Claim No. FL-2020-000018

IN THE HIGH COURT OF JUSTICE

BUSINESS & PROPERTY COURTS OF ENGLAND & WALES

COMMERCIAL COURT (QBD)

FINANCIAL LIST

FINANCIAL MARKETS TEST CASE SCHEME

BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Claimant

- and -

(1) ARCH INSURANCE (UK) LIMITED

(2) ARGENTA SYNDICATE MANAGEMENT LIMITED

(3) ECCLESIASTICAL INSURANCE OFFICE PLC

(4) HISCOX INSURANCE COMPANY LIMITED

(5) MS AMLIN UNDERWRITING LIMITED

(6) QBE UK LIMITED

(7) ROYAL & SUN ALLIANCE INSURANCE PLC

(8) ZURICH INSURANCE PLC

Defendants

SIXTH DEFENDANT'S (QBE'S) NOTE FOR CONSEQUENTIAL MATTERS HEARING ON 2 OCTOBER 2020

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*References in [square brackets] are in the form **[Volume / Page]** and unless otherwise stated are to the Consequential Matters Hearing Bundle*

A. Introduction

1. This is the Skeleton Argument of the Sixth Defendant, QBE Limited ("**QBE**"), in respect of the consequential matters hearing on 2 October 2020 following the handing down of the Court's judgment dated 15 September 2020 ("**the Judgment**") and in support of its

application for a Leapfrog Certificate dated 28 September 2020 ("**the QBE Leapfrog Application**").

2. The issues requiring determination at the hearing and addressed by this Skeleton Argument are as follows:

   2.1. The wording of the Court's Declarations following the Judgment; and

   2.2. The QBE Leapfrog Application (and, if that application is unsuccessful, QBE's application for permission to appeal to the Court of Appeal).

3. Each of these issues is addressed in turn below.

B. Declarations following Judgment

B.1 Introduction

4. Substantial efforts have been made by all of the parties, including the interveners, to agree a set of draft Declarations which represent the findings made by the Court in the Judgment. At the time of writing, there is a large measure of agreement between the parties as to many of those Declarations, but several remain controversial.

5. Insofar as they remain in dispute, QBE maintains that the appropriate Declarations are those put forward by the insurers in their draft of the Declarations issued (by email at 20:26 on 29 September 2020 ("**the Insurers' Draft Declarations**"). References to Declaration numbers below are to the paragraph numbers in the Insurers' Draft Declarations unless otherwise stated.

6. Insofar as the Declarations concern QBE:

   6.1. the parties have agreed, or QBE assumes they will be able to agree, Declarations 1, 5 and 7 (under the heading 'Disease'), Declaration 8 ('Prevalence'), Declaration 13 (under the heading 'Causation and trends clauses') and Declarations 25 and 26 (which are specific to QBE2-3);

6.2. QBE understands, at the time of writing this Skeleton Argument, that the terms of Declarations 10, 11 and 12 (under the heading 'Causation and trends clauses') and Declaration 24 (which is specific to QBE1) are not agreed.

7. The Declarations which remain in dispute are addressed immediately below.

B.2 Declaration 10

8. Declaration 10 states that[1]:

> *"10. In Argenta1, MSAmlin1-2, RSA3-4, QBE1(disease clauses), Hiscox1-4 and RSA1 (hybrid clause); 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."*

9. The FCA had proposed a Declaration which simply stated *"COVID-19 and the governmental and public reaction thereto were one indivisible cause."*[2]

10. The FCA's proposed Declaration has been amended / expanded so to more closely reflect the Judgment at [110-112][3] and [147].[4] Given the terms of the Judgment it is inappropriate to limit the Declaration as proposed by the FCA.

B.3 Declaration 11.2(a)

11. Declaration 11.2(a) of the Insurers' Joint Draft Declarations[5] provides as follows:

> *"11. In Arch1 (denial of access clause), Argenta1, MSAmlin1-2, RSA3-4, QBE1 (disease clauses), Hiscox1-4, RSA 1 (hybrid clause): […]*
>
> *11.2. The 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:*

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[1] **[N/6]**
[2] This additional proposed Declaration was set out at paragraph 13.1 of the draft Declarations circulated by the FCA on 27 September 2020. **[N/6]**
[3] **[N/1/40]**
[4] **[N/1/52]**
[5] **[N/6]**

(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 further public authority or public response thereto (<u>beyond that which had already occurred at the date when the policy was triggered</u>)*…"

12. The underlined section reflects the Court's reasoning in the Judgment in, for example, [102][6], [111-113],[7] [122][8] and [296].[9] The occurrence of a disease in the Relevant Policy Area cannot 'cause' a government response which predates that occurrence.

13. Declaration 11.2(a) should therefore include the underlined text (as set out above).

B.4 Declaration 11.3

14. Declaration 11.3 of the Insurers' Joint Draft Declarations[10] provides as follows:

> *"11.3. As to the proper application of the trends clauses declared applicable in declaration -13 below:*
>
> *(a) What amounts to a trend or circumstance will be a question of fact and construction of the policy terms in each case, and may require an upwards or downwards adjustment;*
>
> *(b) If there was a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered, then it is in principle appropriate for the counterfactual to take into account the continuation of that measurable downturn and/or increase in expenses as a trend or circumstance (under a trends clause or similar) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative; and*
>
> *(c) Any such continuation must be at the level at which it had previously occurred.*

15. Declaration 11.3(b) is the Declaration in dispute. Its terms are disputed by the FCA and HAG.[11]

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[6] **[N/1/38]**
[7] **[N/1/40]**
[8] **[N/1/42-3]**
[9] **[N/1/89]**
[10] **[N/6]**
[11] See #12 to 17 of Second Witness Statement of Mr Leedham **[O/29]** and HAG's Grounds of Appeal #1 **[O/30]**

16. Contrary to the assertions made by the FCA and HAG, Declaration 11.3(b) is consistent with the Judgment and, more particularly with:

16.1. [102],[12] [111-113][13] and [122][14] concerning the Disease Clauses (including QBE1-3); and

16.2. [283][15] and [296][16] which deal with the Hybrid Clauses in Hiscox 1-4, [351] which deals with the Prevention of Access clause in Arch1, and [389] which deals the Prevention of Access clauses in EIO1-2 but apply equally to QBE1-3.

17. The Declaration is not inconsistent with [278-283] (as is particularly made clear by the final sentence of [283]) or with [530-533] which do not deal with the issue covered by Declaration 11.3(b).

18. The Court should therefore make a Declaration in the terms of Declaration 11.3(b) in respect of QBE1-3 (and the other clauses under consideration in this Test Case).

B.5 Declaration 12.2

19. Declaration 12.2 of the Insurers' Joint Draft Declarations[17] provides as follows:

> "*12. In QBE2-3:*
>
> *12.1. There is interruption or interference in consequence of any occurrence(s) of COVID-19 (as to which, see declaration 5 above) within the Relevant Policy Area only if any interruption or interference was caused by such occurrence(s), as distinct from COVID-19 outside that area.*
>
> *12.2. Where the test in the immediately prior sub-paragraph is satisfied, the correct counterfactual is to assume that the particular occurrence(s) of COVID-19 which triggered cover under the policy (i.e. the relevant "event") had not occurred within the Relevant Policy Area, but that any other occurrence(s) of COVID-19 <u>within and/or</u> outside that Area continued, and there remains cover for losses that would not have been suffered had the particular*

[12] **[N/1/38]**
[13] **[[N/1/40]**
[14] **[N/142-3]**
[15] **[N/1/87]**
[16] **[N/1/89]**
[17] **[N/6]**

occurrence(s) of COVID-19 which triggered cover under the policy not occurred."

20. The words in dispute are underlined in the quote above.

21. It is therefore common ground between QBE and the FCA that the counterfactual for purposes of the QBE2-3 Disease Clauses should retain all cases of COVID-19 outside of the Relevant Policy Area, while any case(s) of COVID-19 within the Relevant Policy Area which amounted to the relevant "*event*" triggering cover should be stripped out.

22. However, the FCA has objected to the underlined wording on the basis that, so it argues, the correct counterfactual for the QBE2-3 Disease Clauses is to assume that the Relevant Policy Area is entirely free of COVID-19. This does not accurately reflect the nature of the insured peril, or triggering "*event*", in QBE2-3, nor does it represent the Court's findings in the Judgment, e.g. at [231].[18]

23. The correct Declaration should be as set out in the Insurers' Joint Draft above, which is that the correct counterfactual strips out only the case(s) of COVID-19 amounting to the triggering "*event*" or "*incident*".

B.6 Declaration 24.3 of the Insurers' Joint Draft: QBE1 Disease Clause Cover

24. Declaration 24.3 of the Insurers' Joint Draft provides as follows:

> "*24.3. If COVID-19 was manifested at or within a 25 mile radius of the insured business (as to which see Declarations 6 and 7), there will be cover under the disease clause in QBE1 from the date COVID-19 was manifested in the 25 mile radius of the insured business for losses caused by interruption of or interference with the insured business caused by COVID-19 (including the governmental reaction thereto pleaded at APoC sub-paragraphs 18.9, 18.14, 18.15(d), 18.16 to 18.24 and 18.26 and the public reaction thereto). For the avoidance of doubt: (1) it is not necessary for the interruption of or interference with the insured business to have been caused by the manifestation of COVID-19 within the 25 mile radius, as distinct from its manifestation outside the radius; and (2) the correct counterfactual is as set out in Declaration 11.*"

[18] **[N/1/74]**

25. The non-underlined part of this draft Declaration was inserted into the Insurers' Joint Draft at the request of the HIGA Interveners, and QBE is now content to agree it. As far as QBE is aware, however, the FCA and/or the HIGA Interveners have not yet consented to the addition of the underlined passages. These passages are required, in QBE's submission, in order to achieve consistency with Declarations 11.2(a) and 11.3(b), which are addressed above.

C. The QBE Leapfrog Application

C.1 Introduction

26. Section 12(1) of the Administration of Justice Act 1969 ("**the 1969 Act**") states that:

> *"Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied –*
>
> *(a) that the relevant conditions are fulfilled in relation to his decision in those proceedings or that the conditions in subsection (3A) ("the alternative conditions") are satisfied in relation to those proceedings, and*
>
> *(b) that a sufficient case for an appeal to the Supreme Court under this Part of this Act has been made out to justify an application for leave to bring such an appeal,*
>
> *the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect*."

27. Section 3A of the 1969 Act which sets out the 'alternative conditions' provides that:

> "*The alternative conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in the decision and that—*
>
> *(a) the proceedings entail a decision relating to a matter of national importance or consideration of such a matter,*
>
> *(b) the result of the proceedings is so significant (whether considered on its own or together with other proceedings or likely proceedings) that, in the opinion of the judge, a hearing by the Supreme Court is justified, or*
>
> *(c) the judge is satisfied that the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal*."

28. Section 15(3) of the 1969 Act states:

> "*Where by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would lie to the Court of Appeal from the decision of the judge except with the leave of the judge or of the Court of Appeal, no certificate shall be granted under section 12 of*

this Act in respect of that decision unless it appears to the judge that apart from the provisions of this Part of this Act it would be a proper case for granting such leave."

29. See also 'Leapfrog' appeals in paragraphs 1.2.17 and 3.6.1-7 of Practice Directions 1 & 3 respectively of the Supreme Court Rules 2009.

30. QBE seeks a Certificate pursuant to s.12(1) of the 1969 Act certifying that:

    30.1. the conditions in s.12(3A) are satisfied in relation to the Court's decision in respect of QBE1; and

    30.2. a sufficient case for an appeal to the Supreme Court has been made out to justify QBE's application for leave to bring such an appeal.

C.2 The "alternative conditions" are satisfied

(i) <u>*Points of law of general public importance*</u>

31. The Grounds of Appeal contained within Appendix 1 to the QBE Leapfrog Application all raise issues of general public importance.

32. First, the parties to these proceedings have expressly recorded in the agreement between the parties dated 31 May 2020 ("**the Framework Agreement**") that the issues raised in these proceedings are of general public importance.[19]

33. Second, this is clear from the number of insureds affected both directly and indirectly by the policy wordings considered in these proceedings. Not only do the policy wordings specifically considered within the Judgment cover a large number of insureds, as noted at [7] of the Judgment[20] and paragraph 8 of the continuation sheet to the QBE Leapfrog Application, *"some 700 types of policies across over 60 different insurers and 370,000 policyholders could potentially be affected by the test case."*[21]

[19] See Recitals E, G and K of the Framework Agreement **[F/1]**
[20] **[N/1/4]**
[21] **[O/22/3]**

34. Third, the particular policy wordings included in this Test Case were selected by the FCA on the basis that they would enable the majority of the key issues relating to business interruption insurance claims arising from the COVID-19 public health crisis to be determined. This is acknowledged at [1] of the Judgment, which describes these proceedings as *"a test case to determine issues of principle in relation to policy coverage under various specimen wordings"*.[22]

35. Indeed, it was accepted by Butcher J at the First Case Management Conference on 16 June 2020 when ruling that the Financial Market Test Case Scheme within Practice Direction 51M of the Civil Procedural Rules applied, that these proceedings *"raised issues of general importance to which immediately relevant authoritative English law guidance is needed"* (as provided at [3] of the Judgment[23] and paragraph 4 of the continuation sheet to the QBE Leapfrog Application).[24]

36. Fourth, the final outcome of these proceedings will be far-reaching. According to the Framework Agreement the parties agreed that the final determination of these proceedings would be binding on the Defendants, as well as providing persuasive guidance for other claims before the court and other relevant decision-making bodies. However, as noted in paragraph 9 of the continuation sheet to the QBE Leapfrog Application[25], neither individual policyholders nor reinsurers are bound by the outcome of these proceedings. Ultimate legal certainty is required in light of all the circumstances.

37. Fifth, turning to the particular grounds of appeal, it is evident they each raise points of general public importance in turn:

    37.1. The court has deployed novel concepts such as:

[22] **[N/1/3]**
[23] **[N/1/3]**
[24] **[O/22/1]**
[25] **[O/22/3]**

(i) construing an insured peril as including the business interruption itself, rather than only the event which leads to the business interruption (see Ground 1 of Appendix 1 to the QBE Leapfrog Application[26]); and

(ii) the notion that events can be caused by events which form "*part of an indivisible cause*" (see Grounds 4 and 5 of Appendix 1 to the QBE Leapfrog Application[27]).

The validity or otherwise of such novel concepts is of fundamental importance to business interruption law and indeed insurance law generally.

37.2. Whilst Grounds 2 and 3 of Appendix 1 to the QBE Leapfrog Application are framed in terms of their impact on QBE1[28] policies and the proper construction of the same, these grounds nevertheless raise points of general public importance given the number of insureds affected both directly and indirectly by the findings challenged by these grounds.

37.3. The court has sought to distinguish and/or depart from the *Orient-Express* decision, which has been the leading authority on trends clauses within business interruption insurance policies (see Ground 6 of Appendix 1 to the QBE Leapfrog Application[29]).

(ii) <u>*The proceedings entail a decision relating to a matter of national importance*</u>

38. These proceedings also entail a decision relating to a matter of exceptional national importance. This is reflected, *inter alia*, by the facts that: this case was brought by the FCA, as regulator, in an unprecedented way; the insurers' willingness to participate in these 'test' proceedings; and the extremely expedited fashion in which the trial was prepared by the parties, heard by the Court and then Judgment handed down, all since proceedings first commenced on 9 June 2020.

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[26] **[O/22/5]**
[27] **[O/22/7-8]**
[28] **[O/22/5-6]**
[29] **[O/22/8]**

39. This is also evidenced by the fact that, as provided within the Judgment at [3][30], Butcher J also exercised his discretion *"in a case of particular importance or urgency"* to permit the first instance trial to be heard by himself and Flaux LJ, rather than by himself alone. Further, as noted in paragraphs 5 and 6 of the continuation sheet to the QBE Leapfrog Application,[31] this is also clear from the fact that all parties undertook to take all reasonable steps to ensure any appeal was determined on an expedited basis.

40. The financial ramifications of these proceedings also indicate this is a matter of national importance. This was also dealt with by First Witness Statement of Mr Brewis dated 9 June 2020 (quoted at paragraph 10 of the continuation sheet to the QBE Leapfrog Application).[32] In particular Mr Brewis noted in paragraph 8 of that statement that numerous insureds are *"…suffering widespread financial distress on a very large scale…"*.[33]

(iii) *The result of the proceedings is so significant that a hearing by the Supreme Court is justified*

41. For the reasons set out above, this is a case where the result of the proceedings is of such significance that that a hearing in the Supreme Court is satisfied.

(iv) *The benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal*

42. The exceptional urgency of these proceedings was accepted by Butcher J when making an order for the expedition of the trial at the First Case Management Conference, as noted at [3] in the Judgment.[34]

43. Absolute finality, clarity and certainty on the issues considered within these proceedings remain urgently required notwithstanding the Judgment of this court. The Framework Agreement in accordance with which these proceedings were commenced by the FCA, also records the parties *"mutual objective of achieving the maximum clarity possible for the maximum number of policyholders and their insurers, consistent with the need*

[30] **[N/1/3]**
[31] **[O/22/1-2]**
[32] **[O/22/3-4]**
[33] **[R/2]**
[34] **[N/1/3]**

for expedition and proportionality" as provided at [2] of the Judgment[35] and paragraph 3 of the continuation sheet to the QBE Leapfrog Application.[36]

44. The economic consequences of the COVID-19 public health crisis on the UK economy, and small to medium enterprises in particular, is well-known, as is the potential significance of their business interruption insurance policies.

45. Further, given the significance of these proceedings, it is likely that any determination by the Court of Appeal would be appealed to the Supreme Court in any event, resulting in further delay for all parties.

C.3 A sufficient case for applying for permission has been made out to justify an application to the Supreme Court for leave to bring a leapfrog appeal

46. There is *"a sufficient case so as to justify an application to the Supreme Court for leave to appeal*". In addition to the points raised above, QBE's appeal has, for the reasons set out below, a real prospect of success.

C.4 The case would be a proper one for granting leave to appeal to the Court of Appeal even if no certificate was granted

47. QBE's proposed appeal has *"a real prospect of success"* **CPR 52.6(1)(a)** and there is *"some other compelling reason for the appeal to be heard"* **CPR 52.6(1)(b)**.

48. The points made in Sections C.2 above clearly provide a "*compelling reason for the appeal to be heard*".

49. Further, QBE has a real prospect of success on each and all of the grounds set out in its Grounds of Appeal. Although the Court should consider those Grounds of Appeal in the full form set out and attached to the QBE Leapfrog Application, the next sections of this Skeleton Argument summarise the main reasons why QBE has a real prospect of success on each of them.

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[35] **[N/1/3]**
[36] **[O/22/1]**

Ground (1): Error of law – the insured peril in the QBE1 Disease Clause

50. At [225] of the Judgment, the Court wrongly identified the relevant insured peril in the QBE1 Disease Clause 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*…"[37]

51. This was, with respect, a novel, and wrong, approach to the identification of the relevant insured peril in a business interruption insurance policy. Through the use of an equally novel concept of 'composite' insured perils, the Court held that the interruption or interference to the insured business was itself part of the peril insured against, when it is properly understood and viewed as part of the insured's loss. Just as 'property damage' does not form part of the insured peril in a material damage policy, so 'business interruption' does not itself form part of the insured peril in a business interruption policy.

52. As such, the relevant insured peril in the QBE1 Disease Clause, properly construed, was "*any human infectious or human contagious disease… an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it*…"

Ground (2): Error of law – the proper construction of the QBE1 Disease Clause

53. QBE's second ground of appeal is closely related to its first. At [226] of the Judgment, the Court held that "*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*…" and that the QBE1 Disease Clause 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.*"[38]

54. This construction of the QBE1 Disease Clause, which reduces the 25 mile radius limit to a mere proviso or, in the Court's words, "*an adjectival clause limiting the class of notifiable*

[37] **[N/1/73]**
[38] **[N/1/73]**

diseases which, if they interfere with the business, will lead to coverage" (see [226] of the Judgment)[39], was wrong in law. To the contrary:

54.1. The language of the QBE1 Disease Clause, and particularly its requirements that (i) the notifiable disease in question had to be "*manifested by any person*" and (ii) such manifestation had to be either "*at the premises or within a twenty five (25) mile radius of it*", meant that the cover was limited to the particular consequences of such 'local' manifestations of the disease in question;

54.2. Similarly, the language of the QBE1 Disease Clause itself, and that of the other circumstances which are covered by the extension of which the QBE1 Disease Clause forms a part (e.g. "*vermin or pests in the premises*", etc.) indicates that the cover provided by that clause was intended, objectively, to apply to matters occurring at a particular time, in a particular place and in a particular way.

Ground (3): Error of law – the scope of cover provided by the QBE1 Disease Clause

55. The Court further erred in law by holding, at [228], that there would be 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*".[40]

56. The Court erred by failing to recognise that, properly construed, the QBE1 Disease Clause provides effective cover in a wide range of cases, albeit that such cover is limited to loss caused by 'local' events, i.e. manifestation of the notifiable disease within the 25 mile radius. There will be cover in such cases, including for the effect of governmental / public responses to the disease outbreak in the relevant policy area. What was not intended, however, was cover for pandemics, which is the substantive effect of the Court's findings on the QBE1 Disease Clause.

[39] **[N/1/73]**
[40] **[N/1/74]**

Ground (4): Error of law and/or fact – occurrences of COVID-19

57. At [229], the Court erred in law and/or fact by holding that "*insurers clearly cannot… contend that the occurrence of the disease elsewhere [i.e. outside of the 25 mile radius], or the reaction to it, are to be regarded as separate causes…*"[41]

58. As a matter of fact, this determination is plainly wrong, as illustrated by the different effects of COVID-19 in different locations (and indeed nations) across the UK. It is evidently the case that a serious outbreak of COVID-19 in a 'local' area, such as Leicester, can lead to much more restrictive 'lockdown' measures than a less serious outbreak in, say, the South West of England.

59. As a matter of law, the Court also erred in recognising, at [165], the concept of "*part of an indivisible cause*"[42]; a particular event is either the proximate (or effective, as the Court held) cause of loss or it is not. Moreover, the width of the "*indivisible cause*" identified by the Court in the Judgment, namely "*COVID-19*", is so vague as to be unworkable.

Ground (5): Error of law and/or fact – proximate or effective cause of loss

60. The Court further erred in law and/or fact by concluding, 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*."[43]

61. Again, as a matter of fact, this determination is wrong; 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.

62. 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.

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[41] **[N/1/74]**
[42] **[N/1/57-58]**
[43] **[N/1/74]**

Ground (6): Error of law – the effect of the 'trends' clause in QBE1

63. Finally, the Court erred in its approach to, and construction of, 'trends' clauses in the various policy wordings under consideration. The Court wrongly held that the decision in *Orient-Express Hotels Ltd v Assucurazioni Generali SA* [2010] EWHC 1186 (Comm); [2010] Lloyd's Rep IR 531 was distinguishable from the present case and/or should not be followed (see [529] of the Judgment)[44] 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.

64. For the reasons explained, in detail, by the insurers at the trial, the Court should have held that *Orient-Express* was correctly decided and was not distinguishable and/or should not have found 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.

C.5 Alternative application for permission to appeal to the Court of Appeal.

65. If the Court does not certify the case as suitable for a leapfrog appeal, then QBE seeks permission to appeal to the Court of Appeal on the basis set out in Section C.4 above.

C.6 Extension of Time for Appellant's Notice to the Court of Appeal

66. In the event that the Court grants the Leapfrog Certificate, QBE will then request an extension of time for QBE to file an Appellant's Notice at the Court of Appeal (pursuant to CPR 52.12(2)),[45] until 14 days after the date on which the Supreme Court determines any application for permission to appeal. To the extent that the Supreme Court grants permission, this further extension of time will become redundant.

67. In the event that the Court refuses to grant the Leapfrog Certificate and/or QBE's application for permission to appeal, then QBE respectfully requests an extension of

[44] **[N/1/149]**

[45] Paragraph 3 of the Court's order dated 15 September 2020 **[N/2]** extended time for the filing of any Appellant's Notice until 7 days after the hearing on 2 October, or such later date as may be ordered at that hearing.

time to file an Appellant's Notice at the Court of Appeal (pursuant to CPR 52.12(2)) until 23 October 2020.

D. Conclusion

68. For the reasons set out above, QBE respectfully submits the Court should:

68.1. Make Declarations in the form set out in the Insurers' Joint Draft Declarations; and

68.2. Grant a 'Leapfrog Certificate' in favour of QBE in relation to its appeal or, alternatively, grant QBE permission to appeal to the Court of Appeal.

RACHEL ANSELL QC, 4 Pump Court

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30 September 2020