §57.5 **[A/11/18].**

(7) Thus, taking an example of a business in London, QBE's case must be that the same interruption and interference would have been suffered even but for the presence of Covid-19 in the relevant policy area, namely a 2,000 square mile area in and around London. But if there had been no cases at all of Covid-19 in London or within a 2,000 square mile area from the centre of London as at 20 March 2020, would the government have ordered all hotels, bars, clubs, restaurants in London and the rest of the country to close on that date? Common sense again provides the answer to this question. It would be utterly bizarre if the policy required insureds to obtain evidence from the government to prove that to be so.

(8) It is nothing to the point to identify an area subject to the measures which did not have any reported cases in it.[51] For that area, reported cases within its boundaries were not a relevant cause. But it does not in any way follow that for those areas which did have reported cases, those cases were irrelevant, and not a real (if necessary proximate) cause, of the decision to take the measures which were taken.

(9) Finally, even though the Covid-19 cases in other areas were of course, in the same way, also a cause of the action taken, together with the advice given by the government, that makes no difference because they are all part of the same single disease which has spread widely: this is not a case of entirely separate, unrelated outbreaks and the contrary is rightly not suggested. But even if they were properly to be viewed as concurrent proximate causes, they are not excluded causes and therefore make no difference. The implicit suggestion inherent in QBE's case that the intended effect of the radius requirement is to make them excluded causes cannot be right.

162. Is the above common-sense answer available to the Court? Undoubtedly yes. Nothing in the wording of QBE1 or general principles of insurance law precludes that answer; and indeed, the points made at Section B above when analysing the QBE1 wording further support, or provide an alternative route to, that answer.

163. It is accepted that the position might be more nuanced pre-16 March 2020, when the nationwide social distancing measures were introduced. However:

[51] Though the very fact that the Scilly Isles have been alighted on by some Insurers tells its own story about the prevalence of Covid-19 across the UK.

(1) At least for any business where the international position would be irrelevant, common sense again suggests that it is highly likely that any fall-off in business (and thus interference) pre-16 March 2020 was due, primarily, to localised concerns.

(2) For example, it must be overwhelmingly likely that the cause of the cancellation of Mothers' Day bookings at the Posh Partridge from 9 March 2020 onwards was the announcement, on 9 March 2020, of the first 3 confirmed cases in Dorset. But it is accepted that this is fact sensitive and for another day.

(iv) Conclusion on insured peril

164. The insured peril is therefore established in relation to the effect on business of the nationwide social-distancing and closure measures.

165. The next issue is whether the insured peril caused the assumed loss.

(5) Cause Of The Assumed Loss

166. If the HIGA Interveners are right about what the insured peril is and that it is satisfied, it must be obvious that that *"interruption or interference arising from…[etc]"* will proximately have caused the insured's loss.

167. It will then be for QBE to show that even if there had been no such interruption or interference arising from etc. as there in fact was, the insured would have suffered the same loss or some of it in any event (e.g. the Swedish point).

168. The HIGA Interveners adopt what the FCA says about this.

(6) Trends Clause

169. The 'trends clause' included in most but not all[52] of the QBE1-3 wordings is a definition entitled "*Trends Adjusted*", which relates specifically to business interruption following "*damage*" and adjusts the figures so that they represent the results which but for the "*damage*" would have been obtained. It provides that:

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

[52] There is no "*Trends Adjusted*" clause at all in one of the QBE1 wordings, QBE1: POFPO40120.

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

170. The FCA's detailed submissions as to why this clause has no application at all in this case are adopted.

171. But even if it does, it is hard to see how it helps QBE if the HIGA Interveners are right thus far. The FCA's submissions as to the proper counterfactual are adopted.

C. QBE2 AND QBE3

172. These can be taken very briefly since the points are largely the same. Some differences should, however, be drawn to the Court's attention.

173. The differences are these:

(1) The relevant insuring clauses are found at Clause 3.2.4 (QBE2) and Clause 3.4.8 (QBE3).

(2) Sub-paragraph (c) of those insuring clauses refers to an(y) occurrence of the notifiable disease, as opposed to a manifestation by any person, within a certain radius of the insured premises. As to the difference: see the FCA's Submissions.

(3) QBE3 has a 1-mile radius (rather than the 25-mile radius in QBE2 and QBE1). Two points should be noted about that:

(a) First, the narrower radius may obviously make it harder for an insured to show that there was an occurrence of Covid-19 in that area. It is, in that sense, a real extra filter.

(b) Second, applying the correct approach, set out above and by the FCA, the fact of the narrower 1-mile radius makes no difference at the next stage, in determining whether, if there was an occurrence of the notifiable disease within 1-mile, the relevant causal link to any interruption / interference is satisfied on the facts of this case. The occurrence within 1-mile was also a material part of the overall picture which led to the nationwide response.

(4) QBE2 and 3 include a proviso to the notifiable disease clause which provides that *"the insurer shall only be liable for loss arising at those premises which are directly*

subject to the incident". It is not clear whether QBE seeks to rely on that proviso. In any event, the proviso does not assist QBE:

(a) The proviso plainly does not mean the notifiable disease must occur at the insured premises. That would be inconsistent with the fact that cover is provided where there is an occurrence within a 1-mile radius in sub-paragraph (c) and render the cover under sub-paragraph (c) illusory.

(b) What the proviso excludes is loss resulting from interference / interruption to business at any insured premises other than the particular premises which are affected by the relevant matter in sub-paragraphs (a) to (f) of the insuring clause. But if, for example, there was a notifiable disease at one hotel in a chain, any resulting interruption or interference caused to another insured hotel in the chain would not be covered.

(5) QBE2 includes, in relation to the notifiable diseases cover (and the other covers included in the same insuring clause), a sub-limit of £100,000 in respect of any one incident, or 15% of the total sum insured for Section B, whichever is lesser, any one claim and £250,000 any one period of insurance. In that context QBE's case as to what the policy requires an insured to prove and how it must do so, are all the more unreal.

(6) QBE3 includes (at Clause 3.5.4) an identical exclusion clause to Exclusion Clause 7.4.3 discussed in paragraph 148 above. QBE2 does not: there is therefore no exclusion for loss caused by acts of any civil or government authority at all.

(7) Finally, there are certain other differences, already identified above, in terms of the language used to describe the causal links required in certain clauses. Where that means a point made above on QBE1 does not carry through to QBE2 or 3, that is identified above where the point is made. Importantly, however, the FCA's and HIGA Interveners' primary case on QBE1 does not ultimately depend on any of the points which have no application to QBE2 or QBE3, so the overall conclusions on QBE2 and 3 should be the same.

PART V: CONCLUSION

174. Having provided cover for notifiable diseases, RSA and QBE effectively say that they did so only for little notifiable diseases to which the response was strictly confined. They do so almost entirely on the basis of the relevant geographical restriction in each of the potentially applicable insuring clauses. It simply will not bear the weight which they need it to.

175. The Court is therefore respectfully requested to grant the primary declarations claimed by the FCA in relation to RSA4 and QBE1-3.

PHILIP EDEY Q.C.
SUSANNAH JONES
Twenty Essex

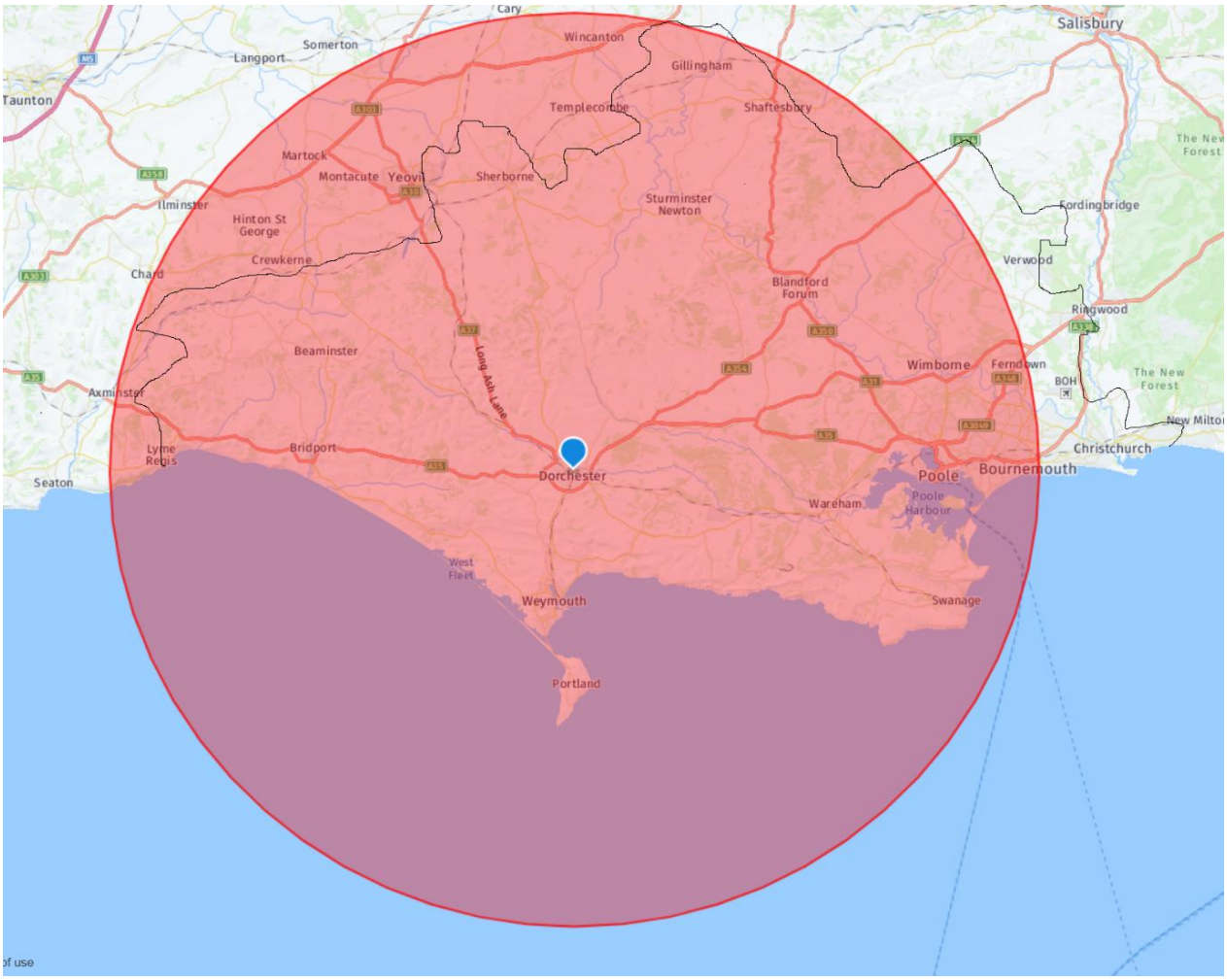
JOSEPHINE HIGGS
7KBW

10 July 2020

APPENDIX 1

The Posh Partridge

25-mile radius show in red, Dorset county border in black



APPENDIX 2

The Dixon Hotel, 1-mile radius show in red