IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM
THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS,
COMMERCIAL COURT (QBD), FINANCIAL LIST
Neutral Citation: [2020] EWHC 2448 (Comm)

BETWEEN:

(1) ARCH INSURANCE (UK) LIMITED
(2) ARGENTA SYNDICATE MANAGEMENT LIMITED
(3) HISCOX INSURANCE COMPANY LIMITED
(4) MS AMLIN UNDERWRITING LIMITED
(5) QBE UK LIMITED
(6) ROYAL & SUN ALLIANCE INSURANCE PLC

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

QBE UK LIMITED'S APPLICATION FOR PERMISSION FOR APPEAL
INFORMATION ABOUT THE DECISION BEING APPEALED

References in square brackets are references to the paragraphs in the judgment of Lord Justice Flaux and Mr Justice Butcher dated 15 September 2020.

I INTRODUCTION

1. This application for permission to appeal is filed on behalf of the Sixth Defendant, QBE UK Limited ("**QBE**").

2. QBE adopts the "Common Sections of the Appellant Insurers' Application for Permission to Appeal", which includes: (1) a narrative of the facts (Section B); (2) the statutory framework (Section C); (3) a chronology of the proceedings (Section D); and (4) reasons for expedition (Section E).

II ISSUES BEFORE THE COURT APPEALED FROM

(a) Introduction

(i) Scope of QBE's appeal

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

4. The insuring clauses in the QBE Wordings, which the Financial Conduct Authority ("**FCA**"), and the interveners known as the 'Hospitality Industry Group Action' ("**HIGA**"), argued responded to loss caused by the COVID-19 pandemic, were one limb of cover provided in the *'Murder, suicide or disease'* extensions in the QBE Wordings. These clauses formed part of the category of clauses referred to in the Judgment as "Disease Clauses". QBE adopts the same term herein, although the clauses in question also cover a range of non-disease related events.

5. QBE appeals against the Court's findings in relation to the construction of the QBE1 Disease Clauses and its findings in respect of causation.

(ii) The QBE1 'Disease Clauses'

6. The extension which contains the Disease Clause in the QBE1 (PBCC040120) Wording (identified as the 'lead' wording for the Test Case) and the QBE1 (PBCC170619) Wording provides (bold emphasis original; underlined emphasis added):

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

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

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

8. In summary, QBE maintains that:

8.1. On a proper construction of the QBE1 Disease Clauses (on a plain reading of the words of the clause in the context of the QBE1 Wording as a whole);

8.1.1. the evident intention of clauses (a) to (e) is to provide cover for interruption of or interference with the insured business ("**BI**") arising from events occurring in or within a designated distance of the premises. In short, the clauses are intended to cover the consequences of events in, or in the locality of, the insured premises;

8.1.2. the insured peril, is (1) the "manifestation" of; (2) a notifiable disease; (3) at the insured premises or within 25 miles of the insured premises;

8.1.3. it is BI arising out of (that is to say caused by) the operation of the insured peril that is covered by the clause;

8.1.4. accordingly, in order for cover to apply under the QBE1 Disease Clauses each insured had to prove that their BI loss was caused by the manifestation of the notifiable disease in the relevant policy area.

8.2. Such cover will respond when there is a local outbreak of a notifiable disease and the business of the insured at the premises is interrupted as a result. In such a case the fact that the disease has also manifested itself outside the relevant policy area will not prevent the policy responding provided that the outbreak within the relevant policy area remains an effective cause of the BI. The policy will not respond, however, to BI caused by a national lockdown imposed to contain or control the transmission of a notifiable disease when there is no evidence, or even suggestion, that the BI was the result of any local appearance of the disease.

8.3. It follows from the above that the correct counterfactual when calculating the indemnity under the QBE1 Disease Clauses is to assume that the particular manifestation(s) of COVID-19 within the relevant policy area that is/are said to have caused the BI did not become manifest, but all other cases of COVID-19 and public response and official action remain;

8.4. The Court erred in law by finding that on a proper construction of the QBE1 Disease Clauses: (1) the BI itself forms part of a "*composite*" insured peril (as to which, see below); (2) the QBE1 Disease Clauses provide cover for the consequences of BI losses arising from COVID-19 anywhere in the UK provided that there has been at least one manifestation of the disease within the 25 mile radius; and (3) there is, accordingly, no requirement that the appearance of the disease in or within 25 miles of the premises should have caused or even contributed to the loss. This

interpretation disregards entirely the focus of each of clauses (a) to (e) on the impact on the insured's business of local events and deprives the manifestation of the disease in or within 25 miles of the insured premises of any relevance as a cause of loss.

8.5. The Court also erred in concluding that:

8.5.1. where COVID-19 is present within the relevant policy area (within 25 miles of the insured premises for QBE1), its effects (in causing BI to insured businesses) cannot be distinguished from the effects of the occurrence of the disease elsewhere, or the reaction to it, but rather they are *"part of an indivisible cause"*, or alternatively, that each individual occurrence of COVID-19 was a proximate cause of all the consequences of COVID-19 in the UK; and

8.5.2. the appropriate counterfactual for quantifying the indemnity payable under QBE1 is to assume that there was no COVID-19 in the UK and that all of the consequences of COVID-19 in the UK have not occurred.

(iii) Quantification machinery and 'trends clause'

9. The BI Section of each of the QBE Wordings begins with a general insuring clause which provides cover for interruption of or interference with the business which results directly from damage to property (QBE1 and QBE3), or is in consequence of damage to property by an insured peril (QBE2). Bases of settlement are then provided for loss of insurable gross profit, gross fees, gross revenue, increased cost of working, rent receivable, etc.

10. The definitions of the bases of settlement include trend adjustment language. By way of example, in the QBE1 lead wording the rate of 'gross profit' and 'turnover' are referred are as being *"the rate of gross profit earned, trend adjusted, on the turnover during the financial year immediately before the date of damage"*[*] and *"the turnover excluding VAT, trend adjusted, during the twelve months immediately before the date of damage"* respectively. *"Trends adjusted"* is defined in the QBE Wordings (save for QBE1 (POFP040120)) as:

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

11. In summary, QBE maintains that the Court was wrong in its approach to the 'trends' clause. The Court wrongly held that the decision in *Orient-Express Hotels Ltd v Assucurazioni Generali SA* [2010] Lloyd's Rep IR 531 was distinguishable from the present case and/or should not be followed and that the 'trends' clause should operate as if the whole COVID-19 pandemic and all of its consequences was part of the peril insured against. *Orient-Express* was correctly decided

and was not distinguishable from the present case. Accordingly the Court ought to have held that the trends clause should operate so that the only event which is not to be considered when quantifying the required indemnity is the insured peril itself.

(b) Common ground between the FCA and QBE

12. Insofar as QBE1 is concerned, the following matters were common ground between the FCA, HIGA and QBE at the hearing:

12.1. COVID-19 was a "*human infectious or human contagious disease which the local authority has stipulated shall be notified to them"* within the meaning of the QBE1 Disease Clauses from 22 February 2020 in Scotland, 5 March 2020 in England and 6 March 2020 in Wales[1];

12.2. as a matter of principle, a *"manifestation"* of COVID-19 within the meaning of the QBE1 Disease Clauses could be said to have occurred within the 25 mile radius of the insured premises, whenever after 5/6 March 2020 the presence of COVID-19 had been demonstrated and/or revealed and/or displayed within 25 miles of the insured premises[2];

12.3. the "*manifestation*" of COVID-19 within the relevant policy area and the date of that manifestation may be proved by a policyholder on the basis of specific evidence of a case or cases of COVID-19 in a particular location and/or publicly available data and/or reliable distribution-based or undercounting analyses[3];

12.4. the human action and/or intervention including the advice, instructions and/or announcements as to social-distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working given from 16 March 2020 and the 23 March Regulations could, in principle, cause interference with the insured's business (within the meaning of the QBE1 Disease Clauses)[4]; and

12.5. the 'trends' clause in the QBE1 (POFF180120) Wording applies to claims under the Disease Clause in those policies notwithstanding reference to 'damage' in the trends clause[5].

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1 Items 1.1 and 1.4 of the Agreed List of Issues and Common Ground.

2 Items 6 & 7 of the Agreed List of Issues and Common Ground and paragraph 199.2 of QBE's Skeleton Argument (for the trial).

3 Appendix 3 to the Joint Skeleton Argument (for the trial) of Ecclesiastical and MS Amlin which was adopted by QBE (paragraph 204 of QBE's Skeleton Argument (for the trial)). For the avoidance of doubt, the agreement, insofar as it relates to the QBE1 Disease Clauses, was an agreement that, assuming the Court endorsed the FCA's arguments on construction of the QBE1 Disease Clauses, then in principle, a policyholder may prove "manifestation" of COVID-19 by reference to statistical analysis. See paragraph 207 of QBE's Skeleton Argument (for the trial).

4 Item 19 of the Agreed List of Issues and Common Ground.

5 Paragraphs 856 and 857 of the FCA's Skeleton Argument (for the trial).

(c) Issues in dispute between the FCA and QBE

13. The main issues in dispute between the FCA (which adopted HIGA's submissions) and QBE in respect of the QBE1 Disease Clauses were as follows:

13.1. whether (as QBE argued) the insured peril, is (1) the *"manifestation"* of; (2) a notifiable disease; (3) at the insured premises or within 25 miles of the insured premises, or whether (as HIGA argued), the insured peril includes: (1) the interruption to or interference with the business arising from / caused by; (2) the "*manifestation"* of; (3) a notifiable disease; (4) at the insured premises or within 25 miles of the insured premises;

13.2. whether (as QBE argued) the words *"arising from"* and *"caused by*" in the QBE1 Disease Clauses require proximate causation between the interruption to or interference with the business and the manifestation of the notifiable disease within 25 miles of the insured premises, or whether: (1) (as HIGA argued), the words *"arising from"*, and *"caused by"* formed part of the insured peril and did not require proximate causation; or (2) (as the FCA argued) they did connote something in the *"nature of"* proximate causation but applied *"as a servant and by reference to the proper construction of the Wordings"*[6].

13.3. whether on a proper construction of the QBE1 Disease Clauses, (as QBE argued) in order for cover to apply under the QBE1 Disease Clauses each insured had to prove that their BI loss was proximately caused by the manifestation of the notifiable disease in the relevant policy area, or whether (as the FCA argued) cover would apply to the BI loss sustained by the insured as a result of the broader COVID-19 situation provided that there has also been at least one case of the notifiable disease within the relevant policy area;

13.4. whether (as the FCA argued), for the purpose of the QBE1 Disease Clauses, there was *"only a single indivisible proximate and 'but for' cause – the single national outbreak of – of which each local outbreak formed an integral part", alternatively, there were concurrent causes but the local disease remains the proximate cause"*[7];

13.5. whether the correct counterfactual (as QBE argued) was that the particular manifestation(s) of COVID-19 within the relevant policy area that is/are said to have caused the BI did not become manifest, but all other cases of COVID-19 and public action remain, or (as the FCA argued) that there was no COVID-19 in the UK (alternatively, the world[8]) and no public action or, alternatively, no manifestation of COVID-19 within the relevant policy area but the disease continues outside such that

6 Paragraph 822 of the FCA's Skeleton Argument (for the trial).
7 *Ibid*.
8 Paragraph 4.3 of the FCA's Particulars of Claim.

the relevant policy area is treated as *"an 'island' of normal disease-free trade in a 'sea' of disease / public action"*[9]; and

13.6. whether the 'trends' clause in the QBE1 (PBCC170619 and PBCC040120) wordings applies to claims under the Disease Clauses in those policies notwithstanding their reference to 'damage', and the correct operation of all of the QBE trends clauses.

III TREATMENT OF ISSUES BY THE COURT APPEALED FROM

14. In respect of the QBE1 Disease Clauses, the Court held:

14.1. the disease would be *"manifest"* if: (1) someone is displaying systems; or (2) a person, though superficially asymptomatic, had been diagnosed with the disease (because the disease would have been 'manifested' to the diagnostician) but there would be no 'manifestation' of the disease if the person was asymptomatic and had not been diagnosed;[10]

14.2. the relevant insured peril was *"interruption or interference with the business arising from (a) any notifiable human or contagious disease manifested by any person whilst in the premises or within a 25 mile radius of it"*[11];

14.3. insofar as the proper construction of the QBE1 Disease Clauses was concerned:

> *"… within the insured peril, the required causal link is between the interruption or interference with the business on the one hand and the notifiable disease on the other, provided it has been "manifested by" a person within the 25 mile radius. We do not consider that the clause most naturally reads or should be construed, as saying that the interference had to result from the particular case(s) in which the disease is manifested within the 25 mile radius. This appears to us to be apparent form the juxtaposition of the notifiable disease and the fact that the phrase "manifested by any person whilst in the premises or within a twenty five mile radius of it" is most naturally read as adjectival clause limiting the class of notifiable diseases which, if they interfere with the business, will lead to coverage."*[12]

14.4. on the basis of this construction, no significant further questions of causation arise because:

> *"The insurers clearly cannot, on this basis, contend that the occurrence of the disease elsewhere, or the reaction to it are to be regarded as separate consequences. There is to be regarded sufficient causation of the business interference if the disease which has manifested itself in the radius is an effective cause of that business interference."*[13]

14.5. insofar as the 'trends' clauses in the QBE1 Wordings were concerned, the Court held that they all *"should be interpreted as applying the contractual quantification*

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9 Paragraph 79 of the FCA's Particulars of Claim.

10 This finding is not appealed but is recorded because QBE submits it is relevant to the proper construction of the QBE1 Disease Clauses.

11 [225].

12 [226].

13 [229].

mechanism applicable to damage-related BI-claims to the non-damage BI covers, including by manipulation of the requirement for damage, save insofar as inconsistent with more specific provisions as to quantification."[14]

15. Insofar as the Disease Clauses in respect of which the Court held there was cover for the consequences of COVID-19 in the UK (including therefore QBE1) the Court found:

15.1. At [111][15]:

> *"… we consider that the right way to analyse the matter is that the proximate cause of the business interruption is the Notifiable Disease of which the individual outbreaks form indivisible parts."*

15.2. At [112][16]:

> *"Alternatively, although we regard this as being less satisfactory, each of the individual occurrences was a separate but effective cause. On this analysis they were all effective because the authorities acted on a national level, on the basis of the information about all the occurrences of COVID-19, and it is artificial to say that only some of those which had occurred by any given date were effective causes of the action taken at that date; and still more artificial to say that because the action was taken in response to all the cases, it could not be regarded as taken in response to any particular cases… it appears to us that it is not unrealistic to say that all the cases were equal causes of the imposition of national measures."*

16. The Court determined that *"questions of causation are largely answered by the issue of construction, because it determines what can and cannot be regarded as independent causes"*. However, the Court stated that if the decision in *Orient-Express* "*somehow dictated the consequences in terms of cover and the counterfactual analysis"* it would have declined to follow it but, in any event, the case was *"clearly distinguishable from the present case in relation to those wordings which we have concluded provide cover in principle."*[17]

17. In relation to the correct counterfactual for the QBE1 Disease Clauses (and other Disease Clauses in respect of which the Court concluded there is cover for the consequences of COVID-19 in the UK in principle), the Court held that *"the whole of the disease both inside and outside the relevant area has to be stripped out in the counterfactual"* because *"the proximate cause of the business interruption is the notifiable disease of which the individual outbreaks form indivisible parts, in other words the disease in the UK is one indivisible cause"*[18], alternatively *"each of the individual occurrences was a separate but effective cause, so that they were all effective"*[19].

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14 [240]. This finding is not appealed. It is referred to because it is relevant to the appeal concerning *Orient-Express*.
15 See also [532].
16 See also [533].
17 [529].
18 [532].
19 [533].

IV RELEVANT ORDERS MADE BY THE COURT BELOW

(a) Declarations

18. The order made by Flaux LJ and Butcher J dated 2 October 2020 contains declarations reflecting the conclusions reached by the Court in the Judgment (as summarised above).

19. The declarations relevant to QBE1 are contained in paragraphs 1, 7, 8, 10, 11, 13 and 24 of the order.

20. Insofar as are relevant to QBE's appeal:

    20.1. the declaration at paragraph 10 provides:

> *"In… QBE1 … the occurrence of a case of COVID-19 within a Relevant Policy Area is to be treated as part of one indivisible cause, namely the national COVID-19 outbreak and the governmental and public reaction, of any business interruption. Alternatively, each such occurrence of a case is to be treated as a separate, but effective cause of national action and any consequential business interruption."*

    20.2. the declarations at paragraph 11.2 states that for the purposes of QBE1:

> *"[t]he correct counterfactual when calculating an indemnity is to assume that once cover under the policy is triggered none of the elements of the insured peril were present, which… (a) for disease clauses means after the date on which cover under the policy is triggered there was no COVID-19 in the UK, or any public authority or public response thereto".*

    20.3. the declaration at paragraph 11.3 records that:

> *"… the Court has not decided and does not declare whether the correct counterfactual does or does not retain the existence or effect of public authority or public response to COVID-19 which was instigated prior to the time when cover was triggered under the policy but which was continued after that time."*

(b) Leapfrog Certificate

21. On 2 October 2020, the Court also granted a 'leapfrog' certificate (pursuant to section 12(1) of the Administration of Justice Act 1969 ("**the AJA 1969**") to (1) the FCA; (2) QBE, and five of the other Defendant insurers; and (3) the 'Hiscox Action Group' Interveners.

22. The Court certified that for the purposes of section 12(1) of the AJA 1969:

    22.1. the alternative conditions in section 12(3A) of the AJA 1969 are satisfied, namely that:

        22.1.1. this test case "*entail[s] a decision relating to a matter of national importance or consideration of such a matter*" (s.12(3A)(a) of the AJA 1969);

        22.1.2. the result of this test case is *"so significant (whether considered on its own or together with other proceedings or likely proceedings) that … a*

hearing by the Supreme Court is justified" (s.12(3A)(b) of the AJA 1969); and

22.1.3. *"the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal"* (s.12(3A)(c) of the AJA 1969); and

22.2. that there is a sufficient case for an appeal to the Supreme Court under Part II of the AJA 1969 to justify an application for leave to bring such an appeal.

V PROPOSED GROUNDS OF APPEAL

23. QBE's proposed grounds of appeal are set out in Appendix 1 hereto. These proposed grounds of appeal are the grounds of appeal in respect of which Flaux LJ and Butcher J granted a 'leapfrog certificate' and permission to appeal to the Court of Appeal (in the event that the Supreme Court does not grant permission to appeal).

VI REASONS WHY PERMISSION TO APPEAL SHOULD BE GRANTED

24. QBE submits that this application for permission satisfies the test provided in paragraph 3.3.3 of the Supreme Court's Practice Direction 3, as it *"raise[s] an arguable point of law of general public importance which ought to be considered by the Supreme Court bearing in mind that the matter will already have been the subject of judicial decision and may have already been reviewed on appeal."*

25. Each of QBE's proposed grounds of appeal (as set out in Appendix 1 hereto) raises points of law which, whilst relating to specific QBE policy wordings in the test case, are nevertheless of general public importance as accepted by Flaux LJ and Butcher J when they granted the 'leapfrog' certificate.

26. These proceedings are estimated to affect (potentially), *"some 700 types of policies across over 60 different insurers and 370,000 policyholders"*[20]. Further, the particular wordings at issue in the Test Case including the QBE1 Wordings were selected by the FCA on the basis that they would enable the majority of the key issues relating to BI insurance claims arising from the COVID-19 public health crisis to be determined[21]. Accordingly, the outcome of these proceedings will have a significant impact upon numerous insurers and reinsurers, together with thousands of policyholders (including QBE1 policyholders), particularly those who have provided / reinsured / purchased cover with wordings which include a radius provision in the same or similar form to that which is the subject of Ground 1 of QBE's appeal.

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20 [7].

21 [1].

27. In respect of Grounds 2 and 3, QBE's appeal concerns novel concepts of law deployed by the Court at first instance. The Court's unorthodox approach in relation to concepts such as "*composite*" insured perils and even proximate causation itself, which contradicts (or at least appears to contradict) a number of previously settled insurance law principles, has already led to widespread uncertainty across the insurance market.

28. By Ground 4, QBE challenges the correctness of the Court's findings that the *Orient-Express* case was distinguishable and/or wrongly decided, which in addition to having direct and indirect effects on hundreds of thousands of BI policyholders in the present case, also has important implications for principles of quantification of claims more generally, given that *Orient-Express* was hitherto the leading case on the application of 'trends' clauses. This is not only a significant issue in respect of non-damage BI insurance but could have substantial ramifications for material damage (BI and non- BI) policies.

29. Whilst the issues in these proceedings have been the subject of a judicial decision at first instance by (unusually) Flaux LJ and Butcher J, there has been no review on appeal of that decision. QBE respectfully submits that given the requirement for ultimate legal certainty QBE's grounds of appeal are issues which ought to be considered by the Supreme Court.

30. Further, the FCA has applied for permission to appeal the Court's decisions in respect of the QBE2-3 Disease Clauses on the basis that the Court should have come to the same conclusion in respect of the QBE2-3 Disease Clauses as it did for the QBE1 Disease Clauses (and the other Disease Clauses). QBE respectfully submits that if the Supreme Court allows the FCA's application for permission to appeal then it should also allow QBE's application for permission to appeal which will involve the same issues.

20 October 2020

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APPENDIX 1

QBE'S PROPOSED GROUNDS OF APPEAL

PROPER CONSTRUCTION OF THE INSURED PERIL IN THE QBE1 DISEASE CLAUSES

Ground 1: **The Court erred in law by holding, at [226], that *"the required causal link ("arising from") is between the interruption or interference with the business on the one hand and the notifiable disease on the other, provided it has been "manifested" by a person within 25 mile radius"* and that the QBE1 Disease Clauses should not be construed as saying *"the interference has to result from the particular case(s) in which the disease is manifested within the 25 mile radius."***

31. On a proper construction of the QBE1 Disease Clauses, the requirement that the relevant notifiable disease be manifested at or within a 25 mile radius of the insured premises is not merely a proviso.

32. Rather, the QBE1 Disease Clauses expressly require that the notifiable disease in question has to (i) be *"manifested by any person"* which the Court correctly found meant that it was either diagnosed or symptomatic (at [224] of the Judgment) and (ii) that such *"manifestation"* had to have been either *"at the premises or within a twenty five (25) mile radius of it"*, thereby limiting cover to BI loss which was proximately caused by a particular 'local' event or outbreak of the disease.

33. This construction of the QBE1 Disease Clauses is consistent with the other 'local' events which are covered by the same non-damage extensions of which the QBE1 Disease Clauses form part (e.g. "*vermin or pests in the premises*", etc.) which all provide cover only for matters occurring at a particular time, in a particular place (e.g. at or in the premises) and in a particular way. This construction also pays due regard to and is consistent with the nature of the BI cover provided by the QBE Wordings and, more particularly, the fact that the QBE1 Disease Clauses comprise one limb out of a number of narrow premises-related non-damage extensions to what is otherwise damage-based BI cover.

34. Properly construed, the requirement that the disease is manifested within a 25 mile radius is a substantive part of the insured peril which delineates the scope of cover under the QBE1 Disease Clauses, i.e. the 25 mile radius provision operates so as to limit the scope of cover to the consequences of 'local' events (namely events occurring within the 25 mile radius which have themselves caused BI loss to the insured) only and means that there is no cover for events occurring outside of the 25 mile radius. Cover is therefore only provided in respect of interruption to and/or interference with the insured's business which is proximately caused by the particular 'local' manifestation of the relevant disease either at the insured premises or within 25 miles of those premises.

35. The Court's decision wrongly 'inverts' the nature of the 25 mile radius provision and therefore the cover which the QBE1 Disease Clauses are objectively intended to provide, by treating the radius provision as a qualifying condition or proviso. The effect of this construction is to bring 'non-local' events into cover and deprive the radius provision of any substantive effect with the result that the scope of cover provided by the QBE1 Disease Clauses is without any meaningful limit.

36. Further, the Court's approach undermines the clear language of QBE1 and in particular the phrase *"arising from"* (or *"caused by"* in other QBE1 Wordings) which is recognised as requiring a proximate causal link, by concluding that causation need only be established as between the loss claimed and the BI, rather than the loss being required to have been proximately caused by the manifestation of the disease within the relevant policy area.

37. Yet further, and in any event, the Court was wrong to conclude that the QBE1 Disease Clauses were distinguishable from the QBE2-3 Disease Clauses, which it properly concluded provided cover only for "*the results of specific (relatively) local cases*". More particularly, the Court should have concluded that:

    37.1. the requirement in the QBE1 Disease Clauses that the disease must be "*manifested*" at the insured premises or within a 25-mile radius of those premises was a requirement that in order for there to be cover there needed to be an *"event"*, i.e. something which occurs at a particular place, at a particular time and in a particular way (as with the other perils for which cover was provided under the extension);

    37.2. consistently with its approach to QBE2-3, the requirement that the disease be *"manifested"* at or within a 25-mile radius of the insured premises meant that cover was to be confined to the results of (relatively) local cases; and, therefore

    37.3. cover is only provided for the BI loss caused by the manifestation of the disease at or within a 25-mile radius of the relevant insured premises.

38. Finally, and in any event, the Court erred in holding, at [228], that QBE's construction of the QBE1 Disease Clauses would result in an *"anomaly of… no effective cover"* where *"a notifiable disease manifested itself both within and outside the 25 mile radius"* and *"there would be such governmental / public responses to the disease outbreak, rather than to specific cases of the disease, either those within or outside the radius"*.

39. The Court's conclusion was wrong because, on a proper construction of the QBE1 Disease Clauses:

    39.1. there would be effective cover in such a case where the case(s) within the 25 mile radius was/were the proximate cause of relevant interruption to or interference with the insured's business, for example as the result of a governmental and/or public response; and

39.2. where the case(s) within the 25 mile radius was/were not the proximate cause of such interruption or interference, there will be no cover under the QBE1 Disease Clauses. There is no anomaly in this outcome. It is the obvious and proper consequence of the limited cover provided pursuant to the QBE1 Disease Clauses, which contain a clear limit in the form of the 25 mile radius provision.

40. Moreover, the Court's own conclusion has the remarkable and surprising effect that cover depends upon the happenstance of whether or not a single case of COVID-19 could be proved to have manifested within the relevant policy area, notwithstanding that it had no causative effect. This, QBE submits, is entirely anomalous.

41. On the Court's (anomalous) approach, an insured could potentially use an 'after the event' statistical analysis in order to recover in respect of BI loss which was suffered long before the analysis was even embarked upon (and so long before the relevant 'manifestation' of the disease was known about by the insured or its customers) in circumstances where there is no effective causative link between the data considered in the analysis and the insured's BI loss. This is anathema to the very concept of proximate causation, which simply means that an insured is entitled to recover for loss actually caused by an insured peril.

Ground 2: **The Court erred in law by wrongly identifying the *"the relevant insured peril"* in the QBE1 Disease Clauses as *"interruption or interference with the business arising from: (a) any notifiable human infectious or contagious disease manifested by any person whilst in the premises or within a 25 mile radius of it…"* [225]. On a true construction of the QBE1 Disease Clauses, the insured peril was (1) the *'manifestation'* of; (2) a notifiable disease (3) at the insured premises or within 25 miles of the insured premises.**

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

43. The approach adopted by the Court of including the *""interruption to or interference with the business"* as part of the *"composite peril"* is inconsistent with the structure of QBE1 and with the established meaning of the term 'peril'.

44. To the best of QBE's knowledge, it is also a construction which is not supported by any legal authority or principle. According to orthodox principles, just as 'property damage' does not form part of the insured peril in a material damage policy, so the 'BI' itself does not form part of the insured peril in a BI policy.

45. The Court's error as to the proper construction of the insured peril in the QBE1 Disease Clauses was significant, because it may have led to, or contributed to, the fundamental error identified in ground 1 above and ground 4 below.

PROPER APPROACH TO PROXIMATE CAUSATION

Ground 3: **The Court further erred in law holding, at [229], that QBE *"clearly cannot… contend that the occurrence of the disease elsewhere, or the reaction to it, are to be regarded as separate causes"* and instead finding, at [165], that *"the occurrence of the disease within the area was a part of an indivisible cause, constituted by COVID-19"* or, alternatively, that "*each of the cases of the disease was an independent cause, and they were all equally effective in producing the government response*."**

46. First, there is no concept known in law of a "*part of an indivisible cause*". One event either is or is not a 'proximate' (or 'effective', as held by the Court) cause of another. Similarly, the test of causation is not satisfied by characterising the relevant event (the manifestation of a particular disease at the insured premises or within 25 miles of the premises) as being "*part of*" a wider event or concept ("*COVID-19*") (see, for example, at [156] of the Judgment).

47. The Court wrongly circumvented orthodox causation requirements by drawing a link, by means of its "*indivisible cause*" theory, between something which was causative but not covered under the QBE1 Disease Clauses (i.e. COVID-19 in the UK and/or worldwide) and something which was not causative but was potentially covered under those clauses (i.e. 'local' manifestation of COVID-19 within a 25 mile radius of the insured premises). As such, the concept of "*indivisible cause*" was an artificial legal construct deployed to overcome orthodox rules of factual and legal causation as apply (and as should be applied) in insurance contract law.

48. The point at which interconnected events become "*indivisible*" was not elucidated by the Court and rather, the Court simply concluded, without further explanation, that the right way to analyse the matter is that individual (local) outbreaks of COVID-19 form indivisible parts of a widespread outbreak of the disease (see, for example, at [111] of the Judgment).

49. Such an approach is wrong for a number of reasons. First, it is wrong because every event is part of wider circumstances and it would be impossible for the parties or the Court to determine the right scope of the wider circumstances which would count as the proximate cause in any given eventuality.

50. Moreover, even on the Court's findings on the present case, the width of the supposed "*indivisible cause"*, "*COVID-19*", is so vague as to be unworkable, given that the Court permits the following to all be seen as "*indivisible*": (i) the disease itself (regardless of the fact that these localised outbreaks of COVID-19 may occur at different times and may be comprised of different strands of the disease); (ii) any government action taken in response; and (iii) the economic and social consequences of the disease.

51. Further, and in any event, the Court erred in law by concluding, in the alternative, that each individual occurrence of COVID-19 was a proximate cause of all the consequences of COVID-19 in the UK. This was the effect of its finding, for example, at [229], that there *"is to be*

regarded as sufficient causation of the business interference if the disease which has manifested itself in the radius is an effective cause of that business interference" and that insurers could not *"contend that the occurrence of the disease elsewhere, or the reaction to it, are to be regarded as separate causes"*.

52. The Court accepted, at [112] and [533], that this analysis was a possible alternative way of characterising the situation, albeit noting it was *"less satisfactory"*. It was in fact an incorrect analysis.

53. As a matter of fact, no single case, or even localised cluster of cases, was the cause of all of the consequences of the COVID-19 crisis in the UK.

54. Moreover, as a matter of law it is wrong to identify a single case, or even localised cluster of cases, as the proximate cause of all of the consequences of the COVID-19 crisis in the UK.

55. Accordingly, there was no basis in law or fact to support the Court's conclusion, at [112], that it was *"not unrealistic to say that all the cases were equal causes of the imposition of national measures"*.

56. The Court should rather have applied orthodox principles of causation as they apply in the insurance law context; these principles require the relevant insured peril (here, the occurrence or manifestation of a notifiable disease at the insured premises or within the relevant policy area around those premises) to have been both the 'factual' and 'legal' cause of the loss complained of (here, the interruption of or interference with the policyholder's business).

57. In terms of 'factual' causation, the Court should have applied the orthodox *'but for'* test and should therefore have asked whether, but for the relevant insured peril, would the policyholder have suffered the same loss in any event. If the answer to this question is 'yes', then the insured peril was not the true factual cause of that loss and there is no cover under the policy. If the answer to this question is 'no', then consideration turns to whether the relevant insured peril is the 'legal', or 'proximate', cause of the loss.

58. There was no basis or justification, as a matter of law and/or public policy considerations, for the Court to adopt an unorthodox approach to factual and/or legal causation in the present case (as might be taken, for example, in the context of the *Fairchild* line of mesothelioma cases).

PROPER APPROACH TO TRENDS CLAUSE COUNTERFACTUALS

Ground 4: **The Court erred in law in its approach to the 'trends' clauses, and to the proper application of counterfactuals for the purposes of such clauses in particular. The Court wrongly held that the decision in O*rient-Express Hotels Ltd v Assucurazioni Generali SA* [2010] Lloyd's Rep I.R. 531 was distinguishable from the present case and/or should not be followed and that the 'trends' clause should operate as if the whole COVID-19 pandemic and all of its consequences was part of the peril insured against.**

59. Contrary to the Court's decision, *Orient-Express* was correctly decided and was not distinguishable from the present case. The Court should therefore have applied the same approach to 'trends' clauses in the QBE Wordings as that seen in *Orient-Express*.

60. In deciding, at [532], that *"the whole of the disease both inside and outside the relevant area has to be stripped out in the counterfactual"*, the Court erred in law both in relation to the proper construction of the QBE Wordings and as a matter of general insurance law principles.

61. In terms of proper construction of the QBE Wordings, the Court held at [240], correctly, that *"all the QBE policies should be interpreted as applying the contractual mechanism applicable to damage-related BI claims to the non-damage BI covers, including by manipulation of the requirement for "damage"…"*

62. The Court then erred in law by failing to operate the trends clauses in the QBE Wordings so that, as stated in the wordings themselves, *"the figures thus adjusted will represent as nearly as may be reasonably practicable the results which but for the damage would have been obtained…"*[22]

63. Instead of asking what would have happened *"but for the **damage**"*, the Court's approach asks what would have happened but for the damage and the cause of that damage. This approach to trends clauses is wrong in law, since it does not accord with the QBE Wordings and, in particular, results in far more being 'stripped out' for purposes of the counterfactual than is permitted by those wordings. This in turn has the effect of bringing into cover, for the purposes of quantification, matters which are not covered under the operative insuring clauses, which is contrary to the Court's correct finding, at [121], that the trends clauses are the quantification machinery for a claim and not part of the delineation of cover.

64. As set out in the *Orient-Express* decision, the correct approach is to strip out only *"the **damage**"*, which in the present case constitutes the particular insured peril referred to in the QBE1-3 Disease Clauses; that is, the (relatively) local event comprising manifestation and/or occurrence of COVID-19, as applicable, and only that event. As such, cases of COVID-19 outside of the relevant policy area would remain in the counterfactual, as would any cases of COVID-19 within the relevant policy area but which had no causative potency to the BI loss under consideration.

65. There is no scope, either in the QBE Wordings or as a matter of general insurance law principles, for the proper counterfactual for purposes of the QBE1-3 trends clauses to be either an entirely disease-free UK (or world) and/or some sort of disease-free 'island' in a 'sea' of UK-wide or worldwide disease.

[22] QBE1 trends clause wording, cited at [206] in the Judgment.