IN THE MATTER OF THE FCA TEST CASE

HIGA'S WRITTEN REPLY SUBMISSIONS: RSA4 – VICINITY

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1. HIGA are grateful to the Court for the chance to set out the additional points which would have been made orally had time permitted. This document addresses the meaning of the defined term *"Vicinity"* in the RSA4 wording.

2. These points apply to all three insuring clauses. However, they are potentially of most significance to the disease and enforced closure clauses.[1] That is because, as explained at {Day8/184:7-22}, this does not matter for the POA – Non-Damage clause: on any view there was government action or advice in the Vicinity (no matter how narrow) and RSA's suggestion that the government action or advice has to be specific to the Vicinity, so that cover is lost if it extends outside of that area at all, is untenable on the words used.

3. HIGA's case is that Vicinity is a flexible definition, capable, in relation to these perils, of extending over a very wide area where the notifiable disease is highly contagious. The definition of *"Vicinity"* is at {B/20/35}:

> *"**Vicinity** means an area surrounding or adjacent to an **Insured Location** in which events that occur within such area would be reasonably expected to have an impact on an **Insured** or the **Insured's Business**."*

(1) The HIGA Interveners' Case

4. The Court is asked to re-read §59 to §72 of HIGA's skeleton argument {I/2/17-20}.

5. RSA was selective: at {Day5/26} and following, it chose to focus only on one part of HIGA's case, criticising the supposed use of hindsight. HIGA is not using hindsight. The definition must be read and applied to each insured peril as it was defined at the outset.

6. That is important, because the nature of those perils is informative as to the likely size of the relevant area. At the time of entering into this policy, the parties knew that it:

   (1) Covered SARS, a disease which had already caused a global pandemic in 2003.

[1] If the Court is against HIGA on there being cover under those clauses even if Vicinity was a narrow area.

(2) Would cover any newly emerging disease serious enough to be made notifiable, which may well have the potential to become pandemic.

7. The parties also knew that governments in the past had reacted to the spread of serious diseases by imposing lockdowns including school closures in the UK[2] and more radical closures in other places worldwide, including the US, Mexico City and Beijing.[3] Further, that in the UK wide reaching powers were available under the Civil Contingencies Act 2004 and under the Public Health (Control of Diseases) Act 1984, in the event of emergencies which may cause loss of human life or illness.[4]

8. Viewed against that background, at the time of entering into the policy, using the language of the definition of Vicinity, the parties' reasonable expectation would have been that notifiable diseases could have an impact on insured locations some significant distance away, over a very wide area and certainly much further than RSA's *"close spatial proximity"*.

9. Indeed, a highly contagious, serious disease is exactly the sort of disease one would expect to be made notifiable, to give rise to health concerns over a wide area and to cause government action nationwide.

(2) RSA's Points

10. At {Day5/27} RSA suggested that the definition of *"Vicinity"* requires the insured to prove that the dramatic events of this year could reasonably be expected. That is not correct. The requirement is to identify, at the time of entering into the policy, what the parties would have reasonably expected the relevant area of impact of a notifiable disease to be, knowing that such could easily be a new highly contagious and deadly disease.

11. For the reasons given above and at §71 and §72 of HIGA's skeleton argument {I/2/20}, the answer is that it would have been a very wide area, sufficient to cover all or (which would be enough) a very significant part of the country.

[2] Agreed Facts 7 at §6 {C/12/3-4}.
[3] Agreed Facts 7 at §10 {C/12/5-6}.
[4] Civil Contingencies Act 2004 at s1(2) {J/8/1} and s20 {J/8/13} and the Public Health (Control of Disease) Act 1984, eg at s13 to s45 {J/5/9-22}.

12. RSA's skeleton at §29(b) {I/18/82} suggests that if the word *"events"* in the *"Vicinity"* definition was intended to refer to the insured perils, then the parties would instead have used the defined term *"Covered Event"*.

13. That is obviously wrong: Covered Event {B/20/23} is a definition which itself encompasses the various Vicinity requirements; it refers to *"the events as described in Insuring Clause … 2.3"* which of course include the Vicinity requirement. It would therefore have been circular and nonsensical to use that defined term in the Vicinity requirement itself. RSA offers no alternative explanation of what *"events"* are being referred to in the Vicinity definition.

14. Further, the inclusion of the relevant insured perils in the Covered Event definition plainly does not have the effect of adding an additional requirement to the insured perils description that they relate to an "event", still less that the occurrence of an "event" in the sense used in aggregation clauses is thereby made a requirement. HIGA adopts what the FCA said about that in its oral reply {Day8/132:1-14} and relies on the points made orally at {Day8/182}; clearly the clause contemplates that an outbreak of a disease can be such an event. To the extent that the reference to *"events"* in *"Covered Events"* refers to anything, it is simply the insured perils themselves. It adds nothing to them.

15. As to the other points made on behalf of RSA at {Day5/25}, first, HIGA adopts the FCA's closing submissions at {Day8/132:15-21} in relation to the words *"surrounding or adjacent to"*. Those words are not ignored by HIGA, but are respected. The point is that those words on their own do not tell you the size of the surrounding or adjacent area.

16. To work that out, you have to look to the remainder of the definition and what might reasonably be expected. None of the clear words in the definition limits the potential area to a "close spatial proximity" and, for the reasons explained the area could in fact extend very far indeed. RSA still have no explanation as to how their "close spatial proximity" test fits with their own case that Vicinity may be as wide as 25 miles.[5] Indeed, even when the word "vicinity" is undefined and used in connection with an insured peril of damage to other property, RSA accepts, by reference to Riley, that it may be as wide as 10 miles.[6]

[5] RSA's Skeleton Appendix 4 §57(b) {I/18/95}.
[6] RSA's Skeleton Appendix 4 footnote 33 {I/18/85}.

17. The second criticism was that HIGA's construction ignores the meaning of the word vicinity (RSA's skeleton {I/18/79} footnote 16). It is important to look at the dictionary definition that RSA cite in that footnote. RSA rely on {K/215.1/2}. That defines Vicinity as *"the area around a place"*. That is entirely consistent with "surrounding" and adds nothing more. The position remains that to establish the size of the relevant area around the Insured Location, you look to the reasonable expectation language.

18. Finally, the Court is invited to consider the definition of *"Vicinity"* in the context of the example given at {Day8/183:13} and following. Radley, one of the HIGA interveners, had 340 locations across the UK.[7] Even on a fairly narrow definition, for a business with Insured Locations across England, the "Vicinity" of each such location will, together, comprise a large proportion (if not the whole) of the country.

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[7] HIGA Skeleton §28 {I/2/9}.