

IN THE HIGH COURT OF JUSTICE

Claim No. FL-2020-000018

BUSINESS AND PROPERTY COURTS

COMMERCIAL COURT (QBD)

FINANCIAL LIST

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 OF THE SEVENTH DEFENDANT

PRELIMINARY

1 In this Defence:

- (a) Save that no admissions are made thereby, and save as set out below, all abbreviations used in the Particulars of Claim are adopted herein; and
- (b) The phrase “*not admitted*” or “*no admissions are made*” means that RSA is unable to admit or deny the fact, matter, assertion or allegation and the FCA is put to proof of the same.

2 This Defence responds to the Particulars of Claim on behalf of RSA only. Accordingly:

- (a) RSA does not plead to or admit any paragraph, or part of a paragraph, in the Particulars of Claim which does not relate to RSA; and/or

- (b) Where a paragraph referring to more than one Defendant is admitted, it is admitted only insofar as the allegation concerns RSA, and otherwise not admitted.
- 3 It should be common ground that each of RSA's policies is to be construed as a whole.¹ Despite this, the FCA's Particulars of Claim:
- (a) Dislocate:
 - (i) Different parts of the same term in each of RSA's policies from each other;
 - (ii) The relevant terms within RSA's policies not only from each other but also from the wordings within which they appear;
 - (b) Consider words and phrases to be found in each of RSA's policies alongside words and phrases extracted from other policies (including those underwritten by other insurers) without acknowledging that the contractual context of such words and phrases may differ as between wordings.
- 4 RSA reserves the right to adopt any argument or the benefit of any argument advanced by any other Defendant.

A. SUMMARY

- 5 Five RSA policy wordings ("**the RSA Wordings**"), to each of which RSA will refer at trial for its full terms and true effect, are in issue in this action. In general terms:
- (a) RSA1, "Cottagesure" was taken out by holiday cottage owners;
 - (b) RSA2.1, "Eaton Gate Super Facility Pubs and Restaurants" was taken out by the owners of one or more pubs and restaurants;
 - (c) RSA2.2, "Eaton Gate Super Facility Retail" was taken out by the owners of one or more shops;
 - (d) RSA3, "Eaton Gate Super Facility Commercial Combined" was taken out by the owners of a variety of businesses including building contractors, landscape gardeners and manufacturers and wholesalers of electronics, fabrics and metal goods; and

¹ Framework Agreement, clause 1.1.

- (e) RSA4, “Marsh Material Damage and BI - Resilience” and “Jelf Material Damage and BI – Resilience” were wordings drafted by the brokers Jelf/Marsh who (acting as agents for the policyholders by which they were retained) placed the relevant risks with a number of different insurers including AIG, Aviva, QBE, RSA and Zurich. RSA4 was used for both SMEs and larger businesses.
- 6 RSA1 to 3 each refer to the insured property as “*the Premises*” whereas RSA4 refers to it as “*the Insured Location*”. For ease of reference and consistency, and without prejudice to the terms of the applicable contractual definition, in this Defence “*the Insured Location*” is referred to as “*the Premises*”.
- 7 Paragraphs 1 to 4 of the Particulars of Claim are noted as a summary of the FCA’s case to which RSA pleads, as relevant, in greater detail below.
- 8 Paragraph 4.2 of the Defence of the Third and Fifth Defendants is adopted *mutatis mutandis*.
- 9 Further, and in summary:
- (a) The assumed losses were proximately caused by (amongst other things):²
- (i) In part, the mere presence of COVID-19 within the United Kingdom and elsewhere;
- (ii) In part, the combination of (1) the widespread presence of COVID-19 within the United Kingdom at a level constituting an epidemic and (2) the measures imposed at a national level by the UK government and devolved governments to mitigate the rate of spread of COVID-19 within the UK population and thereby prevent the capacity of the NHS from being overwhelmed;
- (b) Neither of the matters set out in (a) was a peril insured under any of RSA’s relevant policies;
- (c) The assumed losses were not caused (whether proximately or otherwise) by any peril insured under any of the RSA Wordings;

² See also paragraph 17 below. The “assumed losses” are understood to be the losses of individual policyholders as set out in paragraph 56 below.

- (d) Losses caused by epidemic were excluded under RSA3. Losses caused by infectious or contagious disease were excluded from the relevant extension under RSA2.2;
- (e) The correct counterfactual is one in which the insured peril is absent (or does not eventuate) but everything else remains the same;
- (f) The FCA's case assumes (without actually asserting) that the presence of COVID-19 in the relevant area (a) had been identified, and (b) was a cause in fact of the restrictions imposed and/or of the interruption to the insured's business. As to that:
 - (i) The identified presence of COVID-19 within the relevant area at the relevant time is a necessary, but by itself insufficient, condition for the triggering of cover;
 - (ii) It is not admitted that retrospective statistical analyses as to the presence of COVID-19 which were not available and did not inform the actions of those imposing the relevant restrictions are relevant;
 - (iii) Where the peril insured is the imposition of restrictions due to the occurrence or manifestation of disease within a specified area, the insured has to prove the necessary causal link between (1) the presence of the disease within that area and (2) the imposition of restrictions and/or (3) the interruption of the insured business. In other words, cover is not triggered simply by establishing the happenstance that COVID-19 was manifest within the relevant area.

B. INTRODUCTION

10 Section B of the Defence of the Third and Fifth Defendants is adopted *mutatis mutandis*.

C. THE POLICY WORDINGS AND THE APPLICABLE LAW

11 Subject to the matters set out herein, paragraph 11 of the Particulars of Claim is admitted.

12 Paragraph 12 of the Particulars of Claim is not admitted.

- 13 Paragraphs 13 to 15 of the Particulars of Claim are noted.
- 14 The first sentence of Paragraph 16 of the Particulars of Claim is admitted, the second sentence is noted without admission.

D. COVID-19 AND THE RESPONSE TO IT

- 15 RSA has changed the heading to this section from “*COVID-19 and the Public Authority Response to it*” to the one set out above. This reflects RSA’s position that the response to COVID-19 of people and entities other than public authorities is relevant to this action.
- 16 Paragraphs 17 to 19 of the Particulars of Claim are admitted save that:
- (a) RSA will refer to the listed guidance and/or advice at trial for their full terms and true effect (which have not been accurately reflected in the FCA’s proposed Agreed Facts or within paragraph 18 of the Particulars of Claim);
 - (b) COVID-19 was made a notifiable disease in Wales with effect from 6 March 2020;³
 - (c) The footnote to paragraph 18.11 is irrelevant. RSA notes that the FCA does not seek to prove that any particular matter had been agreed between “*insurers*” and the government. RSA proceeds accordingly and adopts paragraph 15.3(d)(ii)-(iv) of the Defence of the Third and Fifth Defendants *mutatis mutandis*;
 - (d) Insofar as Mr Sunak made the statement alleged in paragraph 18.12 of the Particulars of Claim, no such agreement was reached and paragraph 15.4(b)-(c) of the Defence of the Third and Fifth Defendants is adopted *mutatis mutandis*;
 - (e) Paragraph 15.5 of the Defence of the Third and Fifth Defendants is adopted *mutatis mutandis*;
 - (f) In relation to paragraph 19.3 and 19.5:
 - (i) It is denied that there was an obligation on Category 3 and/or 5 businesses to comply with UK Government advice on social distancing, safety and hygiene but admitted that there was UK Government guidance that they should do so; and

³ Regulation 1 of The Health Protection (Notification) (Wales) (Amendment) Regulations 2020.

- (ii) Whilst it is admitted that the employers' and occupiers' legal duties referred to were owed, it is denied (if it is alleged) that the fact of having to comply with those duties could or did constitute interruption or interference for the purpose of the RSA Wordings;
 - (g) Paragraphs 16.1, 16.2 and 16.3(b) of the Defence of the Third and Fifth Defendants are adopted *mutatis mutandis*.
- 17 Insofar as it is alleged that any loss and/or interruption and interference with business activities as a result of COVID-19 was caused entirely by steps taken by the UK public authorities in relation to those businesses, such allegation is denied. For the purposes of this action, and depending on the nature of the business insured, it should be assumed that the loss and/or interruption or interference was also (or entirely) caused by one or more of factors such as the following:
- (a) Reduction in international demand by reason of overseas customers not travelling to the UK because they were:
 - (i) Suffering from COVID-19;
 - (ii) Self-isolating and/or social distancing and/or in fear of contracting and/or spreading COVID-19;
 - (iii) Subject to restrictions on travel imposed in their home country; and/or
 - (iv) Fearful of the spread of COVID-19;
 - (b) Reduction in domestic demand because potential customers:
 - (i) Were self-isolating, because they were exhibiting symptoms of COVID-19, or are in the same household as those exhibiting symptoms of COVID-19;
 - (ii) Were at high risk from COVID-19 and, therefore, shielding;
 - (iii) Were social distancing and/or in fear of contracting and/or spreading COVID-19;
 - (iv) Were disincentivised to visit the Premises because of the closure of other businesses (such as pubs and restaurants near holiday cottages) or the

- cancellation of other events (such as sporting fixtures being broadcast in public houses);
- (v) Had personal (e.g. weddings) or commercial (e.g. conferences) gatherings cancelled whether: (1) voluntarily or not, or (2) before or after the imposition of restrictions pursuant to regulation 7 of the 26 March Regulations; and/or
 - (vi) Were subject to restrictions as to travel, and overnight stays, imposed upon them by employers prior to the imposition of restrictions and/or government pursuant to regulation 6 of the 26 March Regulations;
 - (vii) Reduced elective spending because of the actual or possible impact of COVID-19 on their personal/family financial position;
- (c) Reduction in turnover caused by one or more employees of a business:
- (i) Suffering from COVID-19;
 - (ii) Self-isolating because they were exhibiting symptoms of COVID-19, or were in the same household as someone exhibiting symptoms of COVID-19; and/or
 - (iii) Shielding because they, or a member of their household, were at high risk from COVID-19;
- (d) Supply side issues resulting in a reduction in turnover by reason of domestic or overseas suppliers:
- (i) Reducing or stopping their supply of goods or services for COVID-19 related reasons; and/or
 - (ii) Being unable to transport product to the UK because of COVID-19.

E. THE DEFENDANTS' REFUSAL OF COVER

18 It is admitted that RSA has declined some claims for COVID-19 business interruption losses under RSA1 to 4. Otherwise, save to admit that some of the bases for declinature pleaded have been relied upon by RSA, paragraph 20 of the Particulars of Claim is not admitted.

F. PREVALENCE OF COVID-19 IN THE UK

19 The purported reservation of rights in paragraph 21 of the Particulars of Claim has been superseded by the ruling of Butcher J at the first CMC on 16 June 2020.

20 As to paragraph 22 of the Particulars of Claim:

- (a) The first sentence is admitted. It is further admitted that the relevant area is stated in RSA1 and RSA3 as being a radius of 25 miles from the Premises;
- (b) It is denied the meaning of the term ‘vicinity’ is to be determined in the manner alleged: in RSA2 the term is to be given its natural meaning while in RSA4 the term has a defined meaning;
- (c) The final sentence is admitted with respect to RSA1 and RSA3 but otherwise denied.

21 As to paragraph 23:

- (a) It is admitted that policyholders may be able to prove a case of COVID-19 at a particular location by specific evidence in a particular case;
- (b) Published NHS hospital death data identifies the NHS trust operating the facility in which patients died but does not identify the specific facility in which a death occurred (save, by implication, where a particular NHS trust operates only a single facility). Most NHS trusts operate more than one facility and many operate more than one hospital providing acute care. Such data may therefore not, without more, be an accurate or reliable indicator as to the location of any particular death or deaths;
- (c) Save as aforesaid, the facts and matters alleged are not admitted.

22 As to paragraph 24 of the Particulars of Claim:

- (a) It is admitted that the UK Government has released data showing confirmed cases of COVID-19 submitted to PHE at a national and at more localised levels, including in relation to certain dates in March 2020 and it is averred that such “Reported Cases” data has both daily and cumulative totals (the latter making no allowance for those who had recovered from COVID-19); but

- (b) Save as aforesaid, no admissions are made. In particular, no admission is made as to the relevance of such data, whether for the purposes of calculating the “*Undercounting Ratio*” alleged in paragraph 26 of the Particulars of Claim or otherwise.

23 As to paragraph 25 of the Particulars of Claim:

- (a) In the early part of March 2020, testing of possible cases of COVID-19 was focused on symptomatic returned visitors from selected countries along with those with whom such returned visitors had been in contact;
- (b) As the government moved from the “delay” to “contain” phase (around 12 March 2020), the limited COVID-19 testing capacity was prioritised towards patients presenting at hospital with symptoms of COVID-19 serious enough to warrant inpatient admission and/or continued inpatient admission;
- (c) It is admitted that the actual presence of COVID-19 in the UK in March 2020 would have been much higher than was reflected by the number of Reported Cases, but no admissions are made as to the extent of such difference either in the UK as a whole or in any particular region/area.

24 As to paragraph 26 of the Particulars of Claim:

- (a) It is admitted that in ‘*Report 13: Estimating the number of infections and the impact of non-pharmaceutical interventions on COVID-19 in 11 European countries*’ (“**Imperial Paper**”),⁴ Flaxman et al sought to estimate what the number of COVID-19 infections and death rate would have been (in the absence of intervention) in various countries at the end of March 2020;
- (b) It is admitted that in ‘*COVID-19: Nowcast and Forecast*’, Cambridge University (5 June 2020) (“**Cambridge Analysis**”),⁵ Birrell et al provided estimates of number of new COVID-19 infections over time on the basis of a range of different scenarios, based on a number of data sources including the number of COVID-19 confirmed deaths reported by the PHE;
- (c) It is denied, insofar as it is alleged, that:

⁴ <https://www.imperial.ac.uk/mrc-global-infectious-disease-analysis/covid-19/report-13-europe-npi-impact/>

⁵ <https://www.mrc-bsu.cam.ac.uk/now-casting/>

- (i) Either the Imperial Paper or Cambridge Analysis sought to create or model an Undercounting Ratio, as the term is employed by the FCA in the Particulars of Claim (namely as a mathematical formula whereby the actual incidence of COVID-19 in any particular area of England can reliably be estimated from Government reported data or confirmed cases of COVID-19);
- (ii) The models used by the Imperial Paper and/or Cambridge Analysis can reliably be used to derive such an Undercounting Ratio. Without limitation, RSA notes in this regard that:
 - (1) The accuracy of both models depends upon assumptions about the behaviour of the SARS-Cov-2 virus and COVID-19, which had not as at the date of the Imperial Paper and Cambridge Analysis, and have not to date, been reliably verified by epidemiological experts;
 - (2) The Imperial Paper was written at an early stage of the COVID-19 outbreak and, as a result, was based on limited reported data;
 - (3) The Cambridge Analysis is based in part upon a 2009 model developed for the behaviour and transmission of A/H1N1 swine flu influenza, which is a different disease with different biological and epidemiological characteristics from COVID-19, and the extent of the difference between those diseases had not at the date of the Cambridge Analysis, and has not to date, been determined by epidemiological experts;
 - (4) The Cambridge Analysis is based on data regarding confirmed COVID-19 deaths which, by virtue of the both (i) the delay between COVID-19 infections and deaths and (ii) the delay between confirmed COVID-19 deaths and the reporting of such deaths, and the variability in that reporting delay in different regions in England, is not necessarily a reliable indicator of infection rates at any particular point in time;
 - (5) The Cambridge Analysis relies upon assumptions as to transmission patterns which are based on data sources including anonymised

location tracking information published by Google and the ONS' time use survey from 2014-15. Neither data source is necessarily representative of the behaviour of the UK population either generally or in any region in March 2020 or subsequently;

(d) Save as aforesaid, no admissions are made.

25 It is admitted that the Cambridge Analysis suggests that there were cases of COVID-19 in every regional Zone of England by 17 February 2020, but it is not admitted that any such suggestion is accurate or reliable. Save as is set out in the preceding sentence, no admissions are made as to paragraph 27 of the Particulars of Claim.

26 Rutland had its first confirmed case of COVID-19 on 23 March 2020, while North Devon had no confirmed case of COVID-19 before 31 March 2020. Save as aforesaid, the facts averred in paragraphs 28.1 and 28.2 of the Particulars of Claim are not admitted since reference is being made to the cumulative totals for Reported Cases which make no allowance for those who had recovered from COVID-19.

27 Paragraph 28.3 of the Particulars of Claim is denied.

28 In relation to paragraph 28.4 of the Particulars of Claim:

(a) Averaging deaths across a local authority area, or Reported Cases across a region or UTLA/LTLA Zone, is not a reliable guide to the distribution of COVID-19 as it is inherently unlikely that cases of COVID-19 would be evenly distributed. By way of example:

(i) In the South-West region it would be highly unlikely that there would be as many cases of COVID-19 in postcode PL20 6SP (the middle of Dartmoor) as there were in postcode TA1 5DA (the location of Musgrove Park Hospital in Taunton which is a large NHS hospital providing acute health services);

(ii) PHE's "Weekly Coronavirus Disease 2019 (COVID-19) Surveillance Report" for Week 24 indicated that changes in sero-prevalence sampling locations within a region were likely to result in changes to reported sero-

prevalence as some areas within a region were likely to have had a higher prevalence of COVID-19 than others;⁶

- (iii) There have been no confirmed cases of, or deaths arising from, COVID-19 in the Scilly Isles (which islands are, for the avoidance of doubt, more than 25 miles from the UK mainland);
- (b) As noted above, NHS hospital death data may not be (and often is not) specific to a particular hospital and Reported Cases cover both cumulative and daily totals;
- (c) Regional data for COVID-19 admissions to hospital will not be specific to a hospital in the Relevant Policy Area. Averaging out regional admissions data will not be a reliable or accurate basis from which to infer, without more, the presence of COVID-19 at a hospital within the Relevant Policy Area;
- (d) Save as aforesaid, no admissions are made.

G. ASSUMED FACTS

29 Paragraphs 29 and 30 of the Particulars of Claim are noted as a statement of the FCA's position. As to that:

- (a) It is not understood what is meant by the "*timing of the disease*" and it is therefore not admitted that the timing of the disease is relevant to the identification of the relevant 'Vicinity' for the purposes of RSA4;
- (b) Further:
 - (i) It is denied (as alleged in paragraph 29.2) that for the purpose of determining the 'Vicinity' for RSA4, geographical location and the timing of the disease could be the only relevant factors: as the FCA effectively acknowledges in paragraph 29.6 of the Particulars of Claim, the nature of the insured business may also be highly relevant. Paragraph 43 below is repeated and relied upon;
 - (ii) Issues of causation as regards particular policyholders (including whether there has been interference of or interruption to an insured business) will be

⁶https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891721/Weekly_COVID-19_Surveillance_Report_-_week_24.pdf

fact sensitive albeit the relevant legal principles can be illuminated by consideration of assumed facts.

H. POLICY INTENTION

30 As to paragraph 31 of the Particulars of Claim, RSA adopts paragraph 23 of the Defence of the Third and Fifth Defendants *mutatis mutandis*. Further:

- (a) The policyholders' subjective reasons for taking out the policies and/or their expectations of the policies are equally neither relevant nor admissible;
- (b) The parties to the policies can be taken to have contracted against a background which included:
 - (i) Previous decisions of the Courts of England and Wales as to the construction of similar contracts;
 - (ii) In particular, the decision of Mr Justice Hamblen in *Orient Express Hotels v Assicurazioni Generali* [2010] Lloyd's Rep IR 531;
 - (iii) The availability of specific pandemic cover and/or wordings which sought to nullify or alter the reasoning expressed in *Orient Express Hotels*.

31 Paragraph 32 of the Particulars of Claim is denied:

- (a) RSA4 was not offered by RSA to policyholders but was a standard broker form of wording on which RSA was invited (by Marsh/Jelf on behalf of policyholders) to underwrite risks presented to RSA;
- (b) Further, policyholders for policies issued under RSA2.1, 2.2 and 3 also were all advised by and acted through authorised insurance intermediaries at the time of placement;
- (c) The fact that the RSA1, 2.1, 2.2 and 3 were offered in a standard form cannot, without more, impact upon the Court's approach to the construction of the RSA Wordings;
- (d) In relation to RSA2.1, 2.2, 3 and 4 the relevant admissible background includes matters known or reasonably available to be known by both parties including

matters known or available to be known to policyholders through their brokers or intermediaries (including as to the matters set out in 30(b)(iii) above).

32 As to paragraph 33 of the Particulars of Claim:

- (a) The final sentence is denied in relation to RSA3 which does contain an express exclusion in respect of losses caused by epidemics;
- (b) Further, liability for losses caused by all infectious or contagious diseases (therefore including COVID-19) was excluded from cover under the Public Emergency extension in RSA2.2;
- (c) Otherwise no admissions are made.

33 As to paragraph 34 of the Particulars of Claim:

- (a) The first sentence is denied. The geographical restrictions encompassed within the perils insured under the relevant extensions within the RSA policies define the scope of the cover provided and demonstrate an objective intention not to provide cover for (amongst other things) pandemics;
- (b) Policies of insurance providing cover in respect of business interruption do not generally provide cover for losses consequent upon pandemics. RSA notes and relies upon the UK Government's statement to this effect as pleaded in paragraph 18.13 of the Particulars of Claim;
- (c) In the premises, and in any event:
 - (i) A business interruption policy which did provide cover for losses consequent upon pandemics would, or would be expected, to contain clear words to that effect; and
 - (ii) The absence of a pandemic exclusion cannot be used as a basis from which to infer that a policy does provide cover for losses consequent upon pandemics;
- (d) Further or alternatively, paragraph 32 above is repeated. The exclusions in RSA2.2 and RSA3 clearly manifest an intention on the part of RSA not to provide cover in respect of pandemics involving diseases such as COVID-19;

(e) The second sentence is admitted.

34 As to paragraph 35 of the Particulars of Claim:

(a) The meaning and effect of the RSA Wordings is, for the reasons set out herein, unambiguous. Accordingly, and also because no relevant ambiguity is asserted by the FCA, it is denied that the *contra proferentem* rule is relevant or applicable to the FCA's claims in this litigation;

(b) In any event, RSA4 was drafted by Marsh/Jelf who acted as agents for the relevant insureds. In such circumstances, the insureds (and not RSA) would fall to be treated as the *proferens*.

I. THE DISEASE COMPONENT OF THE TRIGGER

35 RSA has changed the heading to this section from "*The Disease Trigger*". The FCA's heading might wrongly be understood to suggest that the mere presence of COVID-19 could or would be sufficient to trigger cover under the RSA Wordings.

36 Paragraphs 36 of the Particulars of Claim is admitted.

37 As to paragraph 37 of the Particulars of Claim, COVID-19 became a notifiable disease on the following dates:

(a) 22 February 2020 in Scotland;

(b) 29 February 2020 in Northern Ireland;

(c) 5 March 2020 in England;

(d) 6 March 2020 in Wales.

38 Paragraph 39 of the Particulars of Claim is admitted.

39 As to paragraph 40 of the Particulars of Claim:

(a) The reference in RSA4 to "*diseases notifiable under the Health Protection Regulations (2010)*" is a reference to diseases notified under the Health Protection (Notification) Regulations 2010;

(b) Regulation 1(2) of the Health Protection Regulations 2010 states that they apply in relation to England only;

- (c) Therefore, properly construed the initial outbreak referred to in RSA4 refers to the start of the outbreak in England which was (as set out in paragraph 18.3 of the Particulars of Claim) on 31 January 2020;
- (d) For the sake of completeness, the first positive tests (and the commencement of the outbreak) in other parts of the United Kingdom were as follows:
 - (i) Northern Ireland on 27 February 2020;
 - (ii) Wales on 28 February 2020;
 - (iii) Scotland on 1 March 2020.
- (e) Save as aforesaid, the facts and matters alleged are denied.

J. PRESENCE OF DISEASE WITHIN A CERTAIN DISTANCE FROM THE PREMISES

40 As to the opening words of paragraph 41 of the Particulars of Claim:

- (a) An insured seeking to establish cover under a relevant clause within an RSA Wording would need to prove, on the balance of probabilities, the incidence (or incidences) of COVID-19 relied upon;
- (b) It is denied (if alleged) that anything less than an actual diagnosis of COVID-19 would be sufficient to establish any or any relevant occurrence or manifestation of the disease for the purpose of the RSA Wordings;
- (c) At all material times, fewer than 50% of those with symptoms being tested under what is now Pillar 1 of the UK Government's testing programme returned a positive test result. Accordingly, it is denied (if alleged) that the presentation of COVID-19 symptoms alone is sufficient to establish that a person did in fact have COVID-19;
- (d) For the purposes of this action, incidences of COVID-19 will need to be assumed. The following paragraphs are pleaded without prejudice to the foregoing.

41 Save in so far as is set out in Section F above, and as to paragraphs 41.2 and 41.3 of the Particulars of Claim insofar as they are pleaded in relation to RSA1:

- (a) RSA1 provides cover in respect of “*a notifiable human disease manifesting itself... within a radius of 25 miles of the Premises*”;
 - (b) To satisfy this requirement an insured would need to prove the presence of someone infected with COVID-19 within 25 miles of the Premises; and
 - (c) Save to the extent set out above, these paragraphs are denied.
- 42 Save in so far as is set out in Section F above, paragraphs 41.1 and 41.3 of the Particulars of Claim are admitted in respect of RSA3.
- 43 As to RSA4 and paragraph 41.5 of the Particulars of Claim:
- (a) The “*Notifiable Diseases and Other Incidents*” clause within RSA4 required the notifiable disease to occur at or within the Vicinity of the Premises;
 - (b) The word ‘Vicinity’ was defined to mean “*an area surrounding or adjacent to [the Premises] in which events that occur within such area would be reasonably expected to have an impact on an Insured or the Insured’s Business*”;
 - (c) The proper construction of the term “Vicinity” will be the subject of submissions at trial. Without prejudice to that, RSA avers that the term:
 - (i) Is to be construed as requiring a close spatial proximity having regard to:
 - (1) the nature of the insured’s business;
 - (2) the geographical area in which it is located (including any features peculiar to that area);
 - (ii) Cannot be construed as including the whole of the United Kingdom or as always including the same city, town or village;
 - (d) It is admitted that the first cases of COVID-19 were diagnosed in the UK on 31 January 2020;
 - (e) Save as aforesaid, and for the reasons set out above, sub-paragraphs (a) and (b) are denied.
- 44 The advice given and restrictions imposed by the government of the United Kingdom (and, where applicable, the governments of Scotland, Wales and Northern Ireland) were

given and imposed in order to mitigate the rate of spread of COVID-19 within the UK population as a whole and thereby prevent the capacity of the NHS from being overwhelmed. Save as aforesaid, paragraph 42 of the Particulars of Claim is not admitted.

45 As to paragraph 43 of the Particulars of Claim:

- (a) Without prejudice to sub-paragraph (b) below, and in so far as the outbreak of COVID-19 gave rise to a general public health emergency within the UK, the first sentence is admitted;
- (b) In respect of RSA2.1-2.2 the relevant emergency for the purposes of policy cover was one “*in the vicinity of the Premises*” which was “*likely*” to endanger life, rather than a national pandemic;
- (c) In respect of RSA4 the requirement is that there is “*enforced closure of [the Premises] by any governmental authority...for health reasons or concerns*” attributable to an event in the ‘Vicinity’ of the Premises. This requirement would not be met by a closure attributable to a national pandemic;
- (d) Otherwise, no admissions are made.

K. PUBLIC AUTHORITY ADVICE AND REGULATIONS

46 With respect to RSA4:

- (a) For the purposes of the “*Other Incidents*” aspect of clause 2.3(viii) the only action of the UK Government which would suffice would be a requirement (imposed because of health reasons or concerns at or within the ‘Vicinity’ of the Premises) that the Premises be closed;
- (b) For the purposes of ‘Prevention of Access-Non Damage’ the “*event*” is “*the actions or advice ... of [a] governmental authority... in the Vicinity of the [the Premises]*”. Accordingly:
 - (1) The cover cannot be in respect of actions taken or advice given at a national level by central government because that would render the Vicinity requirement redundant;

- (2) The cover can only be for a governmental authority's action or advice which is operative within (and specific to) the 'Vicinity' of the Premises; and
- (3) Unless the existence of such action or advice can be established, the 'Vicinity' requirement is not satisfied;
- (c) Further, advice is not sufficient to amount to 'enforced closure' as required by clause 2.3(viii).

47 Subject to the preceding paragraph, paragraph 44 of the Particulars of Claim is:

- (a) Admitted in relation to the matters identified in paragraph 18.8-9, 18.14, 18.15(b), 18.16-19, 18.21-22, 18.26;
- (b) Otherwise denied: some of the matters referred to in paragraph 18 of the Particulars of Claim were in the nature of general information from government rather than advice that specific steps should be implemented: for example, the blog article published on 4 March 2020 and referred to in paragraph 18.6 explained what social distancing was but made it clear that no advice was being given at that stage that social distancing should be implemented.

48 Paragraph 45 of the Particulars of Claim is denied for the reasons set out above.

L. INTERRUPTION OR INTERFERENCE

49 As to paragraph 46 of the Particulars of Claim and subject to paragraph 29(b)(ii) above:

- (a) It is assumed that the measures referred to in the first sentence are solely those pleaded in paragraph 18.9, as superseded by those referred to in paragraph 18.17, of the Particulars of Claim. This paragraph proceeds on that basis. If the FCA intends to refer to anything else, RSA reserves its right to plead further if and when those matters are specified;
- (b) The said measures are referred to herein as "**Social Distancing Measures**" to be contrasted with measures mandating that a business cease trading or close its premises;
- (c) RSA does not accept the FCA's formulation of the policy requirements in the sub-paragraphs of paragraph 46. Without prejudice to that:

- (i) In respect of RSA1, :
 - (1) For cover to be engaged by Social Distancing Measures it is necessary that they amounted to a closure of the premises or restrictions placed on the premises;
 - (2) It is denied that they did;
- (ii) In respect of RSA2.1-2.2:
 - (1) For cover to be engaged by Social Distancing Measures it is necessary that they prevented or hindered the use of or access to the Premises;
 - (2) It is denied that they did;
 - (3) The relevance of the contentions in paragraphs 46.7 and 46.8 is denied. For the purposes of policy coverage, the relevant question is whether any interruption or interference with the business was caused by the actions or advice of a competent public authority, due to an emergency likely to endanger life or property in the vicinity of the premises, which prevents or hinders the use of or access to the premises;
- (iii) In respect of RSA4:
 - (1) So far as the first denial of access clause is concerned:
 - (A) For the cover to be engaged by Social Distancing Measures it is necessary that they amounted to either the occurrence of COVID-19, or the enforced closure of the Premises;
 - (B) It is denied that they did;
 - (2) So far as the second denial of access clause is concerned, subparagraph (ii) is repeated and relied upon;
- (d) Otherwise no admissions are made.

50 As to paragraph 47 of the Particulars of Claim and subject to paragraph 29(b)(ii) above:

- (a) RSA refers to the measures described in this paragraph as “**Closure Measures**”;
- (b) In respect of RSA1 it is admitted that Closure Measures (from the date in force) amounted in principle to a closure placed on the Premises and/or restrictions placed on the premises for any business in Category 1;
- (c) In respect of RSA2.1-2.2 it is admitted that Closure Measures (from the date in force) amounted in principle to a *pro tanto* prevention of or hindrance to the use of the Premises with respect to any business ordered to close the Premises in full or in part;
- (d) In respect of RSA4 it is admitted that the Closure Measures (from the date in force) amounted in principle to a *pro tanto* hindrance to the use of the Premises and/or the enforced closure of the Premises with respect to any business ordered to close the Premises in full or in part;
- (e) The Closure Measures did not prevent access to the Premises;
- (f) As to the averments regarding interruption and interference with the business, paragraph 49 above is repeated *mutatis mutandis*.

51 Save that it is denied that Social Distancing Measures are ‘equivalent’ to closure of a business, no admissions are made as to paragraph 48 of the Particulars of Claim.

52 Subject to paragraph 29(b)(ii) above, paragraph 49 of the Particulars of Claim as regards RSA1 and category 6 businesses is:

- (a) Admitted in respect of Closure Measures;
- (b) Denied in respect of Social Distancing Measures;
- (c) Otherwise not admitted.

M. EXCLUSIONS

53 Paragraph 50 is noted.

54 RSA relies upon the sub-exclusion to the denial of access clause in RSA2.2 in respect of “*infectious or contagious diseases*”. RSA’s case as to the scope of that exclusion is further set out in Section N.2 of its Defence below.

55 Paragraph 52 of the Particulars of Claim is denied:

- (a) Save insofar as it is stated to apply to all sections of RSA3 other than sections 5.5 (Employers' Liability) and 5.6 (Public Liability), the title of Exclusion L is irrelevant (see General Terms and Conditions 10.13 "Interpretation" at (e));
- (b) Exclusion L excludes "*any loss...due to...epidemic and disease*";
- (c) Properly construed, Exclusion L:
 - (i) Excludes loss caused by (disease) epidemics. Accordingly Exclusion L(a) excludes losses caused by COVID-19 if they would otherwise have been covered under Extension (vii) to Section 2 of the policy (the infectious diseases extension);
 - (ii) Makes plain that it was not the intention of the parties to RSA3 that the policy should provide cover in respect of any epidemic or (*a fortiori*) pandemic such as COVID-19;
- (d) It is denied sub-paragraph L(a)(bis) bears the meaning attributed to it: the expression "*Peril not excluded*" is a reference to the "Perils" identified as being in sub-paragraph L(b) as being excepted from Exclusion L(a);
- (e) The FCA seeks to deprive Exclusion L of all effect. RSA avers that the exclusion should instead be construed as set out in sub-paragraph (c)(i) above and thereby give effect both to the infectious disease extension and to the exclusion.

N. CAUSATION - PRELIMINARY

56 In Section N, the FCA adopts for the first time the abbreviation "*the assumed losses*". RSA pleads on the presumption that the phrase "*assumed loss*" is intended to refer to business interruption losses:

- (a) Consequent upon the COVID-19 pandemic generally rather than specific or local instances of COVID-19;
- (b) Irrespective of whether caused by COVID-19 itself, fears of COVID-19 or the actions of a public authority;

(c) Irrespective of the nature of the advice of any public authority, including whether local, national, or comprising advice to close, movement restrictions, social distancing etc.

57 The approach taken to causation in Section N of the Particulars of Claim is wrong in principle, in that it seeks to impose a ‘top down’ approach to causation across all of the Wordings, divorced from what the contracting parties have agreed in respect of each wording.

58 Accordingly, RSA’s Defence to Section N of the Particulars of Claim is structured as follows:

(a) RSA’s case as to the principles applicable to causation;

(b) RSA’s case in respect of each RSA Wording individually;

(c) RSA’s response to individual paragraphs of Section N of the Particulars of Claim

N.1 PRINCIPLES APPLICABLE TO CAUSATION

59 The causation of loss requirements for any particular RSA Wording are to be derived from the policy wording itself. In particular, each RSA Wording identifies:

(a) The loss which is insured against;

(b) The peril by which that loss must be caused.

60 As a matter of law, the essence of a contract of indemnity insurance (such as provided by the RSA Wordings and each of them) is to put the insured in the position in which it would have been if the insured event had not occurred but in no better position. There therefore needs to be a focus on the event insured.

61 RSA adopts paragraphs 97 to 99 of the Defence of the Third and Fifth Defendants *mutatis mutandis*.

62 Accordingly, and for the avoidance of doubt, the correct counterfactual is one in which the insured peril (for example, the presence of COVID-19 or an emergency likely to endanger life within the relevant area) is absent or does not eventuate but everything else remains the same: this means that COVID-19 would still have been present outside the relevant area and the measures to tackle it at a national level would still have been

the same. If, on the basis of that counterfactual, the loss (or any part of it) would still have been suffered then it (or that part) is not indemnifiable under the policy.

- 63 Some policies also contain basis of settlement provisions applicable to the calculation of business interruption losses consequent upon physical damage to property which may be subject to a trends clause or equivalent wording. RSA avers that such terminology reflects the fact that the business interruption section of the relevant policy is primarily intended to cover loss sustained through business interruption caused by property damage. When applied to a claim under an extension which does not require property damage the meaning of the term ‘Damage’ (or any equivalent wording) is the insured peril which has caused the relevant business interruption.

N.2 RSA’S CASE ON THE RSA WORDINGS

- 64 It is admitted and averred that regulations made by government requiring a business to close (or close the Premises) are likely to have resulted, from the date such regulations came into force, in:

- (a) Closure or restrictions placed on the Premises (RSA1);
- (b) Hindering the use of or access to the Premises (RSA2.1-2.2);
- (c) Interruption of or interference with the business (RSA3 and RSA4).

- 65 However, for the reasons set out below, it is denied that the closure/restrictions, hindering and/or interruption/interference and/or (to the extent proved by the FCA) any prevention of access were caused by the peril insured under any RSA Wording.

RSA1 – Disease Clause

- 66 The peril insured against is [1] “*closure of or restrictions placed upon the premises*” [2] “*as a result of*” [3] “*a notifiable human disease within a 25 miles radius of those premises*”.

- 67 The assumed losses are not recoverable if:

- (a) They are not proximately caused by the insured peril identified in the Wording;
- (b) They would have been suffered in any event on a but for analysis; and/or

- (c) The terms of the policy require the quantum of the loss to be adjusted to take into account the loss which would have been suffered in the indemnity period absent the insured peril.
- 68 The policyholders under RSA1 were holiday lettings businesses. Subject only to the exceptions identified in regulation 5(4) of the 26 March Regulations, such businesses in England were required by regulation 5(3) of the 26 March Regulations to close at 1pm on 26 March 2020.
- 69 Prior to 1pm on 26 March 2020, there were no “*closure or restrictions placed upon the premises*” and therefore no insured peril.
- 70 Thereafter, the closure/restrictions were not a result of, and were not proximately caused by, the manifestation of COVID-19 within 25 miles of the Premises:
- (a) The closure/restrictions placed on the premises were the result of a government order requiring the Premises to close; and
 - (b) That government order was:
 - (i) Applicable nationally rather than being related to an incident of COVID-19 in any particular location within the UK;
 - (ii) Not made as a result of a manifestation of COVID-19 within 25 miles of the Premises;
 - (iii) Given/imposed in order to limit and contain the future spread of COVID-19 both to save lives and to prevent the capacity of the NHS from being overwhelmed;
 - (c) Any manifestation of COVID-19 within 25 miles of the Premises was neither the proximate cause nor the cause in fact of the closure of or restrictions upon the Premises.
- 71 Further or alternatively:
- (a) The assumed loss would have been suffered in any event even if the insured peril had not occurred because of:

- (i) The general restrictions on social gathering and movement advised and then ordered by government;
 - (ii) The matters identified in paragraph 17 above.
- (b) In the further alternative:
- (i) The primary cover under the Business Interruption section was subject to a Basis of Settlement provision pursuant to which the loss of gross revenue payable was the amount of the reduction in the insured's gross revenue "*solely as a result of Damage to Buildings*";
 - (ii) This provision is:
 - (1) Equivalent in effect to a trends clause;
 - (2) For the reasons set out above, to be construed as limiting RSA's liability under any non-damage extension to a loss of gross revenue occurring solely as a result of the peril insured under that extension.

RSA2 – Prevention of Access

72 The peril insured against is [1] "*the actions or advice of a competent Public Authority*" [2] "*due to*" [3] "*an emergency likely to endanger life or property in the vicinity of the Premises*" [4] "*which prevents or hinders the use or access to the Premises*" [5] excluding "*any period other than the actual period when access to the Premises was prevented*" [6] and also excluding (for RSA 2.2 only) "*as a result of any infectious or contagious disease*".

73 It is admitted that, at all material times from 12 March 2020 to date, the COVID-19 pandemic amounted to a public health emergency. For the avoidance of doubt, a national public health emergency is not the same as an emergency in the vicinity of the Premises.

74 The word "*vicinity*" is to be given its natural meaning and denotes a requirement for a close spatial proximity to the Premises.

75 The word "*likely*" requires a greater than 50% chance that life (or property) in "*the vicinity*" of the insured premises would be endangered. Whether this criterion was in

fact satisfied for any particular insured premises would be fact sensitive and is not admitted.

76 Without prejudice to the preceding paragraph:

- (a) Even if there had not been an emergency in the vicinity of the Premises likely to endanger life, any restrictions hindering or preventing access to the Premises would still have been imposed in order to mitigate the rate of spread of COVID-19 within the UK population and thereby prevent the capacity of the NHS from being overwhelmed;
- (b) Further or alternatively, paragraph 17 above is repeated;
- (c) Accordingly, any interruption or interference with the insured business and/or the actions or advice of any competent public authority were not caused (whether proximately or otherwise) by any emergency likely to endanger life in the vicinity of the Premises.

77 Further or alternatively, the business interruption cover under each of RSA2.1 and 2.2 is subject to an “*Adjustments*” (trends) clause pursuant to which the indemnity payable is limited to reflect the “*results which would have been expected if the Damage had not occurred*”. For the reasons set out above, this clause is to be construed in the context of the relevant Public Emergency extension as requiring any indemnity to be limited so as to reflect the results which would have been expected if the peril insured had not occurred.

78 Further and/or in the further alternative:

- (a) And in respect of Premises permitted to continue trading under Regulation 5(1) of the 26 March Regulations (or equivalent antecedent regulations or advice) there was no hindrance or prevention of use of the premises and therefore no insured peril;
- (b) Paragraphs 49.4 and 49.5 and the second sentence of paragraph 54, alternatively paragraphs 56-60, of the Defence of the Third and Fifth Defendants are repeated *mutatis mutandis*.

79 Further and/or in the yet further alternative and in respect of RSA2.2, if (which is denied) the loss was caused by an insured peril, it was also caused by an “*infectious or*

contagious disease” and therefore falls to be excluded under sub-exclusion (e) to the extension. For the avoidance of doubt, that exclusion:

- (a) Is on its face subject to a manifest formatting error whereby what was plainly intended to be a free-standing inner limit of application to the whole Public Emergency extension was set out on the same line as sub-exclusion (e);
- (b) Should therefore be construed as excluding all losses which result from any infectious or contagious disease (including, without limitation, COVID-19).

RSA3 – Extension (vii) (Disease)

80 The peril insured by the disease extension is [1] *“interruption or interference with the Business during the Indemnity Period”* [2] *“following”* [3] *“the occurrence of a Notifiable Disease within a radius of 25 miles of the Premises”*.

81 A national pandemic is not an *“occurrence”* still less one *“within the radius of 25 miles”*.

82 The word *“following”* in an insuring clause is naturally to be construed as meaning proximately caused by, alternatively having a significant causal connection with. Further:

- (a) Additional Definitions Clause 4 provided what RSA *“shall only be liable for the loss arising at those Premises which are directly affected by the occurrence ...”*;
- (b) Accordingly, so far as is relevant and by reference to the terms of the policy as a whole, the word *“following”* within Extension (vii) imposes a requirement for a direct and proximate causal relationship between:
 - (i) The interruption of or interference with the insured’s business; and
 - (ii) The occurrence of a Notifiable Disease within a radius of 25 miles.

83 The assumed losses:

- (a) Would have been incurred even if the insured event had not occurred;
- (b) Were proximately caused by the national pandemic (and the measures taken by national government in order to mitigate the rate of spread of COVID-19 within

the UK population and thereby prevent the capacity of the NHS from being overwhelmed) and/or the matters otherwise set out in paragraph 17 above;

(c) Accordingly were not caused (whether proximately or at all) by the peril insured.

84 Further or alternatively, any loss otherwise falling with the scope of Extension (vii) to the Business Interruption section:

(a) Was caused by a peril excluded by General Exclusion L, namely an epidemic;

(b) Is therefore not covered under the policy.

85 Further or alternatively, and pursuant to the “*Basis of Claims Settlement*” clause:

(a) the indemnity payable is limited to that which is suffered “*in consequence of the Incident*”;

(b) For the reasons set out above, and in the context of Extension (vii), the term “Incident” is properly to be construed as a reference to the peril insured thereunder; and

(c) Accordingly, if and insofar as the assumed loss would have been suffered irrespective of the occurrence of the peril insured then such losses are not indemnifiable under the policy.

RSA4

Disease/First Denial of Access Clause

86 The peril insured against is the [1] “*interruption or interference to the Insured’s Business*” [2] “*as a result of*” [3] a “*Notifiable Disease*” or “*Other Incident*” [4] “*occurring within the Vicinity of an insured location*”.

87 So far as is material, “*Other Incident*” means “*enforced closure of an Insured Location by any governmental authority...for health reasons or concerns*”.

Second Denial of Access Clause

88 The peril insured against is the [1] “*interruption or interference to the Insured’s Business*” [2] “*as a result of*” [3] “*Prevention of Access – Non Damage*”.

89 “*Prevention of Access – Non Damage*” means “*the actions or advice of... governmental authority... in the Vicinity of the Insured Locations... which prevents or hinders the use of or access to Insured Locations during the Period of Insurance*”.

Causation

90 The assumed losses:

- (a) Would have been incurred even if the insured event had not occurred (if it did);
- (b) Were proximately caused by the national pandemic (and the measures taken by national government in order to mitigate the rate of spread of COVID-19 within the UK population and thereby prevent the capacity of the NHS from being overwhelmed);
- (c) Would in any event have been incurred in whole or part for the reasons set out in paragraph 17 above;
- (d) Further or alternatively, would have been suffered in any event in respect of at least some insureds because of supply side disruption due to COVID-19 (inside or outside the UK);
- (e) Accordingly were not caused (whether proximately or at all) by any peril insured.

91 Further or alternatively the policy contains wording equivalent to a trends clause whereby:

- (a) The amount of any loss recoverable under the policy is determined by reference to the Reduction in Turnover which is calculated by reference to the amount by which the insured’s actual turnover during the indemnity period is less than the insured’s “*Standard Turnover*”;
- (b) The calculation of “*Standard Turnover*” requires adjustments to be made to take into account “*variations in or other circumstances affecting the Insured’s Business either before or after the Covered Event or which would have affected the Insured’s Business had the Covered Event not occurred so that the figures thus adjusted will represented as nearly as may be reasonably practicable the results which but for the Covered Events would have been obtained during the Indemnity Period*”;

- (c) Accordingly:
 - (i) The indemnity payable is limited to that loss arising solely in consequence of an insured peril;
 - (ii) If and insofar as the assumed loss would, for the reasons set out above, have been suffered irrespective of the occurrence of an insured peril, then the Standard Turnover calculation will be adjusted to take that into account.

N.3 RESPONSE TO THE FCA's CASE ON CAUSATION

92 As to paragraph 53 of the Particulars of Claim:

- (a) Paragraph 53.1 asserts that the assumed losses were proximately caused by “*the (nationwide) COVID-19 disease including its local presence or manifestation, and the restrictions due to an emergency, danger or threat to life due to the harm potentially caused by the disease*”. As to that:
 - (i) For ease of reference, in this Defence, RSA refers to such nationwide disease and restrictions as “**Nationwide Disease & Restrictions**”;
 - (ii) It is denied that there is only a single, proximate cause of the assumed losses. Such losses were proximately caused:
 - (1) In part by the mere presence of COVID-19 within the United Kingdom and elsewhere. Paragraph 17 above is repeated;
 - (2) In part by the combination of (1) the widespread presence of COVID-19 within the United Kingdom at a level constituting an epidemic and (2) the measures imposed at a national level by the UK government and devolved mitigate the rate of spread of COVID-19 within the UK population and thereby prevent the capacity of the NHS from being overwhelmed;
- (b) Paragraph 53.1 of the Particulars of Claim is denied:
 - (i) As set out above, RSA is liable to indemnify insureds under the RSA Wordings in respect of losses which are proximately caused by the peril insured under each RSA Wording;

- (ii) None of the RSA Wordings provides cover for Nationwide Disease & Restrictions and, consequently, none of the RSA Wordings provide an indemnity in relation to the assumed losses; and
 - (iii) It is denied (as is alleged by the FCA) that the appropriate counterfactual is a world without the Nationwide Disease & Restrictions. Such an analysis wrongly assumes that the insured peril under the RSA Wordings is the Nationwide Disease & Restrictions;
- (c) Paragraph 53.2 of the Particulars of Claim is denied:
- (i) Properly construed, the RSA Wordings only respond where the peril insured is the proximate cause (or at least a proximate cause, assuming the other proximate cause is not excluded) of the assumed loss; and
 - (ii) Where, as here, the loss would have been incurred even if the peril insured had not occurred, then the peril insured did not cause the loss (whether proximately or otherwise);
 - (iii) The FCA's case seeks to rewrite RSA's policies as if they provided an indemnity against a nationwide pandemic without more and did not require there to be a relevant causal link between the peril actually insured and the interruption of or interference with the insured's business. RSA's policies did not provide cover against a nationwide pandemic.

93 It is admitted that, as at the date of this Defence, there has been a single continuous period since 31 January 2020 during which COVID-19 has been present in the UK. Otherwise, the first sentence of Paragraph 54 of the Particulars of Claim is not admitted.

94 Paragraph 54.1 of the Particulars of Claim is denied. If and insofar as the RSA Wordings require a disease, emergency or public authority intervention to be within a particular locality then, properly construed, the cover provided is:

- (a) Not in respect of loss proximately caused by a disease, emergency or public authority intervention beyond the specified locality and/or which would have occurred in the absence of disease, emergency or public authority intervention within the specified locality;

- (b) In respect of loss proximately caused by a disease, emergency or public authority intervention within the specified locality only.

95 Paragraph 54.2 of the Particulars of Claim is denied:

- (a) The subjective intentions of the parties are irrelevant;
- (b) Cover under the policies is to be construed by reference to the words used;
- (c) If, which is denied, it is relevant to consider what words could have been but were not used then:
 - (i) Paragraph 31(d) above is repeated;
 - (ii) The words of the relevant insuring provisions would have reflected any objective intention (had any such intention existed, which is denied) that the RSA's Wordings should provide cover in respect of losses:
 - (1) Caused by Nationwide Disease & Restrictions; and/or
 - (2) In respect of which the peril insured was not a "but for" cause;
 - (iii) No such express intention is to be found in the language of any of the RSA Wordings;
- (d) The FCA's reliance upon paragraph 33 of the Particulars of Claim is irrelevant to RSA since it refers to Zurich and Hiscox policies only;
- (e) Further and in any event, RSA3 does contain an exclusion for epidemics.

96 The first sentence of Paragraph 54.3 of the Particulars of Claim is denied:

- (a) RSA4 does not refer to "*Governmental action*" as alleged but to "*the actions or advice of the... governmental authority or agency in the Vicinity of the Insured Locations*";
- (b) It is admitted that a governmental authority or agency could be a reference to either (or both) national or local government;
- (c) It is denied that the fact that the clause could encompass action or advice from national government means that the policy contemplated cover in the case of a wide area/national pandemic. Such an interpretation ignores the limitation

reflected by the requirement that the actions/advice of the governmental authority or agency be “*in the Vicinity of the Insured Locations*” (or equivalent);

- (d) On the FCA’s reasoning (which is denied), the absence of reference to ‘government’ within RSA1, RSA2.1-2.2 and RSA3 would indicate that no cover was contemplated for a wide-area or national pandemic.

97 For the reasons set out below and save to the extent indicated, the second sentence of paragraph 54.3 of the Particulars of Claim is denied:

- (a) It is admitted that it is a necessary (but insufficient) requirement for cover under RSA1 and RSA3 that a notifiable human disease manifests itself “*within a radius of 25 miles of the Premises*”. Although a circle with a radius of 25 miles will have an area of almost 2,000 square miles, for practical purposes such an area would only exist within the United Kingdom where an insured location was at least 25 miles from the sea;
- (b) Even for properties at least 25 miles from the sea, neither RSA1 nor RSA3 can be properly construed as providing cover in the case of a wide area/national pandemic: such a construction would effectively delete the geographical limitation to which the parties expressly agreed.

98 Paragraph 55 of the Particulars of Claim assumes what it seeks to prove and is denied for the reasons set out above.

99 As to paragraph 56 (save for paragraph 56.8) of the Particulars of Claim:

- (a) The first sentence is denied. If and insofar as the public authority actions which are the proximate cause of the assumed losses do not fall within the insured peril then the assumed losses are not recoverable under the RSA Wordings;
- (b) The second sentence is admitted save insofar as it is alleged that this impacts upon the ambit of the insured peril;
- (c) The factual matters set out in sub-paragraphs 56.1 to 56.7 are admitted, save that the use of the phrase “*one set of restrictions*” in sub-paragraph 56.5 is denied: the 26 March Regulations (and Welsh equivalent) set out numerous separate restrictions, some applicable to businesses and some to individuals, albeit in one statutory instrument for England and one for Wales.

- 100 Paragraph 56.8 of the Particulars of Claim is denied for the reasons set out above.
- 101 As to Paragraphs 57 and 58 of the Particulars of Claim:
- (a) Paragraph 92(a)(ii) above is repeated;
 - (b) The assumed losses were not caused (whether proximately or otherwise) by any peril insured under RSA1, RSA2.1, RSA2.2, RSA3 or RSA4;
 - (c) FCA's pleading is a matter of argument which will be addressed in submissions at trial.
- 102 With respect to RSA1, RSA2.1, RSA2.2, RSA3 and RSA4 and for the reasons set out above, paragraph 59 of the Particulars of Claim is denied.
- 103 So far as RSA3 is concerned, paragraph 60 of the Particulars of Claim is denied. Paragraph 82 above is repeated.
- 104 As to paragraphs 62 to 79 of the Particulars of Claim:
- (a) These paragraphs:
 - (i) Repeat the FCA's general case by reference to the specific Wordings;
 - (ii) Make submissions about causation, the 'but for' test and the trends clauses;
 - (b) RSA's general case, including on causation, 'but for' and trends clauses, and its specific case on the RSA Wordings is as set out in sections N.1 and N.2 above;
 - (c) Accordingly, it is denied that the assumed losses were caused (whether proximately or at all) by any peril insured by RSA1, RSA2.1, RSA2.2, RSA3 or RSA4.

O. COVER

- 105 Paragraph 80.1 of the Particulars of Claim is denied for the reasons set out above.
- 106 The first sentence of Paragraph 80.2 of the Particulars of Claim is denied for the reasons set out above. Subject to proof by individual insureds of upwards business effects, the second sentence is admitted.

107 Paragraphs 80.3 and 80.4 of the Particulars of Claim are denied for the reasons set out above.

108 Paragraph 80.5 of the Particulars of Claim is noted.

P. DECLARATIONS

109 By reason of the matters set out above, it is denied that the FCA is entitled to the declarations sought insofar as they relate to RSA.

DAVID TURNER QC

CLARE DIXON

SHAIL PATEL

ANTHONY JONES

Statement of Truth

The Seventh Defendant, Royal & Sun Alliance Insurance PLC, believes that the facts stated in this Defence 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 Seventh Defendant to sign this Defence.



Signed:

Full name: Scott Egan

Position or office held: Chief Executive Officer, UK & International - Royal & Sun Alliance Insurance plc

Dated: 23 June 2020

Served this 23rd day of June 2020 by **DWF Law LLP** of 20 Fenchurch Street, London EC3M 3AG, Solicitors for the Seventh Defendant.