

IN THE MATTER OF THE FCA TEST CASE

HIGA'S WRITTEN REPLY SUBMISSIONS IN RELATION TO QBE POLICIES

1. HIGA are grateful to the Court for the opportunity to put briefly in writing the further points they would have made in oral reply in relation to the QBE Policies, had time permitted.

Causal connection on agreed facts between local cases and government actions from 16 March 2020

2. The Court was invited to read the SAGE minutes leading to the Government measures on 16 March¹ {Day8/179:17-19}. For convenience, the references to the key documents in chronological order that the Court is invited to read, and which demonstrate the Government monitoring and responding to the pattern and scale of cases around the country are:
 - a. 3 March SAGE minutes {C/2/52} para 3;
 - b. Government's Coronavirus: action plan, {C/2/60-85}, esp. paras 1.3, 3.8, 4.44;
 - c. 4 March Government "Public Health Matters" statement re social distancing {C/2/86-91}, esp. at {C/2/88};
 - d. 5 March SAGE minutes {C/2/93}, esp. para 5;
 - e. 10 March SAGE minutes {C/2/103-106}, esp. paras 5, 6 and 7 and table at top of {C/2/105};
 - f. 12 March "COVID-19: investigation and initial clinical management of possible cases" {C/6/23} at para 3.5;
 - g. 13 March SAGE minutes {C/12/119-122} at para 3;
 - h. 16 March SAGE minutes {C/2/125-128}, esp. paras 7-8;
 - i. 16 March Prime Minister statement {C/2/145-148};
 - j. 18 March SAGE minutes {C/2/205}, esp. paras 9-10;
 - k. 18 March 'Testing information' {C/6/45};
 - l. 22 March BBC news {C/2/268};
 - m. 22 March SAGE minutes {C/2/278} esp. para 1;
 - n. Skim-read Twitter updates at {C/6/360-391};

¹ References to the Government measures are to the measures from 16 March 2020 which are the measures which the FCA relies upon in relation to the QBE disease clauses in QBE1, 2 and 3.

- o. 28 April Health Minister statement {C/1/36} row 76.

Together, this is undisputed evidence that the Government was responding to the cases and their progression (curve) in each locality not just nationally.

Causation - London

3. Contrary to QBE's oral submissions, neither HIGA nor the FCA contend that there is no required causal link between the cases of Covid-19 in any relevant policy area ("RPA") and the interruption / interference, as Mr Edey QC made clear in opening.² Indeed, in opening,³ Mr Edey QC gave the example of London to illustrate the absurdity of QBE's contention that it could not be said of cases in any RPA that they were not a relevant cause (whether proximate or, as HIGA says, involving a looser test) of the Government measures.
4. Nonetheless, QBE's case apparently remains that the cases of Covid-19 within London were not a cause of the Government measures. Mr Howard QC also suggested⁴ that HIGA were trying to obtain factual findings by the back door that the occurrence/manifestation in London was a "but for" cause of the Government measures. Mr Howard QC submitted that it was not open to HIGA to advance this case, because it is contrary to the FCA's pleaded case.⁵
5. HIGA was not seeking any special findings as regards London (though it reserves its position to do so in the future if necessary). London was given simply as an example to test the absurdity of QBE's case. But the point holds good, on the agreed facts, for every other

²{Day3/174:18-21}. Mr Edey QC addressed the causal questions at {Day3/175} to {Day3/181}.

³{Day3/179:24-25} {Day3/180:1-19}

⁴{Day7/125} to {Day7/126}

⁵ The FCA's pleaded case was addressed briefly in oral reply and the Court was invited to have regard, in particular, to PoC, paras 53.1, 65 and especially 68 {A/2/35}, {A/2/41-42}, which are referred back to in Reply para 52 {A/14/27} which merely says that the Government is not responding to any single occurrence *but to the aggregate of them all*. The Court is also invited to read para 215(2)(b) of the FCA's skeleton {I/1/87}, and para 822 {I/1/267}, and Ecclesiastical's skeleton para 208.1 {I/12/110}. Contrary to Mr Howard QC's assertion {Day7/126:2-9}, the FCA has not conceded that without Covid-19 in the particular RPA, the government response would have been the same as a matter of fact including in that area. There was no such concession. See FCA Skeleton, para 241, footnote 236 {I/1/97} to which Mr Howard QC took the Court to; see para 693 {I/1/231}, and see Mr Edelman QC's submissions on {Day3/52:5-8} "*in reality, if all areas had not been affected to a greater or lesser extent, one can imagine that there would not have been a national lockdown*". The logic of its factual argument is that even by 26 March (when there would have been 12,000 reported cases around the rest of the country) had a 50 mile wide circle around London (or elsewhere) still had not a single case at that stage deep into the crisis, the same nationwide action would have been taken. The factual evidence and common sense could not support such a finding.

RPA in the country that had a case: each such case was taken into account by the Government and was a sufficient cause of its response. It was the spread of the disease to those areas, as much as any other, that mattered; it was the risk to hospitals posed by the cases in those areas that was of concern. The logic of QBE's argument is that no cases anywhere were a cause of the response. That defies common sense.

6. Any suggestion that this causal issue is not before the Court now is hard to understand given: the FCA's pleaded case, including the declarations it seeks; its skeleton argument; QBE's pleaded case⁶, and the declarations QBE itself seeks to the effect that policyholders are not entitled to an indemnity in respect of business interruption losses as a result of Covid-19 and the Governmental or other responses thereto⁷, which implicitly invites the Court to make findings on causation.
7. However, if the Court concludes that it cannot determine at this stage whether the relevant causal link is satisfied by reference to the agreed facts, HIGA's position is that it must in any event remain open for any insured hereafter to seek to prove that the cases within the RPA satisfied the causal link that the Court decides is required to be satisfied. It respectfully invites the Court to make that clear, if appropriate, in its judgment.

Alleged "Postcode Lottery"

8. QBE say that HIGA's and the FCA's case gives rise to a "postcode" lottery - because insureds with Covid-19 within the RPA can recover, but for any insured with no Covid-19 in the RPA, there is no cover (QBE Skeleton, para 9 {I/17/11}). Mr Howard QC suggested {Day7/65:1-12} that Mr Edey had accepted that the construction necessarily leads to a "postcode lottery", that "insurance is not a game of lotto", and that this strongly suggests that HIGA / the FCA's proposed construction is not correct.
9. HIGA's response is three-fold. First, these clauses only provide cover if the disease extends into the RPA (that being a necessary but not sufficient requirement). If not, there is no cover. That is the effect of the RPA. As Mr Edelman QC said {Day8/96:13} to {Day8/98:6}, the commercial rationale or purpose of the RPA is that if there a "remote" disease, i.e. one

⁶ QBE's Defence pleads that policyholders must satisfy the "but for" test (see QBE Defence para 12.1 {A/11/4}, para 14 {A/11/5}, para 62.2 {A/11/20-21}, para 69.3 {A/11/24-25}, para 74.1 {A/11/30-31} and that policyholders cannot do so and this claim and their claims for indemnity must fail (para 60.1 {A/11/19}, para 75.4 {A/11/32})

⁷QBE Defence, para 80 (1) to (7) {A/11/33-35}.

which is not present within the RPA, there is no cover even if it does cause interruption to the insured's business. That is why the greater radius provides greater protection to the insured / the narrower radius restricts the insurer's risk.

10. Second, on QBE's case whether or not there is cover will depend on the insured's location, and the location of the disease. That is the nature of this disease cover. It is therefore inevitable that the cover will depend on postcodes. Similarly, just because the cover only responds to diseases deemed notifiable but not others, does that mean there is a 'notifiability lottery'? That is just the nature of delineating risks.
11. Third, it is nothing to the point that on the highly unusual facts of this case, any insured who can show cases within the RPA is also able to satisfy the causal link required within the insured peril. That does not mean something is wrong with HIGA's construction/approach, unless one starts from the unfounded assumption that there should be no cover where there is a nationwide disease and a nationwide response to it.

Local lock-downs

12. QBE accept there would be cover if an RPA had been locked down by the national government⁸, and that cover is not lost because the disease is also outside the RPA.⁹ But, they say, if there is a wider lock-down, the insured only has cover if the insured can prove that disease in the RPA was the "but for" and proximate cause of the lock-down¹⁰. Moreover, QBE's case (apparently) is that the insured only has cover if and for as long as the disease in the RPA remains the "but for" and proximate cause of the lock-down.¹¹ Thus, if, the very recently introduced local lock-downs in e.g. Greater Manchester, are extended further across the North of England as the disease spreads, the insured initially has, but then potentially loses, cover. That, it is submitted, again defies common sense.

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31 July 2020

⁸ Paras 235.4 and 238-239 of QBE's skeleton {I/17/85-87}. See also para 170 {I/17/64}.

⁹ See paras 59.2, 59.3, 62, 72.3, 238, 239 of QBE's skeleton {I/17/27}, {I/17/28}, {I/17/32}, {I/17/86}.

¹⁰ Mr Howard QC illustrated this by his Isle of Wight example {Day7/122-4}.

¹¹ See para 239, final sentence of QBE's skeleton {I/17/86-87}.