

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

DEFENCE AND COUNTERCLAIM
OF THE SIXTH DEFENDANT, QBE UK LIMITED

A. Summary of QBE's Defence and Counterclaim

1. This is the Defence and Counterclaim of the Sixth Defendant, QBE UK Limited ("QBE"), to the test claim brought against it and seven other insurers by the Financial Conduct Authority ("FCA") in Particulars of Claim dated 9 June 2020.

2. Insofar as the claim against QBE is concerned, the FCA refers to and relies upon seven sets of policy wordings produced by QBE (collectively, “**the QBE Wordings**”), all of which provide cover against certain types of loss caused by a range of insured perils.
3. One section of each of the QBE Wordings provides cover in respect of business interruption loss. The primary insuring clause provides cover for loss caused by the interruption or interference with the insured’s business arising from / caused by or in consequence of damage to property (or any building) used by the insured at the insured premises.
4. The cover provided by the primary insuring clause in the QBE Wordings is extended by way of the ‘damage extensions’ to include damage to property in locations other than the insured premises and by way of the ‘non-damage extensions’ to include cover for business interruption loss for non-damage events which occur at or within a specified range of the premises. The damage extensions remove the requirement under the primary insuring clause that the damage to property must occur at the insured premises. The non-damage extensions remove the requirement for damage to property but require that the insured event still occurs at or within a specified distance of the insured premises. The extensions do not remove (and cannot properly be construed as removing) both the damage and the proximity requirements of the primary insuring clause.
5. In QBE1 the non-damage extension which is under consideration in this case is titled “*murder, suicide or disease*”¹ and covers loss in the form of interruption of or interference with the business arising from events at or, in some cases, within a certain distance of, the insured premises. The full “*murder, suicide or disease*” clause in QBE1 provides as follows:

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

7.3.9 Murder, suicide or disease

interruption of or interference with the business arising from:

¹ Clause 7.3.9.

- a) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the **premises** or within a twenty five (25) mile radius of it;
- b) actual or suspected murder, suicide or sexual assault at the **premises**;
- c) injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided in the **premises**;
- d) vermin or pests in the **premises**;
- e) the closing of the whole or part of the **premises** by order of a competent public authority consequent upon defect in the drains or other sanitary arrangements at the **premises**.

The insurance by this clause shall only apply for the period beginning with the occurrence of the loss and ending not later than three (3) months thereafter during which the results of the **business** shall be affected in consequence of the damage.”

6. Accordingly, one head of this non-damage ‘insured premises-related’ extension provides cover where loss in the form of interruption of or interference with the business is caused by the manifestation (or, in some of the QBE Wordings, the occurrence) of a limited range of ‘notifiable diseases’ either at the insured premises or within a certain radius of the insured premises (25-miles in the case of QBE1-2; 1-mile in the case of QBE3) (“**the relevant policy area**”).
7. All of the other QBE Wordings contain materially the same or similar non-damage ‘insured premises-related’ cover.
8. As such, the clauses of the QBE Wordings which fall for consideration in this case provide limited non-damage ‘insured premises-related’ extensions to the cover provided pursuant to the primary insuring clause. They do not provide, and were not intended to provide, cover in respect of a national pandemic or the Government response to an actual or feared national pandemic.
9. However, the FCA’s case against QBE appears to be premised on the incorrect assumption that the QBE Wordings provide cover against pandemics, which it repeatedly argues throughout its Particulars of Claim have not been excluded.² This is

² See, for example, the FCA’s Particulars of Claim at paragraphs 4.2, 33, 34, 54.2, 58 and 67.

a *non-sequitur*; the fact that something has not been excluded does not mean that it is covered in the first place.

10. In much the same way, the FCA also incorrectly formulates its proposed 'but for' counterfactuals based on the absence of a pandemic (or the Government response to it), rather than on the particular insured perils set out in the QBE Wordings.
11. The correct analysis is much more straightforward. One simply looks at the language used by the QBE Wordings themselves and asks what they actually provide cover for.
12. In terms of causation under the 'notifiable disease' head of cover in the relevant extension, QBE avers that the correct approach is to apply the following three-step process, ensuring not to conflate each stage of the analysis:
 - 12.1. First, it is necessary to ask 'but for' the insured peril (i.e. manifestation or occurrence of COVID-19 at the insured premises or within the relevant policy area), would the insured have suffered the assumed interruption or interference in any event? If the answer to this question is 'yes', the insured's claim must fail.
 - 12.2. Second, and only if the answer to the first question is 'no', was the interruption or interference proximately caused by the insured peril (i.e. the manifestation or occurrence of COVID-19 at the insured premises or within the defined range from those premises)? If the answer to this question is 'no', the insured's claim must fail.
 - 12.3. Third, and only if the insured's interruption or interference was proximately caused by the insured peril, would the nature or extent of any resulting loss have been different 'but for' the occurrence of that peril? If so, then contractual 'loss quantification' machinery in the QBE Wordings (i.e. the 'trends' clause) will operate so as to ensure that the insured is not over- or under-indemnified. Alternatively, the same result (i.e. calculating the insured's actual loss) will be reached by the application of common law principles.

13. In the present case, the Government and other authority action, including 'lockdown' measures and 'social distancing' guidance, etc., were not adopted in response to the occurrence or manifestation of COVID-19 in any particular location (i.e. at any particular insured premises or within a 1-mile or 25-mile radius thereof). That action would have been the same, and would have had the same effect on an insured's business, whether the disease had occurred in the insured location or not. The same applies to the effects of general apprehension and/or fear about the spread of COVID-19 prior to any formal authority action.
14. The FCA has therefore misapplied the 'but for' test in the present case because it has failed to identify and then take into account the correct insured event or peril. The relevant insured event here is the occurrence or manifestation of COVID-19 in a defined location. The correct counterfactual is therefore to ask: if the disease had not occurred or manifested within the relevant policy area, what loss would the insured have suffered? The answer in the present case is that the insured would have suffered the same interruption or interference, and therefore the same loss, in any event.
15. The same conclusion is reached by means of the proper application of the 'proximate cause' test, in light of the QBE Wordings, properly construed.
16. In short, therefore, the non-damage 'insured premises-related' extensions in the QBE Wordings were neither intended to, nor do in fact, provide cover in respect of losses caused by a pandemic. As such, the FCA's claim against QBE must be dismissed. QBE seeks a number of declarations in this respect by way of a Counterclaim, as set out further below.

DEFENCE

B. Introduction

17. Unless stated otherwise, in this Defence and Counterclaim:

- 17.1. references to paragraph numbers are references to paragraphs in the Particulars of Claim; and

- 17.2. QBE adopts (for convenience and without admission) the headings, abbreviations and defined terms adopted in the Particulars of Claim.
18. QBE only pleads to the Particulars of Claim so far as it contains allegations against QBE and/or is relevant to the clauses from the QBE Wordings which are under consideration in this case. QBE reserves the right to make submissions at trial on the proper construction of and legal principles relating to other clauses within the QBE Wordings and other insurers' Wordings.
19. Save as expressly admitted or not admitted herein, each and every allegation contained in the Particulars of Claim which relates to QBE is denied.
20. Paragraphs 1 and 2 are noted.
21. Paragraphs 3 and 4 which set out a summary of the FCA's case are noted and, insofar as the case against QBE is concerned, are denied for the reasons set out in this Defence and Counterclaim.
22. Without prejudice to the generality of that denial, QBE notes the FCA's reference in paragraph 4.3 to "*the correct counterfactual*" (for the purposes of the 'but for' test) allegedly being "*a world in which there was no COVID-19 and no Government intervention related to COVID-19.*" While this is inconsistent with either of the counterfactuals which the FCA goes on to plead in paragraphs 77 and 79, it highlights the flaw in the FCA's position which seeks to define the counterfactual without reference to the insured peril in the QBE Wordings. The correct counterfactual is simple and straightforward: what loss would have been suffered if the insured peril, i.e. the occurrence or manifestation of the notifiable disease at or within the relevant policy area of the insured premises, had not occurred.
23. Paragraph 5 is noted.
24. Paragraphs 6 to 8 are admitted.
25. Insofar as it relates to QBE, paragraph 9 is admitted.

26. Paragraph 10 is noted.

C. The QBE Wordings and Applicable Law

27. Insofar as it relates to QBE, paragraph 11 is admitted. For the avoidance of doubt, QBE reserves the right to rely on the full terms of each of the QBE Wordings.

28. Insofar as it relates to the QBE Wordings, paragraph 12 is admitted.

29. Paragraphs 13 to 15 are noted.

30. Insofar as it relates to QBE, the first sentence of paragraph 16 is admitted. The second sentence of paragraph 16 is noted.

D. COVID-19 and the Public Authority Response

31. Paragraphs 17 to 19 are admitted except that:

31.1. QBE will refer to the listed guidance and/or advice at trial for their full terms and true effect.

31.2. In relation to paragraph 18.7, COVID-19 was made notifiable in Wales on 6 March 2020.

31.3. Political commentary on insurance coverage (as referred to within paragraphs 18.11 to 18.13) is irrelevant. Further and for the avoidance of doubt, it is expressly denied (if such be alleged) that QBE was involved in any of the meetings and/or discussions between the Government and other insurers referred to in paragraphs 18.11 and 18.12. Accordingly, footnote 2 to paragraph 18.11 is not admitted.

31.4. In relation to paragraph 18.14, registered early years providers, including childminders, nurseries, colleges, private schools and sixth forms were also closed as well as schools, albeit with the caveat that an exception would be made for vulnerable children and children of key workers.

31.5. In addition to the steps taken by UK governmental authorities, including social distancing measures and closure measures, as outlined by the FCA in paragraphs

17 to 19, and similar actions and/or interventions by foreign governments there were other 'human actions' in response to COVID-19 as people modified their behaviour in response to COVID-19 by, for example, reducing their social activities, reducing their spending, and in the case of overseas persons, reducing their travel to the UK.

E. The Defendants' Refusal of Cover

32. As to paragraph 20, and insofar as it relates to QBE:

32.1. It is admitted that:

32.1.1. QBE has declined some claims for COVID-19 business interruption losses made under the Disease Clauses in QBE1-3; and

32.1.2. Paragraphs 20.5 and 20.6 summarise the main grounds of refusal contained in QBE's declinatures.

32.2. QBE has declined to cover some claims for COVID-19 business interruption losses made under Disease Clauses in other policies and claims made under other non-damage denial of access clauses in QBE1-3 and other policies, which policies and/or clauses are not in issue in this test claim.

32.3. For the avoidance of doubt, whilst the QBE Wordings (and its other clauses) were not designed to and do not in fact provide cover in the case of pandemics, QBE has not declined cover for COVID-19 business interruption losses on that basis but rather on the proper and conventional basis that the requirements for cover under the particular policy were not met.

F. Alleged prevalence of COVID-19 in the UK

33. Paragraph 21 is noted but has been superseded. At the First CMC on 16 June 2020 Mr Justice Butcher held that the FCA is not entitled to rely on expert evidence as to the prevalence of COVID-19 in the UK at the trial listed to commence on 20 July 2020.

34. Paragraph 22 is admitted: in QBE1-2 the relevant policy area is 25 miles from the insured premises; in respect of QBE3 the relevant policy area is 1 mile from the insured premises.
35. As to paragraph 23:
- 35.1. It is admitted that policyholders may be able to prove a case of COVID-19 at a particular location on a particular date by relying on specific evidence.
- 35.2. It is admitted that such evidence may include evidence from NHS data as to COVID-19 deaths in a hospital.
- 35.3. It is denied (if such be alleged) that evidence that a hospital or care home is within the Relevant Policy Area will of itself prove the presence of COVID-19 in a Relevant Policy Area.
36. Paragraph 24 is admitted, albeit the relevancy of such data in these proceedings is denied.
37. In respect of paragraph 25, it is admitted that the actual presence of COVID-19 in the UK in March 2020 was higher than was reflected by the number of Reported Cases, but it is not admitted that the actual presence was "*far higher*" than reflected by the number of Reported Cases.
38. As to paragraphs 26 to 28:
- 38.1. It is admitted that:
- 38.1.1. the authors of the reports referred to in paragraph 26 undertook modelling in order to attempt to estimate the number of COVID-19 infections in the UK;
- 38.1.2. the Cambridge Analysis concludes there were cases of COVID-19 in every regional Zone of England by 17 February 2020 but it is not admitted that that conclusion is accurate or reliable; and
- 38.1.3. paragraphs 28.1 and 28.4(d) are admitted.

38.2. Save as aforesaid, no admissions are made to paragraphs 26, 27, 28.2, 28.3 and 28.4. The question of whether and how the ratio between the likely actual number of cases of COVID-19 and the Reported Cases can be reliably estimated will, in the absence of agreement between the parties, be a matter for expert evidence. As noted above, the FCA is not entitled to rely on expert evidence as to the prevalence of COVID-19 in the UK at the trial listed to commence on 20 July 2020 and so is not entitled to the declarations sought in paragraphs 28.3 and 28.4.

G. Assumed Facts

39. Paragraphs 29 and 30 of the Particulars of Claim are noted. QBE considers that the 'Assumed Facts' are too abstract to assist the Court at trial and that the Court would be most assisted by assumed factual scenarios for each of the seven different categories of business. The relevance and scope of the Assumed Facts will be determined at the Second CMC, if not agreed.

H. Policy intention

40. Paragraph 31 is admitted. The policyholders' subjective intention is also not relevant or admissible.

41. As to paragraph 32:

41.1. it is admitted that a number of the policyholders of policies with the QBE Wordings were small and medium enterprises;

41.2. however, each of the policyholders of policies with the QBE Wordings acted through an authorised insurance broker intermediary at the time of the placing of the policies with the QBE Wordings whose duty, *inter alia*, was to advise on the suitability of the insurance being obtained; and

41.3. while it is admitted that each policy type issued by QBE has a 'standard form', no 'standard form' wording is used for all of the wordings used by QBE for its different policy types. Each of the QBE Wordings and each type of QBE policy is

designed for particular commercial circumstances and/or industries (e.g. for nightclub owners / operators).

41.4. Save as aforesaid, paragraph 32 is denied.

41.5. For the avoidance of doubt, if (which is denied) the matters pleaded in paragraph 32 are relevant to the construction of the QBE Wordings, it is also relevant that the policyholders acted through (and had access to the professional advice of) the authorised insurance broker intermediaries.

42. As to paragraph 33:

42.1. It is noted that the FCA purports to commence its analysis of the parties' intention by considering not the actual contents of the QBE wordings but rather by considering what is not included by way of exclusion therefrom.

42.2. It is inappropriate to seek to ascertain the contracting parties' intentions as to the scope of the cover by pointing to what the wordings do **not** say and what they do **not** exclude.

42.3. The correct analysis is to construe the words that the parties have in fact used to ascertain the insured peril against which cover is provided. Having so determined the insured peril, it is necessary to determine the causative nexus between the insured peril and any alleged interruption or interference (i.e. 'but for' the occurrence of the insured peril, would the interruption or interference claimed by the insured have been suffered anyway?), and whether the insured peril was the proximate cause of that interruption or interference, and any resulting loss.

42.4. The Disease Clauses in the QBE Wordings only provide cover for business interruption losses "*arising from*", "*caused by*", or "*in consequence of*" the occurrence / manifestation of a notifiable disease at or within the relevant policy area of the insured premises.

42.5. It is admitted that the QBE Wordings do not contain an exclusion relating to 'epidemics' or 'pandemics'. For the avoidance of doubt, it is expressly denied that

the fact that no such exclusions are included within the QBE Wordings means that the QBE Wordings provide cover for pandemics. No exclusion relating to 'epidemics' or pandemics was required.

42.6. Save as aforesaid, no admissions are made to paragraph 33.

43. The first sentence of paragraph 34 is denied. The fact that cover under the Disease Clauses in the QBE Wordings is limited by reference to geographically defined areas of within 25 miles, alternatively 1 mile, of the insured premises (i.e. the relevant policy area), demonstrates an objective intention (i) to provide cover in respect of losses caused by notifiable disease within the relevant policy area and (ii) not to provide cover for losses caused by other matters, including worldwide, international, foreign or nationwide pandemics or epidemics and the responses to such matters. The second sentence of paragraph 34 is admitted.

44. Paragraph 35 is noted. For the avoidance of doubt, it is denied (as alleged in paragraph 43) that the *contra proferentum* rule has any application.

I. The disease trigger

45. Paragraph 36 is admitted: COVID-19 was and is a "disease" (QBE3); a "human disease" (QBE1-2); and an "infectious and/or contagious disease" (QBE1-2).

46. Paragraph 37 is admitted: COVID-19 became a disease which must be notified to the Local Authority (QBE1-2) and a notifiable disease under the Health Protection (Notification) Regulations 2010 (QBE3).

J. Presence of the Disease within a certain distance from the Premises

47. As to paragraphs 41.1 to 41.4:

47.1. An insured seeking to establish cover under the Disease Clause in the QBE Wordings would need to prove, on the balance of probabilities, there was an "occurrence" of COVID-19 (QBE2-3) or that COVID-19 was "manifested by any

person” within the relevant policy area, and that the same caused *“interruption of or interference with”* (QBE1-3) the insured business.

47.2. Indeed the FCA’s approach to the questions illustrates the flaw in its approach to the QBE Wordings, ignoring the need to establish the required causative nexus between the occurrence or manifestation of COVID-19 and the assumed business interruption loss suffered.

47.3. Whilst it may be that in certain circumstances an occurrence or manifestation of COVID-19 for the purpose of QBE’s wording could be said to have occurred at the insured premises or within the relevant policy area when a person who has COVID-19 which is diagnosable but that person is asymptomatic and/or remains asymptomatic, it is difficult to see any circumstances in which it could be said that that an undetected and/or undiagnosed occurrence and/or manifestation would cause interruption to or interference with the insured business.

47.4. In any event, the question of whether or not there has been an occurrence or manifestation of COVID-19 for the purpose of QBE’s wording will be determined on the facts of each particular case.

48. Paragraph 42 is admitted.

49. QBE does not plead to paragraph 43.

K. Public Authority Advice and Regulations

50. QBE does not plead to paragraphs 44 to 45 which are not relevant to the application of the Disease Clauses in the QBE Wordings.

L. Interruption or Interference

51. As to paragraphs 46 and 47 of the Particulars of Claim:

51.1. Save that it is admitted that human action and/or intervention, including the social distancing measures referred to in paragraph 46, closure measures referred to in paragraph 47, and other human action described in paragraph 31.5 above could,

in principle, cause *“interference with”* the insured business, no admissions are made in respect of paragraphs 46 and 47.

51.2. In any event, the question of whether there was *“interruption to or interference with”* a particular business will be a matter of fact for any individual insured to prove.

51.3. Further, the Disease Clauses in QBE1-3 provide coverage for business interruption losses caused by disease within the relevant policy area, namely within 25 miles of the insured premises for QBE1-2 and within 1 mile for QBE3. It is QBE’s case that neither the implementation of social distancing measures, nor closure measures, nor indeed any other form of human action and/or intervention, were caused by the presence of COVID-19 within any specific geographical area. The social distancing measures, closure measures and the other forms of human action and/or intervention were responses to an actual or feared nationwide and/or worldwide pandemic.

M. Exclusions

52. Paragraph 50 is noted.

53. QBE’s position in respect of exclusions is set out below:

53.1. QBE has not and does not intend to rely upon the microorganism exclusion or the pollution and contamination exclusions in the QBE Wordings in respect of claims made under the Disease Clauses in the QBE Wordings.

53.2. More generally, QBE has not and does not intend to rely upon the microorganism exclusion or the pollution and contamination clauses in respect of claims made under Disease Clauses.

53.3. QBE expressly reserves the right to rely upon the microorganism exclusion and/or the pollution and contamination exclusion in respect of claims made under clauses other than the particular clauses at issue in the QBE Wordings including claims for property damage, under damage-based extensions and under other (i.e. not Disease Clause) non-damage extensions.

N. Causation

54. As set out in paragraphs 1 to 16 above, the FCA's case on causation is 'back to front'. In particular, it assumes what it sets out to prove and the assumptions it makes are flawed. Rather than considering the specific insuring clauses set out in the QBE Wordings and pleading out what events they actually cover, the FCA begins by setting out (in paragraphs 53 to 60) its purported high-level analysis of potential causes, and possible distinctions between them, entirely in the abstract and without any specific reference to the QBE Wordings.³ It is not until paragraph 68.1 that the causation section of the Particulars of Claim condescends to consider the QBE Wordings themselves, and even then it cites only a few words of each insuring provision, thereby failing to consider the full relevant wordings or their proper context.
55. While the FCA's 'back to front' approach may be the consequence of its decision to bring this test claim against eight insurers, all of which have different policy wordings, it does not form the basis for accurate legal analysis as far as the QBE Wordings are concerned.
56. Paragraphs 53 and 53.1 are denied. Without prejudice to the generality of that denial:
- 56.1. It is denied that as a matter of construction of the QBE Wordings and/or the law the only one proximate, effective, operative and/or dominant cause ("**proximate cause**") of the assumed interruption or interference, and any loss resulting therefrom, was the nationwide COVID-19 disease *including its local presence or manifestation*, and the restrictions imposed by the Government or any other relevant authority thereafter.
- 56.2. In particular it is denied that the presence or occurrence of the disease within the relevant policy area of an insured's premises (as required by the QBE Wordings and being the insured peril thereunder) was the proximate cause of the interruption to or interference with that insured's business. Such interruption or interference was caused by human action and/or intervention in relation to the nationwide and/or worldwide occurrence and spread of COVID-19, whatever

³ There is a general reference to the 25-mile radius provision in QBE1-2 in paragraph 54.3.

form it took, and which human action and/or intervention took place without reference to and was not dependent on whether the disease was present or had occurred within the relevant policy area.

- 56.3. Alternatively, if (which is denied) the local occurrence or manifestation of COVID-19 was a proximate cause of the assumed interruption or interference, it was separate and independent from other potential causes including the nationwide and/or worldwide occurrence of COVID-19 and/or the human action and/or intervention in relation thereto. In most if not all cases, the assumed loss would have occurred 'but for' the former, i.e. they would have been caused by an independent cause in any event.
57. As to paragraphs 53.2(a) and 54 (including the sub-paragraphs thereto):
- 57.1. It is possible, and correct as a matter of law, to treat (i) any particular local manifestation(s) of COVID-19 and (ii) the nationwide (or worldwide, as pleaded in paragraph 4.3) occurrence of that disease as separate and distinct, or independent, potential causes of loss.
- 57.2. As a matter of the proper construction of the QBE Wordings and/or the law, the QBE Wordings cover and are only intended to cover only such interruption or interference as is directly caused by a particular local, insured premises-related occurrence or manifestation of a relevant notifiable disease and do not cover interruption or interference caused by a nationwide or worldwide occurrence or spread of such a disease.
- 57.3. This is clear on the face of the QBE Wordings themselves, properly construed. Taking the wording of QBE3 as an example (although all of the QBE Wordings contain materially the same or similar provisions) (underlined emphasis added):
- 57.3.1. Clause 3.4.8 provides cover in respect of:

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

- (a) the occurrence of a notifiable disease at the premises or attributable to food or drink supplied at the **premises**;
- (b) the discovery of any organism at the premises likely to result in the occurrence of a notifiable disease;
- (c) the occurrence of a notifiable disease within a radius of one (1) mile of the premises..."

57.3.2. As such, the cover under primary insuring clause was only extended and was only intended to protect against loss caused by occurrences / manifestations of certain diseases or organisms at the insured premises itself or within the particular 'insured premises-related' locality (i.e. within the relevant policy area) of the insured premises (limited to 1 mile in the case of QBE3, and 25 miles in the case of QBE1-2).

57.3.3. Even if it were possible to provide insurance for occurrences of certain diseases or organisms at a nationwide or worldwide level by way of an extension to the primary insuring clause (rather than pursuant to a separate insuring clause), express words would be required. Such express words were not used. To the contrary, as stated above, the extension was expressly limited to occurrences / manifestations of certain diseases or organisms at the insured premises itself or within the relevant policy area of the insured premises.

57.4. It is also clear from the other heads of cover provided by the same insuring clause, which are all of a strictly 'insured premises-related' nature. Taking the wording of QBE3⁴ as an example (although all of the QBE Wordings contain materially the same or similar provisions), cover is provided for: (1) "*the discovery of vermin or pests at the premises...*"; (2) "*an accident causing defects in the drains or other sanitary arrangements at the premises...*"; and (3) Clause 3.4.8(f) provides cover for loss caused by "*an occurrence of actual or suspected murder, suicide or actual or alleged sexual assault at the premises.*"

⁴ Clauses 3.4.8(d),(e) and(f).

- 57.5. The starting point is not (as suggested in paragraph 54.1) to identify what cover the (unidentified) “*particular locality*” clauses are “*intended to prevent*” from arising. Rather, the correct starting point is to determine what is included in the cover provided by the “*particular locality*” clauses. The answer to that question is that cover is only provided in respect of a covered event which occurs within the particular ‘insured premises-related’ locality (i.e. within the relevant policy area) and causes business interruption loss to the insured. If an event occurs inside that ‘local’ area, but also extends outside of it, then cover will apply only if and insofar as interruption or interference is caused by the ‘local’ part of the event. To conclude otherwise would be to ignore the wording of the policy; the particular ‘insured premises-related’ wording would be deprived of any meaningful effect.
- 57.6. It is denied, if so alleged, that the absence of an express exclusion for pandemics is in any way indicative of the parties’ intention to provide cover for pandemics. As such, the first sentence of paragraph 54.2 contains a *non-sequitur*; the fact that a particular potential cause of loss is not expressly excluded by an insurance policy does not confirm or even imply that the cause is intended to be covered.
58. As to paragraphs 53.2(b) and 55:
- 58.1. It is possible, and correct as a matter of law, to treat (i) the occurrence and/or manifestation of COVID-19, at a local and/or nationwide or worldwide level, and (ii) human action and/or intervention in response to that disease as separate and distinct, or independent, potential causes of loss.
- 58.2. It is denied (if so alleged) that the ‘notifiable disease’ extension to cover provided by the QBE Wordings is “*premised on the existence of disease or emergency of sufficient seriousness as to give rise to government or public authority action*”, as appears to be suggested in paragraph 55 (albeit without any reference to the QBE Wordings themselves). There is no basis in the QBE Wordings and/or the inferred or implied intention of the contracting parties for such a contention; it is not inevitable that the disease in question will actually give rise to government or public authority action.

- 58.3. Further and in any event, the occurrence of COVID-19 and any government or public authority action (or any sort of human action and/or intervention) in relation to it are not inseparable and/or inextricably linked. It was not inevitable that the same or indeed any particular human action and/or intervention would occur in relation to the disease.
59. As to paragraphs 53.2(c)-(d) and 56 (including the sub-paragraphs thereto):
- 59.1. Paragraphs 56.1 and 56.3 to 56.7 are admitted.
- 59.2. As to paragraph 56.2, QBE repeats its response to paragraphs 18.11 to 18.13 as set out above.
- 59.3. Since no part of the FCA's case against QBE turns on or involves Government or "*national action*", QBE does not plead further to paragraph 56.8.
60. As to paragraph 57:
- 60.1. If (which is denied) the local occurrence or manifestation of COVID-19 was a proximate cause of the assumed interruption or interference, it was separate and independent from other potential causes including (but not limited to) the nationwide and/or worldwide occurrence of COVID-19 and/or the human action and/or intervention in relation thereto. In most if not all cases, the assumed interruption or interference would have occurred 'but for' the former, i.e. they would have been caused by an independent cause in any event. It is denied that those causes are inextricably linked, alternatively constitute a set of causes none of which are sufficient on their own and which should be considered together.
- 60.2. The final sentence of paragraph 57 is denied. The occurrence of an independent proximate cause does, and will, prevent cover based on an orthodox application of the 'but for' causation test, which is a necessary requirement for an insured to have the benefit of cover under an insurance policy and, in any event, for cover to apply under the QBE Wordings.
61. As to paragraph 58:

- 61.1. It is admitted that the first sentence is a correct statement of legal principle, namely that there will be cover where there are two concurrent and *interdependent* proximate causes of loss, one of which is an insured peril, while the other is uninsured and not excluded. However, this does not apply (i) where there are two concurrent and *interdependent* proximate causes of interruption or interference, but neither of those proximate causes was an insured peril under the policy wording; and/or (ii) where there are two concurrent and *independent* proximate causes of interruption or interference, even where only one of those proximate causes was an insured peril under the policy wording. In either of these two situations, there will be no cover under the policy in question.
- 61.2. The second sentence repeats the *non-sequitur* referred to in paragraph 57.6 above. The fact that a concurrent cause is not expressly excluded from an insurance policy does not mean, or even imply, that cover is available for that cause under the policy. To the contrary, where an *independent* proximate cause occurs concurrently with an insured peril and would have caused the same loss (i.e. interruption or interference) in any event, there will be no cover as a result of the orthodox and straightforward application of the 'but for' causation test. This is a matter of basic insurance law, since the intent and purpose of an insurance policy is to provide a full and fair indemnity in respect of certain specified insured perils. For cover to be available where interruption or interference would have occurred even 'but for' the occurrence of those insured perils would effectively over-indemnify the insured.
62. As to paragraph 59:
- 62.1. It is denied that the "*causal relations*" required by the QBE Wordings are satisfied in the present case.
- 62.2. It is further denied that any of the "*causal language*" in the QBE Wordings, namely "*arose from*", "*a result of*", and/or "*in consequence of*", requires anything other than a strict 'but for' causation test, whether as alleged in paragraph 59 or at all. There is no reason or justification for departing from the orthodox rule that 'but for'

causation is a necessary but not a sufficient requirement which an insured must satisfy in order to succeed in an insurance claim.

62.3. Accordingly, it is denied that the “*causal language*” in the QBE Wordings merely requires “*some*” causal link between two elements in the causal chain, i.e. that one played a role in bringing about the other.

62.4. To the contrary, in order to succeed with a claim under the QBE Wordings, the insured must prove that, ‘but for’ the occurrence of a particular insured peril, it would not have suffered the assumed interruption or interference. This requires the straightforward application of the orthodox ‘but for’ causation test, based on an appropriate counterfactual which is founded on the policy wording itself. The correct counterfactual for the court to apply in the present case is set out at paragraph 75.4 below.

63. As to paragraph 60, QBE does not understand the FCA to allege that the word “*following*” is used as relevant ‘causal language’ in any of the QBE Wordings. If and to the extent that it may be required to do so, QBE denies that this word requires or “*represents a looser causal connection*” and avers that it requires the particular insured peril to be the proximate cause (or a proximate cause, where there are multiple proximate and interdependent causes) of the assumed loss.

Denial of Access and Public Authority Restriction Clauses

64. Paragraphs 62 to 66 do not concern any of the QBE Wordings, insofar as they are at issue in this claim, and so QBE does not plead to the same.

Disease Clauses

65. As to paragraph 67:

65.1. The distinction which the FCA attempts to draw between “*local-only diseases (e.g. food poisoning)*” and “*broader diseases*” is not understood.

65.2. It expressly denied that the proper construction of the Disease Clause in QBE1-3 is that QBE is distinguishing between “*remote-only diseases that cause government*

action”, and “diseases that include a local manifestation which have some sort of anchor to the happenings in the area of the insured premises”.

- 65.3. The FCA’s proposed “*anchor*” formulation has no basis in the language of the QBE Wordings themselves, properly construed, or in the intention of the parties. It would also give rise to a range of inconsistent and/or absurd consequences.
- 65.4. The cover provided by the Disease Clause in QBE1-3 is expressly stated to be limited to business interruption losses “*arising from*”, “*caused by*” and/or “*in consequence of*” by food poisoning which occurred at the insured premises and notifiable diseases which occurred at or within the relevant policy area of the insured premises.
- 65.5. The proper construction of the Disease Clause in QBE1-3 is that cover would only be provided if the insured peril, i.e. the occurrence or manifestation of a notifiable disease occurred at or within the relevant policy area of the insured premises. The question of whether or not the disease also occurred outside of the relevant policy area is irrelevant to the question of whether there was an insured peril under the Disease Clause (although it might, of course, be relevant to the amount of the insured’s indemnity).
- 65.6. QBE notes, again, the FCA’s repeated use of the same argument that the fact that the QBE Wordings did not expressly exclude pandemics or epidemics somehow suggests or implies that they should be taken to provide cover in respect of such pandemics or epidemics. As explained above, this is a *non-sequitur*. QBE repeats paragraph 57.6 above.
66. As to paragraphs 68 and 69:
- 66.1. It is denied that any of the human action and/or intervention in relation to the nationwide and/or worldwide occurrence and spread of COVID-19 (and any interruption of or interference with the insured’s business) that post-dated COVID-19 being carried or contracted by a person at or within 25 miles of the premises (in the case of QBE1-2) or within 1 mile of the premises (in the case of

QBE3) was “*arising from*” (QBE1⁵) and/or “*caused by*” (QBE1⁶) the manifestation of COVID-19 at the premises or within a 25-mile radius of the premises and/or was “*in consequence of*” the occurrence of COVID-19 at the premises or within a 25-mile radius of the premises (QBE2); and/or was “*in consequence of*” the occurrence of COVID-19 at the premises or within a 1-mile radius of the premises (QBE3).

66.2. While the public authority measures referred to in paragraphs 68 to 69 may have been intended and/or imposed in order to “*deal with*” the developing and/or aggregate prevalence of COVID-19 across the UK and/or worldwide, including (theoretically) within a 1-mile and/or 25-mile radius of the insured premises, and indeed all premises all across the UK, it is denied that they were a direct result of manifestation and/or occurrence of COVID-19 within the relevant policy area of any particular insured premises and further denied that they constituted an insured peril under the QBE Wordings in any event.

66.3. As to the final sentence of paragraph 68, QBE repeats paragraphs 38 to 47 above.

67. Paragraph 70 does not concern any of the QBE Wordings, insofar as they are at issue in this claim, and so QBE does not plead to the same.

Cause of the Loss

68. As to paragraphs 71 and 71.1:

68.1. Save that the existence and extent of any individual insured’s loss will be fact-specific to each particular insured, it is admitted that in principle that the assumed loss “*resulted from*” (QBE2-3) interruption of or interference with the business, and that in principle, the required causal link in QBE1 was satisfied in that limited respect.

68.2. However, and for the avoidance of doubt, the assumed loss (i) would have been suffered in any event, whether or not the insured peril occurred; (ii) was not

⁵ PBCC040120 Business Combined Insurance Policy and PBCC0170619 Business Combined Insurance Policy, clause 7.3.9(a).

⁶ POFF180120 Office, clause 8.2.5(a); and POFP040120 Office, clause 11.1.10(a).

proximately caused by any of the insured perils in QBE1-3 and, (iii) accordingly, there is no cover in respect of any interruption of or interference with the business and/or any loss which may have resulted from COVID-19 and the Government and/or public response thereto.

The 'But For' Test and Trends Clauses

69. As to paragraph 74:

69.1. The FCA's approach to the 'but for' test of causation appears to be based on a fear that some sort of undesirable 'legal lacuna' would result from its traditional application in the present case. The suggestion seems to be that, notwithstanding that the human action and/or intervention leading to 'social distancing' guidance and other 'lockdown' measures, etc., only came into effect as a result of the (actual or feared) manifestation of COVID-19 throughout the UK, and while *some* of the manifestation across the UK must have occurred on *some* premises and/or within *some* 1-mile or 25-mile zones, an orthodox application of the 'but for' causation test would lead to the allegedly artificial result that no single premises, 1-mile or 25-mile zone, as applicable, would be held to be the cause of the assumed loss. It is denied that this is the correct approach to adopt to the 'but for' test when the QBE Wordings are properly construed.

69.2. It is incorrect (as the FCA appears to do) to approach this on the assumption that QBE should be held responsible as if they had, by means of their 'local' coverage policies, agreed to provide cover for a nationwide or worldwide occurrence of COVID-19. Such an approach to causation is inapplicable and inappropriate in an insurance law context such as the present, where the scope of each contracting party's obligations are limited to the wording of the relevant insured peril(s) in question, properly construed.

69.3. Once the 'but for' test is viewed, correctly, through the lens of what the QBE Wordings actually provide, its application is straightforward and neither absurd nor in defiance of common sense. Nor does it result in any 'legal lacuna', whether undesirable or otherwise. It simply leads to asking what would have been the

result had *the insured peril*, i.e. the occurrence or manifestation of COVID-19 on the premises or within a 1-mile or 25-mile radius, as applicable, not happened. That is a realistic counterfactual and, unlike the two counterfactuals suggested by the FCA, pays due regard to the language of the QBE Wordings themselves.

69.4. The fact that there is no coverage on the QBE wordings on the assumed facts does not mean that there is a 'lacuna'; it simply reflects the fact that the wordings were designed and intended to provide cover in respect of losses caused by specific insured perils and not for losses caused otherwise.

70. As to paragraph 75 and 75.1:

70.1. It is denied that the contractual quantification machinery in the QBE Wordings, including the 'trends clauses' in QBE1-3, are limited to claims under the primary cover clause and/or to physical or property damage only. Accordingly, it is denied that the claims must be quantified without reference to such machinery.

70.2. To the contrary, all of the QBE Wordings incorporate a trends clause as part of the contractual machinery required to quantify any claim for business interruption loss, whether in respect of 'damage-based' cover or 'non-damage cover'. The indemnity which might be payable by the insurer under the business interruption section of each of the QBE Wordings is calculated, in all cases, by reference to defined concepts, including "*gross fees*", "*gross revenue*", "*rent receivable*", etc. All of these defined concepts expressly incorporate the relevant trends clause from that particular policy wording.

70.3. By way of example, QBE1 (PBCC040120) provides, in its main business interruption insuring clause (i.e. clause 7.1.1), as follows:

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

...

- c) **our** liability under this **section** shall not exceed the lower of:
 - i) the **sum(s) insured** shown in the schedule; or
 - ii) any applicable **sub-limit** stated in any extension clause.”

70.4. The contractual machinery used to quantify the insurer’s potential liability under the above main insuring clause is then set out by reference to a number of items, including “*Insurable gross profit*”, “*Gross fees*”, “*Gross revenue*”, “*Increased cost of working*” and “*Rent receivable*”, etc. The nature of financial information which will be used to calculate these items, making up the insurer’s overall liability for business interruption loss, is based on a number of key defined terms, including:

“23.6 Annual gross fees

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

23.7 Annual gross revenue

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

23.8 Annual rent receivable

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

23.9 Annual turnover

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

...

23.85 Rate of gross profit

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

70.5. As such, the quantification of any indemnity which might be due to the insured in respect of business interruption losses is calculated by financial figures which must be “**trend adjusted**”, which is defined as follows:

“23.117 Trend adjusted

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**.”

70.6. With the exception of QBE1 (POFP040120), all of the QBE Wordings include contractual quantification machinery in materially the same or similar form to that set out above.

70.7. The same contractual quantification machinery set out above must apply to the ‘non-damage’ ‘insured premises-related’ business interruption cover, including that provided by the clauses at issue in the present claim, since otherwise the QBE Wordings contain no mechanism for quantifying the value of a ‘non-damage’ business interruption claim. In this respect, the reference to “*damage*” in the definition of “*trend adjusted*” above must be properly construed as ‘insured contingency or incident’. In support of this interpretation:

70.7.1. First, two of the QBE1 wordings⁷ provide, in clause 7.3, that the extensions, including the ‘notifiable disease’ clause, “*do not increase the sum(s) insured and any sub-limits stated form part of and are not additional to the sum(s) insured*”. The “*sub-limits*” for this purpose are defined, in clause 23.104, as “*the maximum liability of the insurer under a specified section, clause or other party of this policy*”. As such, the limits imposed with respect to “*gross profits*”, etc., which require the incorporation of the trends clause, will apply to the business interruption “*section*” as a whole, including the ‘non-damage’ extensions to cover.

70.7.2. Second, the business interruption section in the QBE2 policy wordings includes, in clauses 3.4 to 3.4.10, a set of “*limitations and exclusions*” which are applicable to that section as a whole, including the ‘non-damage’

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PBCC040120 Business Combined Insurance Policy and PBCC170619 Business Combined Insurance Policy.

clauses. Those “*limitations and exclusions*” contain the contractual quantification machinery referred to above (i.e. concepts of “*gross profit*”, etc.).

70.7.3. Third and in any event, it would be contrary to commercial common sense and inconsistent within each of the QBE Wordings for the contractual quantification machinery set out above to apply only to business interruption loss where such loss has resulted from physical damage but for no quantification machinery at all to apply where precisely the same type of business interruption loss has resulted from a ‘non-damage’ insured peril.

70.8. Further or in the alternative, as a matter of general common law and/or insurance law principles, any given claim must be quantified by reference to whatever loss the insured would have suffered ‘but for’ the occurrence of the insured peril in question. The insurer is obliged, subject to questions of coverage and causation, etc., to indemnify the insured against its actual loss. The assessment of that actual loss requires the application of a ‘but for’ test to the question of *loss* itself. This is the only way in which the sum required to indemnify the insured can be fairly and fully calculated.

71. As to paragraph 75 and 75.2:

71.1. It is denied that QBE1 (POFP040120) does not contain a trends clause at all. Although it is admitted that this particular policy wording does not contain the same specific definition of “*trend adjusted*” as the other QBE Wordings (set out in paragraph 70.5 above), it nonetheless uses the same sort of contractual quantification machinery and includes the following key defined concepts:

“20.75 Standard gross fees

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

20.76 Standard gross revenue

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

- 71.2. Accordingly, the contractual quantification machinery used to calculate the insured’s business interruption loss, if any, in QBE1 (POFP040120) requires the insured’s “*gross fees*” and/or “*gross revenue*” to be “*trend adjusted*”. The concept of trends language and/or clauses in business interruption insurance is widely and sufficiently understood that the methodology set out in the trends clauses in the other QBE1 policy wordings should therefore be operated in any event.
- 71.3. Further or in the alternative, how any given insured’s figures should be “*trend adjusted*” would be a matter of contractual interpretation in the particular circumstances of each individual case, and the policy in question may, depending on the particular facts, be interpreted in line with and/or rectified so as to include the sort of trends language and/or clauses set out in the other QBE Wordings. QBE’s position with respect to each individual insured in this respect is reserved and, it is submitted, cannot be determined within the parameters of this test case claim.
- 71.4. With respect to the application of such trends language and/or clauses as may be incorporated into QBE1 (POFP040120) to ‘non-damage’ cover as well as ‘damage-based’ cover, QBE repeats paragraph 70.7 above (and the sub-paragraphs thereto), *mutatis mutandis*.
- 71.5. Further or in the alternative, QBE repeats paragraph 70.8 above in relation to QBE1 (POFP040120) in particular.
72. As to paragraph 76:
- 72.1. The proper purpose of the trends language in the QBE Wordings is to provide a mechanism for the quantification of the indemnity properly due to the insured, if any. In calculating the insured’s actual loss as the result of the relevant insured peril, which is the measure of indemnity to which the insured is entitled under the policy (in the absence of terms to the contrary, etc.), this contractual machinery

takes into account loss which the insured would have suffered in any event, i.e. 'but for' the insured peril in question.

72.2. In order to calculate the insured's loss fairly and fully, therefore, the 'but for' test in the trends language and/or arising as a matter of common law and/or insurance law principles, as set out in paragraph 70.8 above, must be applied so that the insured is not under- or over-indemnified as the case may be. This necessarily involves taking into account both the ordinary vicissitudes of commercial life and also the natural, probable and/or inevitable results of independent causes of the same or similar loss. The only cause which is not taken into account in this 'but for' test is the relevant insured peril itself.

72.3. Save as set out above, paragraph 76 is denied.

73. Paragraph 77 is denied. The counterfactual proposed by the FCA is highly artificial, unrealistic and bears no relation to the language and/or effect of the QBE Wordings themselves, properly construed. There is no basis in the policy wording of QBE1-3 to apply a counterfactual which assumes that the relevant insured peril was a nationwide (or indeed worldwide, as proposed in paragraph 4.3) occurrence and/or manifestation of a disease and/or a wide range of human actions and/or interventions in response to it. The proper counterfactual which should be applied is to ask whether, 'but for' the occurrence of the *insured peril*, i.e. manifestation or occurrence of COVID-19 at the premises, and/or within a 1-mile or 25-mile radius of it, as applicable, would the assumed interruption, interference and/or loss have been suffered by the insured in any event? The answer to this in the present case can only be 'yes'.

74. As to paragraph 78:

74.1. In this paragraph, the FCA has conflated, wrongly, two different 'but for' tests. As set out in paragraph 12.1 above, the first 'but for' test applies at the *causation* stage and is a question with a binary 'yes/no' answer; 'but for' the occurrence of the insured peril, would the insured have suffered the interruption or interference complained of? It is only if the answer to this question is 'no' that the analysis will

proceed to consider whether the insured peril was the proximate cause of that interruption or interference, as set out in paragraph 12.2 above.

- 74.2. By contrast, and as set out in paragraph 12.3 above, the second ‘but for’ test applies at the *quantification of loss* stage and is a question which admits of a range of possible answers; ‘but for’ the occurrence of the insured peril, would the insured’s loss have been different and, if so, how would it have been different?
- 74.3. As to the first sentence of paragraph 78, therefore, the quantification or valuation of the insured’s loss is required, whether as a matter of trends language and/or clauses in the QBE Wordings and/or as a result of the application of common law and/or insurance law principles generally, to be reduced (or potentially increased in certain fact-specific cases) by reference to facts and events, including the nationwide and/or worldwide outbreak of COVID-19, the ‘lockdown’, self-isolation, ‘social distancing’, business closure and other national measures imposed by the Government, etc., which would have caused the insured to suffer all or part of that loss in any event, i.e. ‘but for’ occurrence of the *insured peril* in question, i.e. manifestation or occurrence of COVID-19 at the premises, and/or within the relevant policy area, as applicable.
- 74.4. As to the second sentence of paragraph 78, on their proper construction, all of the QBE Wordings require the relevant insured peril to be a proximate cause of the assumed loss before cover will *prima facie* operate.
75. As to paragraph 79:
- 75.1. It is denied that the proper counterfactual is as set out in paragraph 77. The proper counterfactual is not as set out above.
- 75.2. Further and in any event, it is denied that the FCA’s alternative counterfactual is proper and/or correct, i.e. that, for such of the QBE Wordings which contain as an insured peril the manifestation or occurrence of a notifiable disease within a particular radius of the insured premises, “*the correct counterfactual is to assume that there is no disease or action (as applicable) within that Area but that the disease or action*

continued outside it... [i.e.] that there was an 'island' of normal disease-free trade in a 'sea' of disease/public action."

75.3. Insofar as this alternative counterfactual is capable of being understood and/or applied at all, it is highly artificial and bears no reasonable relation to any realistic counterfactual scenario. In any event, it is denied that this sort of counterfactual is can or should be applied in relation to the QBE Wordings.

75.4. Accordingly, and as set out above, the only counterfactual which can and should properly be applied in the present case is to ask whether, 'but for' the occurrence of the *insured peril*, i.e. occurrence or manifestation of COVID-19 at the insured premises, and/or within the relevant policy area, as applicable, would the assumed interruption, interference and/or loss have been suffered by the insured in any event? The answer to this in the present case must be 'yes'. As such, the claim against QBE must fail.

75.5. Save as set out above, paragraph 79 is denied.

O. Cover

76. As to paragraph 80 (and the sub-paragraphs thereto):

76.1. Paragraph 80.1 is denied for the reasons set out above.

76.2. The first sentence of paragraph 80.2 is denied for the reasons set out above. The second sentence is admitted, subject to proof by individual insureds as to any actual or alleged upwards business effects.

76.3. Paragraphs 80.3 and 80.4 are denied for the reasons set out above.

76.4. Paragraph 80.5 is noted and averred.

P. Declarations

77. By reason of the matters set out above, QBE denies that the FCA is entitled to the declarations sought in this claim.

78. As to the declarations sought by the FCA in its Prayer for Relief:
- 78.1. Declaration (1) is admitted.
- 78.2. Declarations (2), (3), (4), (8), (9), (10), (11)(a)-(f), (12)(a)-(f), (13) and (14) are not relevant to the FCA's claim against QBE and are therefore denied as against QBE.
- 78.3. Declarations (5), (6), (11)(g)-(h), (12)(g)-(h), (15), (16), (17) and (18) are denied for the reasons set out above.
- 78.4. The FCA is not entitled to declaration (7), or any parts thereof, since it concerns factual questions, the resolution of which require expert evidence, which are outside the remit of this test case scheme.
- 78.5. Declaration (19) refers to further declarations sought specifically against QBE as set out in Schedule 6 to the Particulars of Claim. Schedule 6 sets out five separate specific declarations in relation to each of QBE1-3, but QBE's response to all three sets of specific declarations is as follows:
- 78.5.1. In relation to specific declarations (1) and (3), QBE repeats its response to declaration (7) above.
- 78.5.2. Specific declarations (2), (4) and (5) are denied for the reasons set out above.

COUNTERCLAIM

79. QBE repeats paragraphs 1 to 76.4 of the Defence above.
80. Accordingly, QBE seeks the following declarations, or such other declarations as the court deems appropriate:
- (1) The Disease Clause in QBE1 provides cover where a proximate cause of the interruption, interference and/or loss claimed by the policyholder is the manifestation of COVID-19 in the insured premises or within a 25 mile radius of those premises.

- (2) The Disease Clause in QBE2 provides cover where a proximate cause of the interruption, interference and/or loss claimed by the policyholder is the occurrence of COVID-19 at the insured premises or within a 25 mile radius of those premises.
- (3) The Disease Clause in QBE3 provides cover where a proximate cause of the interruption, interference and/or loss claimed by the policyholder is the occurrence of COVID-19 at the insured premises or within a 1 mile radius of those premises.
- (4) None of the Disease Clauses in QBE1-3 provide cover for interruption, interference and/or loss that would have been sustained by a policyholder in any event, i.e. 'but for' the occurrence and/or manifestation of COVID-19 in or at the insured premises or within a 25-mile (QBE1-2) or 1-mile (QBE3) radius of those premises.
- (5) None of the Disease Clauses in QBE1-3 provide cover for any loss the proximate cause of which is:
 - (i) the COVID-19 pandemic or epidemic; and/or
 - (ii) an occurrence and/or manifestation of COVID-19 in other locations, i.e. other than within a 25-mile (QBE1-2) or 1-mile (QBE3) of the insured premises; and/or
 - (iii) any human action and/or intervention in relation to the COVID-19 pandemic or epidemic, including the response of the UK Government (and/or the devolved administrations and/or any foreign government).
- (6) Accordingly, in the light of the agreed facts and assumed facts, policyholders are not entitled to an indemnity pursuant to the QBE Wordings in respect of business interruption losses as a result of COVID-19 and the Governmental or other responses thereto.

- (7) All of the QBE Wordings, alternately such of the QBE Wordings as the Court shall determine, include operative 'trends clauses', which apply such that the policyholder will not be entitled to recover payment in respect of financial loss which they would have suffered in any event, i.e. 'but for' the occurrence and/or manifestation of COVID-19 in or at the insured premises or within a 25-mile (QBE1-2) or 1-mile (QBE3) radius of those premises.
- (8) Even in the absence of 'trends clauses' in the QBE Wordings, as a matter of general common law and/or insurance law principles, any indemnity which the insurer is required to pay will be assessed by reference to the insured's actual loss, such that they are fairly and fully indemnified, and are not under- or over-indemnified.

MARK HOWARD QC, Brick Court Chambers

RACHEL ANSELL QC, 4 Pump Court

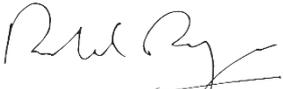
MARTYN NAYLOR, 4 Pump Court

SARAH BOUSFIELD, Brick Court Chambers

Statement of Truth

The Sixth Defendant, QBE UK Limited, believes that the facts stated in this Defence and Counterclaim are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth.

I am duly authorised by the Sixth Defendant to sign this Defence and Counterclaim.

Signed: 
Full name: RICHARD VAUGHAN PRYCE

Position or office held: CEO QBE UK Limited

Dated: 23 June 2020

Served this 23rd day of June 2020 by **Clyde & Co LLP** of The St Botolph Building, 138 Houndsditch, London EC3A 7AR, Solicitors for the Sixth Defendant.