Appeal Nos. 2020/0179-0183

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM

THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS

COMMERCIAL COURT (QBD)

FINANCIAL LIST

Neutral Citation: [2020] EWHC 2448 (Comm)

BETWEEN:

(1) ARCH INSURANCE (UK) LIMITED

(2) ARGENTA SYNDICATE MANAGEMENT LIMITED

(3) HISCOX INSURANCE COMPANY LIMITED

(4) MS AMLIN UNDERWRITING LIMITED

(5) QBE UK LIMITED

(6) ROYAL & SUN ALLIANCE INSURANCE PLC

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

-and-

HISCOX ACTION GROUP

Intervener

WRITTEN CASE OF THE SIXTH APPELLANT (ROYAL & SUN ALLIANCE INSURANCE PLC)

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*References to the hearing bundle are in the form **{Bundle/Tab/Page}***

*References to the judgment below are in the form of **[j/Paragraph]**.*
*The judgment itself is to be found at **{C/3/30}**.*

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I. INTRODUCTION

(a) The Appeal in Outline

1 The first, and principal, issue arising on RSA's appeal is whether disease-based extensions to business interruption cover in two of its policy wordings should be construed as providing cover for (highly correlated)[1] losses arising from the national COVID-19 pandemic.[2]

2 The wordings in question are:

(a) "Cottagesure" ("RSA 1"), a wording designed for owners of holiday cottages **{C/15/1114}**; and

(b) Eaton Gate Commercial Combined ("RSA 3"), a policy wording underwritten by Eaton Gate, a Managing General Underwriter, on RSA's behalf **{C/16/1200}**.[3]

3 The relevant extension in RSA 1 stipulated that:

> "*This insurance also covers… Loss as a result of …closure or restrictions placed on the Premises as a result of a [notifiable disease] manifesting itself at the Premises or within a 25 mile radius of the premises"* **{C/15/1129}**.

4 The relevant extension in RSA 3 stipulated that:

> "*We shall indemnify You in respect of interruption or interference with the Business during the Indemnity Period following … any … occurrence of a Notifiable Disease within a radius of 25 miles of the Premises…*" **{C/16/1237}**

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1 "Highly correlated" losses are those which arise for very many policyholders at the same time. For example, if a flood occurs, many policyholders in the area are likely to be affected at the same time; flood losses – where they arise – may therefore be more highly correlated within a locality than fire claims. A pandemic, however, raises the possibility of highly correlated losses on a national scale, across the full 'pool' of policyholders.

2 Technically "pandemics" are a cross-border phenomenon but the phrase "national pandemic" was used in the Judgment and is used in these submissions to refer to the COVID-19 pandemic as it occurred within England & Wales / the United Kingdom.

3 Other insurers write cover on identical or materially identical wording.

5 Flaux LJ and Butcher J, sitting as a Divisional Court in the Financial List under the Financial Markets Test Case Scheme, concluded that the geographical limitation ostensibly applicable to each extension should be construed as no more than a non-causal, adjectival qualification to cover. RSA submits that the geographical limitation should have been construed as a substantive part of the peril insured, defining the scope of the insured event for which cover was provided.

6 Assuming that RSA's appeal as to the construction of the relevant extensions is upheld, it will be necessary also to determine issues of causation including whether:

(a) As the Court below held (at [j/111]), each individual occurrence of COVID-19 was an "indivisible part" of the national pandemic; or

(b) As the Court held (at [j/112]), each individual occurrence of COVID-19 was an effective cause of the measures taken at a national level to combat the pandemic; or

(c) As the Court held (at [j/418]), it cannot be said that any localized incident of COVID-19 caused the imposition by the government of the national restrictions.

7 The causation issues will necessitate consideration of the requirement for policyholders (here represented by the FCA) to establish factual and legal causation, and the identification of the relevant counterfactual(s) for the purpose of testing both common law causation and the operation of any relevant contractual trends/quantification machinery.[4]

8 In addition, a discrete issue arises as to the construction and effect of a general exclusion (for "epidemic") within RSA 3. Flaux LJ and Butcher J declined to give effect to that exclusion. RSA submits that the learned judges' approach was, again, plainly erroneous.

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[4] RSA submits that the trends/quantification machinery simply 'codifies' within the contract the approach to causation which would in any event be taken at common law. There is no longer any dispute that they apply to the non-damage extensions with which this appeal is concerned.

(b) Summary of RSA's Case

9 Flaux LJ and Butcher J failed to construe the relevant extensions in the context of the policies as a whole. Had they properly applied the relevant principles of construction they could only have concluded (as they did in respect of QBE 2 and QBE 3) that the cover provided under each policy did not extend to the consequences of a national pandemic.

10 The approach adopted to the construction of General Exclusion L was equally erroneous, because there was no attempt to construe the exclusion with a predisposition to reconciling, rather than exaggerating, any potential inconsistency with the disease extension.

11 The approach to causation set out in [j/418] was plainly correct, while the contrary views expressed in [j/111-2] were contrary to principle and wrong.

(c) Taxonomy

12 The Court below adopted a taxonomy which separated the policies considered in the test case into three types:[5]

(a) "*Disease clauses*" which provide cover in respect of business interruption in consequence of or following or arising from the occurrence of a notifiable disease within a specified radius of the insured premises [j/81];

(b) "*Hybrid Clauses*" where the cover refers to both restrictions (or similar) being placed on the insured premises and also to the occurrence or manifestation of a notifiable disease [j/242]; and

(c) "*Prevention of access and similar wordings*" where the cover is against a prevention or hindrance of access to or use of the premises as a consequence of government or local authority action or restriction [j/306].

13 Applying this taxonomy to RSA's policies, the relevant extension in RSA 1 would be a "Hybrid" Clause and that in RSA 3 would be a "Disease" Clause. However, RSA does

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5 See [j/8].

not suggest that the distinction between "Hybrid" and "Disease" clauses is of great significance in the context of the two wordings which are the subject of its appeal.

14 Neither of the RSA wordings which is the subject of RSA's appeal contains a Prevention of Access wording.

II. THE RSA POLICIES

15 Relevant provisions from RSA 1 and RSA 3 are set out in Appendices A and B.

III. THE JUDGMENT BELOW

16 Each of the policies considered in this action involved cover for business interruption which was not consequent upon physical or property damage. From the outset,[6] the parties identified that there were, broadly, two disputed issues:

(a) First, whether the wordings covered losses arising from the COVID-19 pandemic. This was called "*the coverage issue*"; and

(b) Second, if the wordings did provide cover, whether the losses claimed were caused by the perils insured in any event and when any 'trends' or similar clauses were considered. This was called "*the causation issue"*.

17 Again, in broad terms, the learned judges found:

(a) So far as the coverage issue was concerned, some of the wordings should be construed as covering losses arising from the COVID-19 pandemic, whilst others should not;[7] and

(b) So far as the causation issue was concerned, where a policy covered losses arising from the COVID-19 pandemic the relevant counterfactual excluded the entire COVID-19 pandemic meaning that all losses consequent upon that pandemic were indemnified.

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6 See Recital D to the Framework Agreement dated 28 May 2020 **{D/15/1551}**.

7 All of RSA's wordings, save for RSA 2.1 and RSA 2.2, were found to provide cover for the COVID-19 pandemic.

18 The learned judges' primary findings, therefore, turned on the identification and construction of the insuring clauses in issue. These findings are summarised in the order in which they are addressed in the judgment.

RSA 3

19 So far as RSA 3 (a Disease Clause) was concerned, the learned judges found that:

(a) The insured peril was a "*composite peril*", comprising: "*interruption or interference with the Business"*, following the "*occurrence of a Notifiable Disease within a radius of 25 miles of the Premises"*;[8] and

(b) Further, the words "*following any occurrence of a Notifiable Disease within a radius of 25 miles"*:

> "*can and should properly be read as meaning that there is cover for the business interruption consequences of a Notifiable Disease which has occurred, i.e. of which there has been at least one instance, within the specified radius, from the time of that occurrence"* [j/102] ("**the Construction Conclusion**").

20 This conclusion had important consequences on the question of cover. In short:

(a) It was not necessary to demonstrate *any* causal link between the disease occurring within 25 miles, and the business interruption loss;[9]

(b) Rather, it was necessary and sufficient to show that (a) the notifiable disease (at large) caused the business interruption, and (b) that an occurrence within 25 miles was part of the same notifiable disease. In this way, once the Court had reached the Construction Conclusion, the primary issues of causation (so far as cover is concerned) would resolve themselves.

21 The causal connector between the business interruption and the disease was the word "*following*" such that the interruption or interference with the Business had to be

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8 [j/94].

9 The Hospitality Insurance Group Action interveners frankly acknowledged that this construction of the radius requirement reduced it to the status of a *"postcode lottery*" – see Transcript, Day 3 / page 168 / lines 3-8 {**D/28/1644**}.

"*following"* the occurrence of COVID-19 within 25 miles. In relation to this causal connector, the Court found that:

(a) As was common ground between the FCA and RSA, it imported more than merely a temporal relationship. It required that one of sub-clauses (a)-(d) within the Infectious Disease extension "*should have a causal connection to the business interruption"* [j/95];

(b) As it was a causal connector within the insured peril, rather than between the loss and the insured peril, the causal connection did not have to be one of proximate causation (whether within the meaning of s.55(1) of the Marine Insurance Act 1906 or at all). Rather, a "*looser link"* – denoted by the word "*following*" – had been used in recognition of the fact that COVID-19 "*would not of [itself] directly cause interruption to or interference with the business, but would in almost every case have such an effect only via the reaction of the authorities and/or of the public"* ([j/95]);

(c) On the basis of the Construction Conclusion, the internal causal connection (even if it required proximate causation) was satisfied because the national lockdown and actions of the public were caused by a notifiable disease (COVID-19) and any local occurrence of the disease was an indivisible part of the national pandemic [j/111];

(d) Alternatively, and if the Construction Conclusion was incorrect, each occurrence of the disease within 25 miles was a separate but equal and effective cause of the national measures consequent upon the COVID-19 pandemic [j/112];

(e) RSA 3 therefore:

    (i) Provided cover for "*interruption or interference with the Business"* consequent upon the COVID-19 pandemic from the date of an occurrence of COVID-19 within the relevant policy area; and

(ii) Was not confined to cover for "*interruption or interference with the Business"* consequent upon the occurrence(s) of COVID-19 in the relevant policy area.

RSA 1

22 So far as RSA 1 (a Hybrid Clause) was concerned, the learned judges found that:

(a) Cover would not be triggered until there was:

(i) A "*manifestation*" of COVID-19 within a radius of 25 miles of the Premises; and

(ii) "*[Closure] or restrictions placed on the Premises*" which, in the case of holiday cottages, resulted from the 26 March Regulations;

(b) As with RSA 3, this causal connection ("*as a result of"*) between the manifestation and the closure or restrictions, was satisfied by there being a manifestation of COVID-19 within the relevant policy area which was held to have resulted in the closure or restrictions "*because it was part of one cause of those restrictions, which were imposed by the government as a response to a national picture which was made up of the individual local parts"* [j/296].

23 The learned judges therefore redeployed the Construction Conclusion. They found that cover was provided for the effects of the Notifiable Disease in its entirety so long as there had been an occurrence within 25 miles of the premises which pre-dated the imposition of closure/restrictions on the premises. On this basis, RSA 1 would provide an indemnity where there was a manifestation of COVID-19 which pre-dated (and therefore could be said to have resulted in) the 26 March Regulations.

IV. PRINCIPLES OF CONSTRUCTION

(a) In General

24 Although they were not properly applied, the relevant principles of construction are, in the main, set out at [j/62-79] of the learned judges' judgment.

(b) Construing Insuring Provisions in Contracts of Indemnity

25 Whether the contract be one of indemnity or (as with life or personal accident cover) contingency, the liability of an insurer depends on the occurrence of a specified fortuity. The difference, however, is that whilst a contingency policy may depend purely on happenstance or random chance (as with the rolling of a dice), a contract of indemnity generally does not.

26 In ***Becker, Gray & Company v London Assurance Corporation*** [1918] AC 101 **{E/10/172}** the claimant cargo owner had insured its cargo against the perils of "*men of war, enemies and restraints of princes"*. On being informed that war had broken out, the captain of the ship on which the cargo was being transported put into a neutral port and the voyage was abandoned. The plaintiff claimed that the voyage had been frustrated by a restraint of princes, and there was a constructive total loss of the goods due to the (imminent) peril of capture. The claim for an indemnity was refused. The House of Lords upheld that refusal on the basis that the insured peril (actual capture) had not eventuated and the cause of the loss was an uninsured peril (risk of capture).

27 In the course of his speech Lord Sumner stated:

> *"Proximate cause is not a device to avoid the trouble of discovering the real cause or the "common sense cause", and though it has been and always should be rigorously applied in insurance cases, it helps the one side no oftener than it helps the other. I believe it to be nothing more nor less than the real meaning of the parties to a contract of insurance…".*[10]

28 Having established the importance of proximate cause he then went on to say:[11]

> "*In a contract of indemnity… the insurer promises to pay in a certain event and in no other, namely, in case of loss caused in a certain way, and the question is whether the loss was caused in that way, and whether the event occurred, and the remoter causes of this state of things do not become material. If contracts of marine insurance were still regarded, as once they were, as aleatory bargains, this would be plain on the face of them. One need only ask, has the event, on*

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10 Page 112 {**E/10/183**}.

11 Pages 113-114 **{E/10/184-185}**.

which I put my premium actually occurred? This is a matter of the meaning of the contract, and not, as seems sometimes to be supposed, of doing the liberal and reasonable thing by a reasonable assured. This is why, as it seems to me, the causa proxima rule is not merely a rule of statute law, but is the meaning of the contract writ large.".

29 Lord Sumner was, therefore, emphasising that – quite apart from s.55(1) of the Marine Insurance Act 1906 – the requirement for proximate causation in a contract of indemnity insurance is a principle of construction. Whilst s.55(1) applies to the link between the peril and the loss, this requirement should – at the very least – inform the approach taken to construing the internal causal linkage within the peril. Lord Sumner also drew a distinction between:

(a) Contracts of pure chance (*"aleatory bargains"* in his language), where payment depends only upon whether the event has occurred; and

(b) Contracts of indemnity, which – in the absence of clear wording – require not only that the fortuity has occurred but also that the loss then claimed was proximately caused by that fortuity.

30 The approach taken by Flaux LJ and Butcher J renders the response of extensions such as those in RSA 1 and RSA 3 dependent on matters of random – and non-causal – chance (or, as the HIGA Interveners rightly acknowledged, a *"postcode lottery"*) with respect to the satisfaction of any radius requirement.

31 RSA does not dispute that, in theory, insurance could be obtained on a basis where cover was dependent upon the satisfaction of some wholly non-causal contingency. However, in the context of a contract of indemnity insurance the requirement to satisfy such a contingency would be both uncommercial and unusual. To adopt Lord Sumner's language, any stipulation that cover was dependent on any such non-causal contingency would need to be "*plain on* [its] *face"*.[12]

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[12] Property-damage-based business interruption insurance is commonly subject to a "material damage" proviso, requiring that material damage cover be in place under which the insurer has admitted liability (or would have done so but for a policy excess). Such a proviso is not only clearly expressed but (being intended to ensure that an insured has the means with which to reinstate or repair its property) directly relevant to the exposure under the business interruption cover.

(c) "Inconsistent" Clauses

32 Particular principles have evolved to address potentially inconsistent contractual clauses. Although those principles, and the relevant authorities, were cited to the court below, they were not even mentioned in the judgment. The failure to acknowledge and apply those principles led the learned judges into obvious error in their treatment of General Exclusion L in RSA 3.

33 The starting point is that a contract term is only inconsistent with another if effect cannot fairly be given to both terms. As stated in ***Pagnan S.P.A. v Tradax Ocean Transportation S.A.*** [1987] 3 All E.R 565 by Bingham LJ **{E/32/943}**:

> *"It is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses".*

34 The role of the court is to attempt to reconcile the terms in an agreement, where that can be done, rather than adopting a construction which has the opposite effect:[13]

> *"…the court's duty, when confronted with two provisions in a contract that seem to be inconsistent with each other, is plain. It must do its best to reconcile them if that can conscientiously and fairly be done".*

35 It is rare that this will not be achievable, because the parties will be taken to have intended consistency rather than conflict:[14]

> *"The court must start from the premise that the parties intended that effect should be given to each of the clauses in their agreement; so that "to reject one clause in a contract as inconsistent with another involves a rewriting of the contract which can only be justified in circumstances where the two clauses are in truth inconsistent" — Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co. Ltd [1989] 2 HKLR 639 , 645G–H. And, as Lord Goff of Chieveley pointed out, in delivering the advice of the Privy Council in that case:*

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13 ***Société Générale v Geys*** [2013] 1 AC 523 at [24], per Lord Hope **{E/38/1083}**.

14 ***Taylor v Rive Droite Music Ltd*** [2005] EWCA Civ 1300 at [27] per Chadwick LJ **{E/39/1140}**, citing Lord Goff in ***Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd*** [1989] 2 HKLR 639 (PC) **{E/42/1189}**.

> *"In point of fact, this is likely to occur only where there has been some defect of draftsmanship …. But where the document has been drafted as a coherent whole, repugnancy is extremely unlikely to occur. The contract has, after all, to be read as a whole; and the overwhelming probability is that, on examination, an apparent inconsistency will be resolved by the ordinary processes of construction."*

V IDENTIFICATION OF THE INSURED PERIL (Ground 1)

36 In their judgment, the learned judges construed the insured event as being a composite peril of (1) interruption or interference with the insured business during the indemnity period due (2) to a disease event etc. In doing so, they held that the requirement of proximate causation codified in s.55(1) of the Marine Insurance Act 1906 applied (only) to the link between the loss claimed and the *"interruption or interference with the Business"* [j/94].

37 The court's approach was as novel as it was wrong:

(a) The suggestion that s.55(1) applied only to the link between the loss and the "*interruption or interference"* was (rightly) not advanced by the FCA in its skeleton argument for trial;

(b) The word "*peril*" (whether in the Marine Insurance Act or more generally) should be given its ordinary meaning of being something that is dangerous.[15] While that meaning must then be applied in context, it would be both strained and unrealistic to describe *"interruption or interference"* as a danger to an insured's financial interests as opposed to being a consequence of such a danger;

(c) In the only preceding case (of which RSA is aware) to consider the nature of the peril insured under a business interruption cover, the court rightly concluded that the peril was "Damage". It (equally rightly) does not appear to have occurred to Hamblen J that the insured peril was "*interruption or interference*": see ***Orient-Express Hotels v Assicurazioni Generali*** [2010] Lloyd's Rep IR 531 at [52] **{E/31/931}**.

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15 https://dictionary.cambridge.org/dictionary/english/peril **{F/75/1393}**.

38 Accordingly, RSA submits that business "*interruption or interference*" is:

(a) An intermediate step between the peril and any resultant loss, which has no independent existence and should not be confused (for the purposes of s.55(1) or otherwise) with the peril insured;

(b) At its highest, simply a way of:

(i) Explaining why the peril has caused the loss;

(ii) Describing the nature of the cover, in the same way that "Damage" or "Material Damage" is descriptive of the nature of the cover provided for first party property damage, or "liability" is descriptive of the nature of cover provided for liability to third parties.

39 Conversely, the approach adopted by the learned judges would deprive the requirement for proximate causation of any meaningful content in the context of business interruption cover, since the recoverable loss does no more than represent the quantification of the interruption/interference sustained by the insured business.

40 In fact, the conclusion that the "*interruption or interference*" was part of the peril, was not necessarily dispositive of the learned judges' decision on cover. Whether or not "*interruption or interference"* was part of the peril, the Court's construction of the *other* part of the peril (the requisite disease element, addressed below) could on its own have led to the same decision. Nevertheless, RSA considers that the error addressed in this section contributed to the learned judges proceeding in the wrong direction thereafter.

VI. CONSTRUING THE COVER (Ground 2)

41 Because the learned judges first analysed the cover under RSA 3, and then applied that analysis to other wordings including RSA 1, it is more convenient to address RSA 3 before RSA 1.

(a) RSA 3

Preliminary

42 The following features of the RSA 3 wording are relevant to the construction of the disease extension:

(a) The relevant "*interruption or interference*" had to "*follow*" an *"occurrence of a Notifiable Disease within a radius of 25 miles of the Premises"*. The term "*occurrence*" is therefore integral to the scope of the insuring clause. As to that:

(i) Authority of long-standing has regarded the term as synonymous with "*event*": see both ***Kuwait Airways Corporation v Kuwait Insurance Co*** [1996] 1 Lloyd's Rep 664 at pp.685-6 (Rix J) **{E/26/861-862}**, and ***Countrywide v Marshall*** [2003] Lloyd's Rep IR 195 at [15] (Morison J) **{E/13/208-209}**;

(ii) It is trite that the term *"event"* means something happening *"at a particular time, at a particular place, in a particular way*", to be contrasted with a continuing state of affairs – see ***Axa Reinsurance v Field*** [1996] 1 WLR 1026 *per* Lord Mustill at 1035G **{E/8/120}**;

(iii) It is notable that the learned judges implicitly acknowledged the widely understood meaning of *"occurrence"* when addressing the disease extension in MSA 1 and MSA 2 – see [j/196], where they place weight on the absence of any reference to an "*occurrence*";

(b) The use of the term *"occurrence"* is repeated and emphasised in:

(i) The second "*Additional Definition*" applicable to the disease extension. That definition further indicates, by use of the words *"in consequence of the occurrence"*,[16] that there must be a direct causal link between the

[16] Those words are consistent with a requirement for proximate causation – see ***MacGillivray on Insurance Law*** (14th Ed. 2018) at 21-004 {**E/44/1210}**; ***Ionides v The Universal Marine Insurance Company*** (1863) 143 ER 445 at pp.455-6 *per* Erle CJ **{E/20/466-467}.**

occurrence of the notifiable disease within the specified radius and the relevant interruption/interference;[17]

(ii) The fourth "*Additional Definition*" applicable to the disease extension ("*directly affected by the occurrence"*).[18] That definition again reinforces the fact that the extension as a whole is concerned with specific occurrences, limited in time and space (*cf* the learned judges' conclusion in respect of QBE 2 at [j/232]);

(c) All sections of RSA 3 are subject to the general exclusions. These included General Exclusion L which, amongst other things, excluded loss "*due to ... epidemic ...*"; and

(d) All of the other sub-extensions within the "Infectious Diseases" extension provide cover for perils whose operation is restricted to the insured premises or to places close to the insured premises. If such sub-extensions were to be triggered, they would be manifestly unlikely to lead to highly correlated losses across the entire pool of policyholders.

Analysis – the 25 mile radius

43 At [j/107] the learned judges concluded that Extension vii(a)(iii) *"is not confined to the effects only of the local occurrence of a Notifiable Disease"* (by which they clearly meant the occurrence of the disease within the specified radius). That conclusion is both remarkable and wrong:

(a) In ordinary usage, the meaning of the word "*within*" includes "*not beyond*";[19]

(b) The learned judges' conclusion implicitly acknowledges the requirement for there to be an "*occurrence*" (using that term as it is commonly understood) of the notifiable disease within the specified radius (see [j/102]);

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17 The requirement for a "direct" causal link does not mean that the notifiable disease is the last event in the causal chain leading to the loss.

18 In reality this is a special condition rather than a definition.

19 https://dictionary.cambridge.org/dictionary/english/within **{F/76/1404}**

(c) The conclusion reached (by a process of island-hopping rather than construction of the insuring provision within the landscape of the policy as a whole) involves rewriting the extension to provide, so far as is relevant:

> *"We shall indemnify You in respect of interruption or interference with the Business during the Indemnity Period following:*
>
> *...*
>
> *iii. ~~occurrence of~~ a Notifiable Disease anywhere provided it is also present within a radius of 25 miles of the Premises;*
>
> *..."*

(d) The Court's rewriting of the parties' bargain is an extreme example of a court crossing the line between construing a contract and (impermissibly) *"[forcing] upon the words a meaning which they cannot fairly bear [so as] to substitute for the bargain actually made one which the Court believes could better have been made"*.[20] There is simply nothing in the words used within the extension to provide cover for anything other than *"the local occurrence of the disease"* (*cf* the "reasoning" of the Construction Conclusion set out in [j/102], which makes no attempt to explain how the actual wording used accords with the learned judges' conclusion);

(e) Even if the conclusion reached by the learned judges were potentially open to them as a matter of language (which it was not):

(i) The "*postcode lottery*" to which it would give rise would reduce the radius requirement to the status of a non-causal factor, irrelevant to the loss.[21] For the reasons set out above, such a construction is antithetical to the proper construction of a contract of indemnity insurance;

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[20] ***Charter Reinsurance v Fagan*** [1997] AC 313 at p.388C *per* Lord Mustill **{F/77/1486}**.

[21] The postcode lottery can be illustrated by comparing the position of equivalent businesses in, say, (1) Plymouth, adjacent to a large hospital with reported COVID deaths, and (2) the Scilly Isles. Both would be subject to exactly the same restrictions as a result of the same national pandemic and therefore be exposed to the equivalent interruption/interference and losses; but – on the basis of the agreed facts before the learned judges – there would be no cover for the business in the Scilly Isles due to the happenstance that there had been no COVID-19 in the Scilly Isles (see "Agreed Facts 10 – Scilly Isles" **{D/14/1548}**).

(ii) The reasoning deployed by the learned judges to support their conclusion begs the question. It starts from the premise that a notifiable disease may spread widely and unpredictably and assumes that the parties objectively intended there to be cover for such a state of affairs. This reasoning (such as it is) rests on a *non-sequitur* namely that, the fact that notifiable diseases may spread widely and unpredictably (see [j/104]), is a powerful reason for the cover not to be circumscribed in the manner for which Insurers contend. The opposite is true;

(iii) It is also a *non-sequitur* to suggest (as the learned judges appear to in [j/104]) that, because the parties envisaged that an occurrence of a notifiable disease up to 25 miles away might interfere with the insured business, they can be taken to have intended that the cover should be extended to the consequences of occurrences of the notifiable disease beyond the specified radius;

(iv) In reality, the construction adopted by the learned judges is not only linguistically impermissible, but it would give rise to absurd anomalies;[22]

(v) Conversely, there is nothing anomalous about RSA agreeing to provide cover only for the consequences of a local occurrence of a notifiable disease. Such an approach is consistent with the other sub-extensions within the "Infectious Diseases" extension, none of which would expose RSA to liability to anything approximating to highly correlated losses across the entire pool of policyholders as a result of a national/global pandemic.

Analysis – "*following*"

44 The Court below found that "*following*" involved "*a causal connection*" (which was more than a merely temporal connection), denoted a "*looser form of link*" than proximate causation [j/95] and involved (albeit in the context of MSA 1-2) a "*requirement of "consequence"* [j/194]. Two preliminary points arise:

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22 See also section B5 of QBE's Written Case, which RSA adopts *mutatis mutandis*.

(a) However attenuated (or 'loose') the approach to *legal* causation imported by "*following"*, any requirement of "*consequence"* must require that the basic criterion of *factual*, or 'but for' causation is satisfied. If the result would have occurred irrespective of the purported cause, the latter is not a cause, and the former is not a "*consequence"*;[23] and

(b) Given that the learned judges would have construed RSA 3 in the same way if they had found that "*following"* required proximate causation, the precise meaning of "*following"* was irrelevant to the outcome. Nevertheless, RSA addresses the point in case it becomes an issue in the appeal.

45 "*Following*" does not have a settled legal meaning. The term therefore falls to be construed in its context.

46 The learned judges attributed a looser form of link to "*following*" than one of proximate causation because "*the matters referred to within Extension vii, (a) and (d) would not of themselves directly cause interruption to or interference with the business, but would in almost every case have such an effect only via the reaction of the authorities or the public. In (b) and (c) that part of the chain is specified in the clause, but not in (a) and (d), and thus the use of the word "following" is entirely understandable*" [j/95] (emphasis supplied). This reasoning makes the error of conflating proximate causation with the causative event which was the last event in the causal chain.[24]

47 When the word *"following"* in RSA 3 is construed (as it must be) in the context of the relevant extension and the policy wording as a whole, there can be no doubt that it imposes a requirement that the relevant *"occurrence"* (or *"discovery"*) must be both a 'but for' and the proximate cause of the interruption:

(a) First, paragraph 44(a) above is repeated;

(b) Second, sub-clause 2 of the *"Additional Definition in respect of Notifiable Diseases"* contains a definition of "*Indemnity Period"* which is particular to the disease clause:

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23 See ***The 'Kamilla'*** [2006] 2 Lloyd's Rep 238 at [15] *per* Morison J **{E/24/594}**.

24 *Cf* ***Leyland Shipping v Norwich Union Fire Insurance Society*** [1918] AC 350 at p.358 per Lord Finlay LC **{E/27/884}**, p.363 *per* Lord Dunedin **{E/27/889}**.

(i) The role of the "*Indemnity Period"* is to define the period during which BI losses are covered.[25] There is also a general definition of "*Indemnity Period"* applicable to BI losses caused by material damage.[26] In both definitions the time period commences when the fortuity occurs and continues so long as the business is "*affected in consequence"*. For the Disease Clause the Indemnity Period is the period "*during which the results of the business shall be affected in consequence of the occurrence discovery or accident"* (emphasis supplied);[27]

(ii) As to proximate (or legal) causation, the Court held that the words "*in consequence of"* simply echoed back to "*following"* and "*refer to the same [causal] connection"*. However, the expression "*in consequence"* has long been held to be one importing (and not displacing) the presumptive requirement of proximate causation in insurance contracts;[28]

(c) Third, sub-clause 4 confirms that Insurers' liability is restricted to the loss arising at *"those Premises which are directly affected by the occurrence discovery or accident"* (emphasis supplied):

(i) Not only does this again confirm that a *"but for"* relationship is required between the relevant occurrence or discovery and the interruption, but use of the word *"directly"* indicates that the causal relationship must be proximate (see ***PMB Australia Limited v MMI General Insurance Limited & ors*** [2002] QCA 361 at [9]-[12] *per* de Jersey CJ) **{E/33/951}**;

(ii) The Court dismissed the import of the words "*directly affected"* on the basis that sub-clause 4 was merely intended to distinguish between different premises owned by the Insured. This may be a consequence of the clause but it does not explain the use of the words "*directly*

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25 **{C/16/1238}**.

26 **{C/16//1232}**.

27 The reference to *"occurrence discovery or accident*" is a reference to the fortuities specified in sub-paragraphs (a)-(d) and echoes the language used in those clauses.

28 ***Ionides v Universal Marine Insurance Co***. (1863) 143 ER 445 at pp.455-6 **{E/20/466-467**}.

affected", which are striking, and must be deliberate. Further, even on the Court's construction as to the purpose of the sub-clause, it follows that if none of the insured premises were "*directly affected*" by the occurrence, the insurer "*shall not be liable"*. It is therefore a necessary condition of cover that the premises be "*directly affected"* by the occurrence.

48 The learned judges' general approach was to start from the conclusion that "*following"* imported a loose causal test and to then to ask whether "*in consequence of"* or "*directly affected"* were intended to "*narrow"* ([j/97]) the cover. This approach failed to read the Disease Clause as a whole, and failed to treat important instances of the use of causative wording as *indicia* of what the parties intended. It is notable that the learned judges took a contrary approach to the use of similar language in QBE 2: see [j/232]-[j/235].

(b) RSA 1

Preliminary

49 It is necessary first to set the disease extension in RSA 1 within its contractual landscape:

(a) The Cottagesure wording is aimed at providers of holiday accommodation. Such businesses could readily be expected to be vulnerable to offsite, but relatively local, outbreaks of disease – for example affecting tourist attractions which might be visited by guests. This appeared to be acknowledged by the FCA in its skeleton argument for trial at §964 **{D/20/1613}**;

(b) The principal business interruption cover provided by the policy as a whole is triggered by property damage to the insured premises – see the insuring clause for the Business Interruption Insurance section (set out at paragraph B.4 of Appendix B to this Written Case), along with the "Material Damage Requirement" (summarised in paragraph A.10 of Appendix A); and

(c) All of the other extensions to the Business Interruption Insurance section provide cover for perils whose operation is restricted to the insured premises or

to places close to the insured premises. If such extensions were to be triggered, they would be inherently unlikely to lead to highly correlated losses across the entire pool of policyholders.

50 Second, loss is only insured under the relevant extension where it is *"as a result of"* closure or restrictions etc. which are in turn *"as a result of"* the disease *"manifesting itself"* at or within 25 miles of the premises. It was common ground that the linkage *"as a result of"* imported a requirement for proximate causation [j/289].

51 Third, the use of the present participle *"manifesting"* defines the scope of the cover which is being provided under the disease extension.

Analysis

52 Once again, the approach adopted by the learned judges was wrong:

(a) As in the case of RSA 3, it ignores that the clause does not require the closure/restrictions to be attributable to a notifiable human disease in the abstract or 'at large' but, specifically, to the disease "*manifesting itself at the Premises or within a radius of 25 miles of the Premises"*. Thus there is a requirement for a (proximately causative) link between the local manifestation of the disease and the imposition of restrictions;

(b) For the Court's construction to be correct, words would have to be written in: "*closure or restrictions placed on the Premises as a result of a notifiable human disease provided that there has been a manifestation of that notifiable human disease at the Premises or within a radius of 25 miles of the Premises";*

(c) The contextual arguments invoked by the learned judges are no stronger for RSA 1 then they were for RSA 3. As before, they point away from the conclusion reached;

(d) There is nothing anomalous about RSA agreeing to provide cover only for the consequences of a local occurrence of a notifiable disease. Such an approach is consistent with the other extensions to the notifiable disease extension, none of which would expose RSA to liability to highly correlated losses across the entire

pool of policyholders such as those which would result from a national/global pandemic;

(e) Contrary to the proper approach to the construction of a contract of indemnity insurance, the approach adopted by the learned judges would result in a "*postcode lottery*" which would reduce the radius requirement to the status of a non-causal factor, irrelevant to the loss.

53 It cannot be suggested that RSA's approach to the construction of the extension would empty it of meaningful content: by way of example, there is no reason why RSA 1 would not respond to a local lockdown (such as that in Leicester) imposed due to cases within the specified radius.

VII. GENERAL EXCLUSION L (RSA 3) (Ground 3)

Introduction

54 RSA relies on this general exclusion insofar as clause L(a) excludes cover for an "*epidemic"*. The FCA did not contend that COVID-19 in the UK was not an epidemic. Rather it contended that:[29]

(a) The epidemic arose from "*pollution and/or contamination"* and therefore the exclusion was inapplicable given the terms of L(a)(bis);

(b) Alternatively, on its true construction General Exclusion L is "*not applicable to the disease clause as otherwise that clause would have no or little operative scope, which cannot have been intended*".

The decision below

55 The learned judges did not accept the first point. Instead they concluded that "*the correct construction of the policy is that sub-clause L(b) (bis) must be understood as meaning that the terms of the exclusion were not intended to override express grants of cover, or at least was not intended to apply to the disease clauses in Extension vii*." [j/117]. This was not a point which the FCA had taken either in its Reply or its skeleton argument for trial.

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[29] See [52] of the FCA's Amended Particulars of Claim **{D/16/1581-1582}**.

Analysis

56 The principles relevant to construing potentially inconsistent provisions are set out above. Neither they nor the underlying authorities are acknowledged or addressed in the judgment.

57 RSA accepts that where there is an irreconcilable conflict, and it is impossible through the process of construction to resolve it, it may be necessary to disregard one of the clauses. The learned judges particularly focused on the blanket exclusion of "poisoning", which RSA accepts cannot easily be reconciled with the provision of cover (under the notifiable disease extension) for *"food or drink poisoning"*.

58 However, the purported exclusion of cover for poisoning is irrelevant to the question of whether the exclusion of loss due to epidemic should be upheld. As to that:

(a) The essential purpose of any exclusion is to delineate and restrict the cover which would otherwise be provided by a policy. That it would achieve that purpose if upheld is no reason to strike it down;

(b) The exclusion for epidemic is narrower and more specific than the general grant of cover for infectious diseases at or within a radius of 25 miles of the premises;

(c) Accordingly, it is possible to give effect to both the extension and the exclusion by construing them alongside each other so that cover is provided for the consequences of an occurrence of an infectious disease (within the specified radius) provided that the occurrence is not part of an epidemic;

(d) The restriction of cover for infectious diseases to cover for (local) occurrences not forming part of an epidemic is entirely consistent with the proper construction of the relevant extension (as to which, please see above);

(e) There was therefore no principled basis by which the learned judges could justify drawing a red line through the word "epidemic" within General Exclusion L.

59 Clause L(b)(bis) provides: "*all other terms and conditions of this Policy shall be unaltered and especially the exclusions shall not be superseded by this clause.*" The

FCA rightly did not rely on this provision in its Reply or its skeleton argument for trial. This provision plainly cannot have been intended to mean that wherever a general exclusion was inconsistent with a grant of cover, the exclusion should be ignored: such a construction would render the entirety of General Exclusion L redundant. No sensible reader of the Policy would understand that the parties included detailed provisions in L(a), L(b) and L(a)(bis), only to put a line through them with L(b)(bis). Yet this appears to have been the learned judges' conclusion at [j/117]. That conclusion is plainly wrong: L(b)(bis) cannot be construed in this way, and it should instead be construed as being intended to complement L(a)(bis).

60 In conclusion, therefore, there is no principled basis upon which to decline to give effect to the exclusion insofar as it relates to loss due to "epidemic".

VIII. CAUSATION (Grounds 4 to 7)

Preliminary

61 For the reasons set out above, the learned judges should have found that both RSA 1 and RSA 3 required the FCA to establish a proximate causal relationship (or at least a 'but for' causal relationship) within the insured peril (where that involved internal causal connectors) and between the relevant peril and any business interruption loss.

62 To avoid duplication, MS Amlin has agreed to take the lead on behalf of Insurers in developing submissions in relation to causation. What follows in this Written Case is therefore deliberately skeletal.

Principles

63 It is a cardinal principle of contract damages (of which the indemnity payable under a contract of insurance is but one example) that a claimant must establish factual or 'but-for' causation – see, by way of example, Burrows *Remedies for Torts, Breach of Contract, and Equitable Wrongs (4th Edition)* at Chapter 4 §s 1-2 **{E/45/1216-1217}**; Kramer *The Law of Contract Damages (2nd Edition)* at §1-38, §s 11-01, 11-02, 11-04 **{E/47/1367-1369}**; ***Endurance Corporate Capital v Sartex Quilts*** [2020] EWCA Civ 308 at [36] *per* Leggatt LJ **{E/37/1053}**.

64 A corollary of the 'but for' principle is that an insured is not entitled to be put in a more advantageous position than it would have been in if the insured event had not occurred – see ***Callaghan v Dominion Insurance*** [1997] 2 Lloyd's Rep 541 *per* Sir Peter Webster at p.544 col. 2 **{E/12/200}**. This passage of Sir Peter Webster's judgment was not just embraced by the FCA at trial, but was positively advanced as providing *"the most accurate summary of"* the "hold harmless" principle – see Transcript, Day 1 / page 95 / lines 8ff **{D/26/1633}**. It follows that contractual quantification machinery, such as the "trends clause" in RSA 3,[30] simply reflects the position which would otherwise apply as a matter of law.

65 Of course, establishing 'but for' causation is a necessary but, in itself, insufficient platform for the establishment of proximate causation.[31] As to the latter, it is trite that what is required is the identification of the 'efficient' or 'effective' cause: ***Leyland Shipping v Norwich Union*** [1918] AC 350 *per* Lord Shaw at p.369 **{E/27/895}**; Mance, Goldrein & Merkin *Insurance Disputes* (3rd Edition) at §7.15 **{E/48/1374}**. Underlying causes (or "*causes of causes*") and "*remoter causes*" are not to be confused with proximate causes.[32]

The Judgment Below

66 At [j/100], the learned judges indicated that issues of causation would largely be answered by the proper construction of the relevant extension. This approach was repeated elsewhere.[33]

67 Nevertheless, the learned judges did address causation throughout their judgment. The need to do so arose, amongst other reasons, as a consequence of their findings that

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30 See paragraph B.7 of Appendix B to this Written Case. In RSA 1 the relevant principle is reflected in the definition of "Loss of Gross Revenue" {**C/15/1186**} set out in paragraph A.3 of Appendix A to this Written Case. The learned judges concluded that the quantification machinery in both RSA 3 and RSA 1 applies to non-damage extensions [j/120], [j/297]; this conclusion has not been appealed by the FCA.

31 See ***The 'Kamilla'*** [2006] 2 Lloyd's Rep 238 at [15] where Morison J stated: *"The test for causation is whether the act or default complained of is a "proximate cause" of the alleged damage. The "but for" test is appropriate to establish whether there is a causal link between the act or default and the alleged damage. It is a necessary but not sufficient test"* **{E/24/594}**. The principle is implicit in cases such as ***Sartex Quilts*** **{E/37/1046}** and ***Callaghan*** **{E/12/197}**. Indeed, the *Insurance Disputes* book notes at §7.14 that *"it is usually necessary for it to be shown, not only that the loss would not have occurred "but for" the peril(s) insured, but also that that loss was proximately caused by that peril …"* **{E/48/1374}**.

32 ***Everett v London Assurance*** (1865) 144 ER 734 at 736 **{E/16/302}**; ***Becker, Gray*** at p.113 **{E/10/184}**.

33 See, e.g., [j/164] (Argenta).

certain insuring provisions (such as QBE 2, QBE 3 and the Hiscox NDDA wordings) were not engaged by the national pandemic. Without seeking to understate the scale of the task facing the learned judges, it is fair to record that their treatment of causation was inconsistent – contrast and compare the approach taken in paragraphs such as [j/111], [j/112], [j/165], [j/296] with that taken in [j/235], [j/418].

68 As for the relevant counterfactuals, the learned judges considered it was necessary to strip out everything related to the insured peril. This included (in the case of RSA 3) the business interruption itself [j/122], thus rendering the counterfactual an entirely pointless exercise (at least from the date when the insured peril crystalised). For RSA 1, the learned judges held that it was necessary to strip out both the closure/restrictions imposed and (the national) COVID-19 [j/298].

Analysis

69 The learned judges' conclusions in [j/235], [j/418] are consistent with the FCA's concession, rightly made, that the pandemic caused the occurrences of COVID-19 in each locality.[34] Those conclusions are irreconcilable with, and are to be preferred over, the views set out in [j/111], [j/112], [j/165], [j/296].

70 At its most basic, the learned judges' reasoning in relation to causation and RSA 1 and RSA 3 ([j/111], [j/112], [j/296]) was wrong because:

(a) It took no account of 'but for' causation. As the example of the Scilly Isles (set out in Agreed Facts 10 **{D/14/1548}**) demonstrated, an occurrence of COVID-19 within any specific 25 mile radius was not a 'but for' cause of the national advice/restrictions or lockdown;

(b) As the FCA itself pleaded, the only proximate cause of any losses was *"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"*.[35] The nationwide disease (and associated restrictions) was not a peril insured under either RSA 1 or RSA 3.

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[34] See [58.1] of the FCA's Reply ("… *one of the things (COVID-19 in the UK) is the underlying cause of the other (such as the presence of the disease within the Relevant Policy Area*) …" **{D/18/1593}**.

[35] Amended Particulars of Claim at [53.1] **{D/16/1582}**.

71 Specifically, the learned judges' finding (in the alternative to the Construction Conclusion) that each occurrence of the disease within 25 miles was a separate but equal and effective cause of the national measures consequent upon the COVID-19 pandemic [j/112] treated an individual occurrence of COVID-19 as causally sufficient even though it could not itself satisfy the 'but for' test.

72 The occasions when the Court has departed from 'but for' causation are rare and there is no justification for such a departure in this case

(a) In ***Kuwait Airways Corporation v Iraqi Airways (Nos 4 and 5)*** [2002] 2 AC 883 **{E/25/596}** the state of Iraq seized the claimant's aircraft and handed them over to the defendant for its use. Both the defendant and the Iraqi state were liable in the tort of conversion but the claimant could not establish that 'but for' the defendant's conversion it would have been kept out of its possession of the aircraft. The House of Lords relaxed the test of 'but for' causation on the basis that the defendant's wrongful conduct had a sufficient causal connection with the loss;

(b) Although no reference was made in the Judgment to this line of authority, the finding at [j/112] echoes the findings made by the House of Lords in ***Fairchild v Glenhaven*** [2003] 1 AC 32 **{E/17/304}**. As is well known, the decision in ***Fairchild*** came about because it was impossible for claimants to prove on a 'but for' basis that the asbestos dust to which they had been tortiously exposed had caused the mesothelioma from which they suffered. The House of Lords therefore relaxed the causation test finding that it was sufficient if a claimant established that he had been exposed by the defendant to a quantity of asbestos which materially increased the risk of him contracting mesothelioma. Whilst the policy-driven reasons for the Court's decision in ***Fairchild*** were both recognised at the time and understandable,[36] this Court will not need reminding of the problems it has caused.[37]

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[36] See Lord Bingham at [33] **{E/17/338-339}** and Lord Nicholls at [41] **{E/17/342}**.

[37] See ***International Energy Group Ltd v Zurich Insurance Plc*** [2016] AC 509 at [114] *per* Lord Sumption **{E/21/529}**; and ***Equitas Insurance v MMI*** [2020] QB 418 at [1]-[6] *per* Males LJ **{E/14/226-228}**.

73 No assistance can be derived by the FCA from either of these lines of authority, because:

(a) The present case is concerned with an insurance contract, whereas in both ***Kuwait Airways*** and ***Fairchild*** the causes of action were based in tort. Here, the parties have reduced their bargain to writing. The Court's role is to respect the parties' contractual autonomy and to interpret their bargain. If the bargain, properly construed, requires 'but for' and/or proximate causation then the only remaining question is whether those tests have been satisfied. If the tests are not satisfied, then the FCA's case must fail;

(b) The policy driven reasoning behind ***Fairchild*** does not apply in this case:[38]

(i) In ***Fairchild*** the claimants (and all those who were in the same position) were suffering from an (almost invariably) fatal disease and, as a consequence of the limitations of science, could not establish the causative potency of their employer's negligence;

(ii) Without in any way diminishing the suffering of insureds interested in this action, their position is simply not the same: the loss is economic, only some of those people and businesses who have been impacted by COVID-19 will be affected by this action and the inability to establish causation cannot be blamed on a failure of science.

74 As with any departure from long established principle, relaxation of the 'but for' test could have anomalous and undesirable consequences, not only in relation to business interruption policies, but insurance policies generally and/or contract law generally.

75 Further, the learned judges' approach to counterfactuals ignores not just the nature of the insured event but also the 'Minimum Obligation Rule'.[39] Accordingly:

(a) For RSA 3, all that is required for the purposes of the counterfactual is to remove the disease within the specified proximity;

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38 See also Burrows (*Op. Cit.*) at Chapter 4, §4 **{E/45/1219-1221}**.

39 As to the latter, see Kramer (*Op. Cit.)* at §13-34 **{E/47/1372-1373}**. For the purposes of any counterfactual the FCA is not entitled to expand the scope of the insured event against which the insurer has promised to hold the insured harmless.

(b) For RSA 1, it is sufficient to remove the disease within the specified proximity and any measures to contain it imposed (1) as a direct consequence of the local disease and (2) specifically upon holiday rental accommodation;[40]

(c) It is not permissible to remove the national incidence of COVID-19 since that was not an insured event against which RSA had contracted to hold its insured harmless.

76 With respect to the decision of Hamblen J in ***Orient-Express Hotels Ltd v Assicurazioni Generali*** **{E/31/921}**, RSA adopts the submissions of MS Amlin.

IX. SUMMARY OF REASONS

77 RSA respectfully asks the Court to allow its appeal for the reasons that:

(a) The notifiable disease extension in RSA 1:

(i) Provides cover for loss as a result of closure or restrictions imposed on the insured premises only because of notifiable disease occurring within 25 miles of the premises;

(ii) Does not provide cover in respect of the national pandemic;

(b) The notifiable disease extension in RSA 3 does not provide cover in respect of the national pandemic;

(c) Loss due to the COVID-19 epidemic/pandemic is excluded from cover under RSA 3 by reason of General Exclusion L;

(d) Losses due to the COVID-19 pandemic which would have been suffered by an insured in the absence of the insured peril are not recoverable under either RSA 1 or RSA 3; and

(e) For the purposes of the relevant counterfactual and the quantification machinery in RSA 1 and/or RSA 3, it is not necessary to remove the national incidence of COVID-19.

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[40] Thus, as noted above, RSA 1 might respond to a Leicester-type situation but not otherwise.

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30 October 2020

APPENDIX A to RSA's APPELLANT'S WRITTEN CASE: RSA1

A.1 RSA1 provides a number of different types of cover including Property Damage Insurance **{C/15/1119-1124}** and Business Interruption Insurance **{C/15/1125-1132}**.

A.2 The wording provides **{C/15/1118}** that:

> *"This **Policy** and any **Schedule**, Endorsements, Clauses or Certificates should be read as if they are one document".*

A.3 It is logical to take the policy definitions next even though they appear towards the end of the wording. They include the following:

> *"...*
>
> ***Business***
>
> *That shown in the **Schedule** relating to your running of a Commercial holiday let **business** at the location shown"* **{C/15/1183}**
>
> ...
>
> ***Damage***
>
> *Accidental loss, destruction or damage"* **{C/15/1184}**
>
> ...
>
> *"**Gross Revenue***
>
> *Shall mean the money paid or payable to the **Policyholder** for **services** rendered in the course of the **Business**."* **{C/15/1185}**
>
> ...
>
> *"**Indemnity Period***
>
> *The maximum period from the date of the **Damage** for which **We** will pay any **loss of Gross Revenue** shown in the **Schedule**."* **{C/15/1185}**

...

Loss of Gross Revenue

*The actual amount of the reduction in the **Gross Revenue** received by **You** during the Indemnity Period solely as a result of **Damage** to **Buildings**..."* **{C/15/1186}**

A.4 The insuring clauses for both the Property Damage Insurance and the Business Interruption Insurance are to be found after the insured perils ("Events") and extensions applicable to each section have been spelled out. Both insuring clauses are "hybrid" in nature, also including features often found in a free-standing basis of settlement provision. The insuring clause for the Business Interruption Insurance section **{C/15/1135}** provides as follows:[1]

*"If **Damage** by any **Event** covered under this Insurance occurs*

1 *at the **Premises** to **Property** Insured by **You** for the purpose of the **Business***

2 *...*

*and causes interruption of or interference with **Your Business** at the **Premises***

***We** will pay **You** the amount of loss resulting from the interruption or interference caused by the **Damage** in accordance with the following*

1 *in respect of **Gross Revenue***

*the amount by which the **Gross Revenue** received during the **Indemnity Period** falls short of the Standard **Gross Revenue** as a result of the **Damage***

2 *in respect of Increased Cost of Working the additional expenditure reasonably incurred in avoiding or minimising the **loss of Gross Revenue** which but for that expenditure would have taken place during the **Indemnity Period** ..."*

A.5 The *"**Event**[s] covered under this Insurance"* within the insuring clause comprise the perils set out at **{C/15/1125}**ff**,** which broadly track the equivalent list of perils for the

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[1] The insuring clause for the Property Damage Insurance can be found at **{C/15/1133}**.

Property Damage Insurance at **{C/15/1119}**ff, but also includes "Event 13" in respect of *"Mechanical or electrical **breakdown** or derangement in respect of **Covered Equipment**"* **{C/15/1128}**. While there are some textual differences between the two lists of perils, it is not suggested that they would be material. Note also the introductory wording to the listing of the Business Interruption Insurance perils **{C/15/1125}**:

> *"THE FOLLOWING EVENTS ONLY APPLY WHERE SHOWN AS INCLUDED UNDER PROPERTY DAMAGE INSURANCE SECTION IN THE SCHEDULE"*.

A.6 The Business Interruption Insurance section also includes various extensions **{C/15/1129}**ff (**"the Cottagesure BI Extensions"**). Most of the Cottagesure BI Extensions provide cover for losses caused by additional perils (see extensions 1 to 4 and 6 to 7) in the absence of "Damage" to the insured premises.[2]

A.7 So far as is directly relevant to the Test Case, the extensions provided as follows **{C/15/1129}**:

> ***"Extensions to Cover***
>
> ***THIS INSURANCE ALSO COVERS***
>
> ...
>
> ***2. Disease, Murder, Suicide, Vermin and Pests***
>
> *Loss as a result of*
>
> *A) closure or restrictions placed on the **Premises** as a result of a notifiable human disease manifesting itself at the **Premises** or within a radius of 25 miles of the **Premises**.*
>
> *..."*

---

[2] Extension 5 addresses outstanding credit balances recovery of which is prevented by insured "Damage", while Extension 8 makes specific provision for the cost of alternative accommodation following "Damage" **{C/15/1130}**.

A.8 Under the heading "*What is not covered"*, the following applies to extension 2:

> *"1 Any amount in excess of £250,000 after the application of all other terms and conditions of this Insurance.*
>
> *2. Any amount of the loss that continues more than twelve months after the occurrence of the loss."*

A.9 The Court is asked to note the references to *"the **Indemnity Period**"* in the exclusions applicable to Extensions 1 **{C/15/1129}** and 4 **{C/15/1130}**.

A.10 The Business Interruption Insurance section is also subject to a "Material Damage Requirement" (in effect, a material damage proviso) **{C/15/1136}** to which the only express exception is "Event 13" (for mechanical and electrical breakdown etc).

A.11 The sample schedule **{C/15/1194-1199}** includes a sum insured (of £150,000) for *"**Loss of Gross Revenue**"*, and also specifies a Maximum Indemnity Period of 24 months.

APPENDIX B to RSA's APPELLANT'S WRITTEN CASE: RSA3

General Scheme

B.1 The policy starts with a "welcome page" **{C/16/1202}**, which includes the following:

> *"Each section of this **Policy**, the **Schedule**, any **Endorsements** and the Definitions, General terms and conditions and General exclusions shall be read as one document".*

B.2 There are general policy definitions at the start which "*will have the same meaning wherever it appears in **Your Policy** unless **We** state otherwise"* **{C/16/1211}**. In these general definitions "*Damage"* is defined as "*material loss destruction or **Damage**"*.

B.3 Section 1 of the policy concerns property damage **{C/16/1215}**, along with extensions **{C/16/1220}** and exclusions **{C/16/1218}** applicable to that section. Section 2 of the policy concerns BI, **{C/16/1231}** along with extensions **{C/16/1236}** and exclusions **{C/16/1240}** applicable to that section.

B.4 There are general policy exclusions which "*apply to all sections of the Policy unless stated otherwise"* **{C/16/1290}**. These include General Exclusion L, as further described below.

Section 2 – Business Interruption

B.5 The preamble to the Business Interruption Section **{C/16/1231}** states:

> *"Certain words have specific meanings for the purpose of this section, General exclusions also apply to this section".*

B.6 So far as is relevant, the sectional definitions **{C/16/1231}** include the following:

> "…
>
> ***Business Interruption***
>
> ***Business Interruption** shall mean loss resulting from interruption of or interference with the **Business** carried on by **You** at the **Premises** in consequence*

*of loss or destruction of or **Damage** insured under Section 1 to **Property** used by **You** at the **Premises** for the purpose of the **Business***

...

Incident

*a) Loss or destruction of or **Damage** to **Property** used by **You** at the **Premises** for the purpose of the **Business**; or*

*b) Loss destruction of or **Damage** to **Your** books of account or other **Business** books or records at the **Premises** in respect of Book Debts.*

Indemnity Period

*The period beginning with the occurrence of the **Incident** and ending not later than the **Maximum Indemnity Period** thereafter during which the results of the **Business** shall be affected in consequence thereof*

Maximum Indemnity Period

*The Period as stated in the **Schedule***

..."

B.7 The following trends clause appears immediately below the sectional definitions **{C/16/1233}**:

*"Special provision applicable to this section: Under **Rate of Gross Profit**, **Annual Turnover**, **Standard Turnover**, **Annual Rent Receivable**, **Standard Rent**, **Receivable Annual Gross Revenue and Standard Gross Revenue** adjustments shall be made as may be necessary to provide for the trend of the **Business** and for variations in or other circumstances affecting the **Business** either before or after the Incident or which would have affected the **Business** had the **Incident** not occurred so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the **Incident** would have been obtained during the relative Period after the **Incident**."*

B.8 The main insuring clause for the BI section **{C/16/1233}** provides as follows:

> *"**Cover***
>
> *In the event of **Business Interruption We** will pay to **You** in respect of each item in the **Schedule** the amount of loss resulting from such interruption or interference provided that at the time of the happening of the loss destruction or **Damage** there is an insurance in force covering **Your** interest in the **Property** at the **Premises** against such loss destruction or **Damage** and that:*
>
> *a) payment shall have been made or liability admitted therefore; or*
>
> *b) payment would have been made or liability admitted therefore but for the operation of a proviso in such insurance excluding liability for losses below a specified amount".*

B.9 The basis of settlement clause provides as follows **{C/16/1233}**:

> *"**Section 2 – Gross Profit/Estimated Gross Profit***
>
> ***(if shown as operative in the Schedule)***
>
> *The insurance is limited to loss of **Gross Profit** due to:*
>
> *a) reduction in **Turnover**; and*
>
> *b) increase in cost of working;*
>
> *and the amount payable as indemnity shall be*
>
> *a) in respect of a reduction in **Turnover**:*
>
> *b) the sum produced by applying the Rate of **Gross Profit** to the amount by which the **Turnover** during the **Indemnity Period** shall fall short of the **Standard Turnover** in consequence of the **Incident**; and ...*
>
> *...*

Section 2 – Gross Revenue/Estimated Gross Revenue

(if shown as operative in the Schedule)

The insurance is limited to:

a) loss of ***Gross Revenue****;*

[…]

and the amount payable as indemnity shall be:

a) in respect of loss of ***Gross Revenue****: the amount by which the Gross Revenue during the* ***Indemnity Period*** *shall fall short of the* ***Standard Gross Revenue*** *in consequence of the* ***Incident****[…]*

…".

The Disease Extension

B.10 The "*Infectious Diseases"* extension is followed by a series of definitions and terms relating to that extension only. RSA adopts the FCA's shorthand of 'disease clause' when referring to this provision below, without admission **{C/16/1237}**:

*"**vii. Infectious Diseases***

We shall indemnify ***You*** *in respect of interruption of or interference with the* ***Business*** *during the* ***Indemnity Period*** *following:*

a) any:

i. occurrence of a Notifiable Disease (as defined below) at the ***Premises*** *or attributable to food or drink supplied from the* ***Premises****;*

ii. discovery of an organism at the ***Premises*** *likely to result in the occurrence of a Notifiable Disease;*

iii. occurrence of a Notifiable Disease within a radius of 25 miles of the ***Premises;***

*b) the discovery of vermin or pests at the **Premises** which causes restrictions on the use of the **Premises** on the order or advice of the competent local authority;*

*c) any accident causing defects in the drains or other sanitary arrangements at the **Premises** which causes restrictions on the use of the **Premises** on the order or advice of the competent local authority; or*

*d) any occurrence of murder or suicide at the **Premises**.*

Additional Definition in respect of Notifiable Diseases

1. Notifiable Disease shall mean illness sustained by any person resulting from:

i. food or drink poisoning; or

ii. any human infectious or human contagious disease excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition an outbreak of which the competent local authority has stipulated shall be notified to them

2. For the purposes of this clause:

***Indemnity Period** shall mean the period during which the results of the Business shall be affected in consequence of the occurrence discovery or accident beginning:*

i. in the case of a) and d) above with the date of the occurrence or discovery; or

*ii. in the case of b) and c) above the date from which the restrictions on the **Premises** applied; and ending not later than the **Maximum Indemnity Period** thereafter shown below.*

***Premises** shall mean only those locations stated in the **Premises** definition. In the event that the section includes an extension which deems loss destruction or **Damage** at other locations to be an **Incident** such extension shall not apply to this clause.*

3. *We shall not be liable under this clause for any costs incurred in the cleaning repair replacement recall or checking of Property;*

4. *We shall only be liable for the loss arising at those* ***Premises*** *which are directly affected by the occurrence discovery or accident[.]* ***Maximum Indemnity Period*** *shall mean 3 months".*

The General Conditions

B.11 The General Terms and Conditions contain both numbered and unnumbered clauses, including the following **{C/16/1285}**:

*"**Interpretation***

In this ***Policy****;*

...

e) the headings are for reference only and shall not be considered when determining the meaning of this ***Policy****".*

General Exclusion L

B.12 The general exclusions section states that the exclusions listed "*apply to all sections of the Policy unless stated otherwise"* **{C/16/1290}**.

B.13 General Exclusion L **{C/16/1292}** provides:

*"**L Applicable to all sections other than Section 5 – Employers' Liability and Section 6 – Public Liability***

Contamination or Pollution Clause

a) The insurance by this ***Policy*** *does not* ***Cover*** *any loss or* ***Damage*** *due to contamination pollution soot deposition impairment with dust chemical precipitation adulteration poisoning impurity epidemic and disease or due to any limitation or prevention of the use of objects because of hazards to health.*

*b) This exclusion does not apply if such loss or **Damage** arises out of one or more of the following Perils:*

- *Fire, Lightning, Explosion, Impact of Aircraft*
- ***Vehicle** Impact Sonic Boom*
- *Accidental Escape of Water from any tank apparatus or pipe Riot, Civil Commotion, Malicious **Damage***
- *Storm, Hail Flood Inundation Earthquake*
- *Landslide **Subsidence** Pressure of Snow, Avalanche Volcanic Eruption*

*a)[bis] If a Peril not excluded from this **Policy** arises directly from **Pollution and/or Contamination** any loss or **Damage** arising directly from that Peril shall be covered.*

*b)[bis] all other terms and conditions of this **Policy** shall be unaltered and especially the exclusions shall not be superseded by this clause."*