

BUSINESS INTERRUPTION INSURANCE TEST CASE

DRAFT TRANSCRIPT

OF DAY 3 OF TRIAL (22 JULY 2020)

Pursuant to paragraph 30 of the court's order made on 26 June 2020, what follows is a **draft** transcript.

A final transcript will be published when it is available.



The Financial Conduct Authority vs. MS Amlin Underwriting Limited and others

Day 3

July 22, 2020

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1 Wednesday, 22 July 2020
 2 (9.57 am)
 3 Hearing via Skype for Business
 4 Submissions by MR EDELMAN (continued)
 5 LORD JUSTICE FLAUX: Yes, Mr Edelman, good morning.
 6 MR EDELMAN: Good morning, my Lords.
 7 I was dealing with Hiscox and I was near the end of
 8 it. I've just got a few topics still left.
 9 The counterfactual. Can I first deal with the
 10 public authority clause. Hiscox analyses this as
 11 a disease -- maybe we ought to have it up on screen; it
 12 is {B/6/42}. They analyse it as A "disease", followed
 13 by B "restrictions", followed by C "inability to use",
 14 causing D "interruption".
 15 Hiscox doesn't merely remove the interruption, the
 16 immediate cause of the loss, if one might say that, in
 17 terms of what the loss is all about, it is all about the
 18 interruption; instead, it removes B plus C plus D, but
 19 not A, the disease.
 20 In other words, it removes government actions,
 21 albeit as applied to the entire country, not merely
 22 insofar as they restrict the premises. And the
 23 skeleton, just for my Lords' reference, their skeleton
 24 at paragraph 330, {1/13/106} says the proper
 25 counterfactual is the same world as we are in, but

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1 without the government actions as are found to be
 2 qualifying restrictions.
 3 We submit that if you are taking out of account for
 4 the purposes of the counterfactual everything down to C,
 5 why aren't you taking out D as well? The only answer to
 6 that, and perhaps we should have a look at this as well,
 7 is their paragraph 346.
 8 LORD JUSTICE FLAUX: It is the other way round, isn't it,
 9 Mr Edelman? If you are taking out B, C and D, why
 10 aren't you taking out A?
 11 MR EDELMAN: Sorry, my Lord, yes. Why not A? Sorry, I got
 12 the letters muddled up in my notes. Yes, why not A?
 13 Their answer is, and this is at paragraph 346 of
 14 their skeleton, it is {1/13/110}, is that this is at the
 15 core of the insured peril. That is how they justify it.
 16 What they are doing is trying to identify one thing
 17 which they pick on as being the core of the insured
 18 peril, and treating that as something which must be
 19 removed for the counterfactual, but the disease, they
 20 say, isn't the core of the insured peril and so it
 21 remains for the purposes of the counterfactual.
 22 We say that's its assertion, but there is no real
 23 rationale for it. One has, going back to {B/6/42}
 24 please, it is a composite peril. And the entire reason
 25 that the restrictions were imposed in fact, and the

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1 context in which the restrictions are being imposed, as
 2 contemplated by the clause, is the occurrence of the
 3 disease.

4 Why one should subtract that? I quite understand
 5 their point that the disease on its own is not covered,
 6 but neither are restrictions on their own, unless they
 7 are restrictions that follow one of the specified
 8 criteria; and neither is interruption covered unless
 9 there is an inability to use, and inability isn't
 10 covered unless it's restrictions imposed by a public
 11 authority, and the restrictions imposed by a public
 12 authority don't qualify unless they follow the outbreak
 13 of a disease. But it is all part of a package.

14 LORD JUSTICE FLAUX: Yes.

15 MR EDELMAN: Once one gets beyond what is the cause, what is
 16 the overall content of the clause, where does one stop?
 17 Why go as far as the government restrictions but no
 18 further? And if the government restrictions are to be
 19 removed for the whole country, why not the disease for
 20 the whole country?

21 LORD JUSTICE FLAUX: They may say, not in relation to this
 22 wording, but one of their wordings in the trends clause
 23 actually refers to restrictions, doesn't it? Damage or
 24 restrictions have not occurred. Doesn't that relate to
 25 the argument that you made yesterday about, well,

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1 leaving aside the point about this wording, Hiscox 1
 2 wording only refers to "insured damage", which is
 3 a defined term, and in turn "damage" is a defined term,
 4 "accident or physical loss or physical damage" and there
 5 is no hint there of non-damage related extensions. So
 6 your primary case is the trends clause just doesn't
 7 apply at all. But assuming that somehow we manipulate
 8 the wording, your point is that what you don't do is to
 9 take out that, as it were, say, well, the physical
 10 damage to the premises wouldn't have occurred, but
 11 everything else, including what caused it, is assumed to
 12 remain in place.

13 MR EDELMAN: Yes.

14 LORD JUSTICE FLAUX: Ergo, you don't get any business
 15 interruption insurance. It's the Orient-Express point.

16 MR EDELMAN: Exactly, my Lord.

17 But where the wording does refer to restrictions,
 18 there are particular submissions I would make.

19 Firstly, that the use of the word "restriction" is
 20 merely a signpost to the relevant insuring provision.
 21 Because it is rather more complex than damage, what the
 22 draftsman is doing is signposting the relevant provision
 23 and giving a shorthand for it, rather than plucking out
 24 the restriction, as Mr Kealey would want to do, as the
 25 core of the peril.

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1 LORD JUSTICE FLAUX: Is it Mr Kealey or Mr Gaisman?
 2 MR EDELMAN: Mr Gaisman, sorry. Sorry, my mistake.
 3 My second submission would be just as a reference to
 4 damage must encompass what caused the damage, so
 5 a reference to the restriction must include a reference
 6 to what caused the restriction to be imposed, as
 7 required by the clause.
 8 So if you are treating the restriction as the
 9 equivalent to damage, which is what the clauses that
 10 refer to restrictions seem to do, and if you are with me
 11 that when it refers to damage it is contemplating not
 12 just the damage but the cause of the damage, then the
 13 insured peril for the purposes of the restriction is the
 14 disease. Just as the hurricane is the insured peril for
 15 the ...
 16 LORD JUSTICE FLAUX: The insured peril; I thought your case
 17 was that the insured peril is as you put it the package.
 18 MR EDELMAN: My Lord, yes. But if you were to say that --
 19 LORD JUSTICE FLAUX: If you are right in saying, well, it is
 20 a shorthand, "restrictions" is a shorthand for the
 21 relevant public authority provision, which is where the
 22 disease has led to the imposition of restrictions, which
 23 in turn cause an interruption to the business, on your
 24 case you take out everything.
 25 MR EDELMAN: Yes, my Lord.

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1 LORD JUSTICE FLAUX: And assume a world where there isn't
 2 a disease and there isn't a restriction.
 3 MR EDELMAN: Yes. But this is the alternative argument. If
 4 one doesn't do that and says no, it is not a shorthand,
 5 it just says "restriction", and it is like using
 6 restriction like damage, it is identifying one
 7 particular thing, then if you are comparing like with
 8 like, if damage, the reference to damage encompasses
 9 what caused the damage, then you must do the same for
 10 restriction; and what caused the restriction, what was
 11 required to cause the restriction under the policy, was
 12 the occurrence of the disease. So even on that
 13 alternative base, even if it is not a shorthand for the
 14 full clause, we say the same result follows.
 15 In the trends clause, my Lords will also have seen
 16 that it refers to "special circumstances".
 17 In our submission, just as with the Orient-Express,
 18 that doesn't include the outbreak of the disease. And
 19 in relation to the clauses with a radius or a vicinity
 20 limit, it doesn't include the wider outbreak of which
 21 the qualifying outbreak formed part because, as we have
 22 already explained earlier, that prospect is inherent in
 23 the nature of what Hiscox is covering and must be taken
 24 as having been contemplated as being associated with the
 25 insured peril.

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1 So if you are insuring a notifiable disease, you are
 2 stipulating that in order for cover that must have
 3 occurred within a particular limit from the premises.
 4 But, necessarily by insuring a notifiable human disease,
 5 you are contemplating and appreciating that amongst the
 6 possibilities may not be just a local outbreak but also
 7 it is contemplating that it could be a wider outbreak
 8 that has spread to the 1 mile radius or vicinity of the
 9 premises.
 10 That is within the contemplation of the parties and
 11 I will give you an example of that when we get to RSA,
 12 the way in which they define the notifiable disease, the
 13 date on which it becomes notifiable is particularly
 14 significant as showing what insurers would have
 15 understood this risk to involve. In other words, the
 16 potential for a new epidemic disease to emerge.
 17 LORD JUSTICE FLAUX: We were looking at the Hiscox public
 18 authority wording, which we have got on the screen at
 19 the moment and, I mean, that wording, unlike others,
 20 doesn't include any sort of radius limit. So in
 21 a sense --
 22 MR EDELMAN: That last point ...
 23 LORD JUSTICE FLAUX: Leaving aside arguments about what is
 24 meant by "inability to use the premises", what is meant
 25 by "restrictions", et cetera, it all comes down, doesn't

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1 it, to whether an occurrence of a human infectious or
 2 contagious disease, an outbreak of which must be
 3 notified, et cetera, is referring to a local occurrence
 4 or is capable of referring to a national outbreak of
 5 a disease. In other words, "occurrence", you know, as
 6 a global concept, if I put it that way, as opposed to
 7 a local concept. That was the argument that you were
 8 running yesterday afternoon.
 9 MR EDELMAN: Yes. My Lord, that is the primary argument.
 10 But our alternative argument is that even if it is
 11 contemplating something local, that just puts it in the
 12 same argument basket --
 13 LORD JUSTICE FLAUX: Yes, I understand.
 14 MR EDELMAN: -- as all the other policies with a 1 mile or
 15 a 25-mile limit.
 16 LORD JUSTICE FLAUX: Yes.
 17 MR EDELMAN: It was that latter argument, that latter point
 18 that my argument about what this is contemplating.
 19 Sometimes one has to apply this discerning an intention.
 20 MR JUSTICE BUTCHER: Mr Edelman, I understand completely,
 21 and this is no doubt a very sort of simplistic question,
 22 but I understand completely the use of the concept of
 23 counterfactuals in the context of trends clause, of
 24 course. For my own part, at the moment I don't really
 25 find the concept of counterfactuals in application of

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1 the basic coverage provision very useful, because
2 clearly we are interested for those purposes in seeing
3 what the effect of various things is, and they may be
4 distinct and they may have different effects at
5 different stages.

6 I think your real position is that although there
7 may be effects of, let's say, restrictions imposed by
8 a government, a public authority, that you can imagine
9 that there is an effect of that. If there is then an
10 occurrence of a disease in the relevant vicinity, once
11 you have got those two matters you have an insured
12 event.

13 MR EDELMAN: Yes.

14 MR JUSTICE BUTCHER: At that point it becomes really
15 impossible to distinguish these matters. So that even
16 if before you have got all the facets of the clause
17 there, there may have been an effect, once you have got
18 them all, then it is a sort of composite position.

19 MR EDELMAN: Yes, and might I make it quite clear that the
20 reason we are focusing on counterfactuals so much is
21 not -- I would emphasise "not" -- because we consider
22 that is the correct approach; it is the insurers' entire
23 causation case appears to be premised on
24 counterfactuals. So they take these clauses with the
25 vicinity limit, for example, and they say their

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1 counterfactual is with the disease everywhere but not
2 within the radius. So it is all about counterfactuals.

3 Hiscox's answer to this clause, which has no
4 geographic restrictions so they can't argue that, apart
5 from arguing that occurrence is local, so they try and
6 get themselves into that category with that argument,
7 but their alternative argument is the counterfactual is
8 without the restrictions that applied to the business,
9 but with everything else. Therefore, with the national
10 disease. So that if occurrence does cover the national
11 outbreak, they say, well, you assume that there were the
12 restrictions but still the national outbreak.

13 That is the case the FCA is answering. That was the
14 road block, the counterfactual road block that the FCA
15 was aiming at.

16 LORD JUSTICE FLAUX: My Lord's point, I think, is that if
17 you look at the public authority clause, if what you
18 have got is the national outbreak of the disease
19 followed by restrictions imposed by the government as
20 a consequence, and that leads to an inability to use the
21 insured premises, then, leaving the trends clause out of
22 account, what the underwriters have agreed to pay is the
23 difference between the actual income that you made
24 during the relevant period, the indemnity period, and
25 what you would have earned during the indemnity period,

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1 what you would have earned during that period. And what
2 you would have earned during that period must involve
3 taking everything out, mustn't it?

4 MR EDELMAN: That is our case, my Lord. That is our case.

5 LORD JUSTICE FLAUX: Because apart from the trends clause,
6 all a loss of income provision is doing is saying it's
7 the difference between what you have actually made and
8 what you would have made if none of this had happened.

9 MR EDELMAN: Exactly, my Lord. Exactly.

10 That is entirely our case. I don't want to mislead
11 the court with our focus on counterfactuals that we
12 believe that there is anything in it at all. It is just
13 simply the wrong approach. But we are referring to
14 counterfactuals because this is the battleground, the
15 real battleground that all the insurers have identified,
16 and it is what they are all relying on.

17 They are saying how important "but for" is a test of
18 causation, importing it from other areas of the law
19 where its application is an entirely different context,
20 where it is talking about tortious conduct, for example.
21 And you get the odd cases, the opposite extremes, the
22 Baker v Willoughby, a man whose leg is injured
23 negligently and then some time later he is shot in the
24 leg and the leg is amputated, and the complex questions
25 of how "but for" applies to the first tortfeasor. Then

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1 the Jobling example of the person who is injured and
2 then later develops a condition which means that they
3 would have suffered the same symptoms anyway. These are
4 complex "but for" questions that arise in other areas of
5 the law.

6 But insurance is something different. It doesn't
7 mean it has got its unique principles of law, but one is
8 just asking a different question for a different
9 purpose. It is a much simpler question and it comes
10 down to my Buncefield example. A man whose warehouse is
11 flattened by an explosion, and an explosion is something
12 that is insured by the policy as a sort of peril that
13 would cause it. He has got a business interruption
14 policy. He simply should be getting the business
15 interruption losses he has suffered by having his
16 warehouse in ruins. You compare the income from what it
17 was before the explosion to what it was in the period
18 after. It is very simple, and that is what insurance is
19 for.

20 It is rather like the classic example of the 1906
21 earthquake when I think CE Heath gave instructions to
22 loss adjusters in San Francisco to pay all losses
23 without question. People's houses and businesses had
24 been destroyed in an earthquake, and you are just paying
25 them to put them back into the position in which they

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1 were before it all happened.
 2 That is why insurance, we submit, has its own
 3 causation test and they are founded in some general
 4 principles of causation but they have to be applied in
 5 the context of an insurance policy.
 6 MR JUSTICE BUTCHER: I see that, Mr Edelman, but you could
 7 have a position where the disease has already caused
 8 a reduction in turnover before there have been any
 9 restrictions imposed by a public authority.
 10 MR EDELMAN: Quite.
 11 MR JUSTICE BUTCHER: And still more before there has been an
 12 occurrence of an infectious disease in the vicinity, if
 13 that is part of the clause.
 14 Now, as I understand it you don't, at least in this
 15 action, suggest that there can be recovery for that
 16 downturn before those matters have happened.
 17 MR EDELMAN: The answer to that is yes. But there is one
 18 further question which arises.
 19 MR JUSTICE BUTCHER: You can come back to that in a second.
 20 You say it is only once there has been the
 21 occurrence of all the features, then, you say, there is
 22 then recovery for that part of the loss, part of the
 23 interruption, which arises from that combination of
 24 matters from that date, effectively. Is that right?
 25 MR EDELMAN: Certainly you only recover your loss as from

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1 that date. So to that extent it is rather like the New
 2 World Harbourview case where, although there were losses
 3 prior to the disease becoming notifiable, because
 4 notifiability was one of the ingredients, as it is in
 5 this clause, you can't recover for any losses before the
 6 disease becomes notifiable. That is just one of the
 7 ingredients and that is just tough, that is what the
 8 policy says, that is when it kicks in. So that is
 9 a dating issue. And on the dating issue, I entirely
 10 agree they are not insuring the disease separately, only
 11 when it operates in combination with all these factors.
 12 LORD JUSTICE FLAUX: Likewise, presumably to the extent loss
 13 is suffered before the restriction is imposed.
 14 MR EDELMAN: Well, now that raises the question that I was
 15 discussing with the point in New World Harbourview.
 16 Because ordinarily one might say yes to that; you have
 17 got to take the standard turnover, and if you are in the
 18 contractual machinery, the standard turnover would take
 19 you up to and including the depression of turnover.
 20 Then would you say: well, there was already a depression
 21 of turnover because of the disease? But then you get --
 22 this is why this is a rather curious and fairly unique
 23 element in business interruption insurance extensions,
 24 because if what you are accepting is that you are taking
 25 everything out from the date that everything was

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1 satisfied, that is on the basis that you are taking out
 2 the causes of the interruption, what do you do about one
 3 of the causes where the parties must have contemplated
 4 that it would be a developing cause?
 5 This is the issue with diseases. Because by giving
 6 this cover for disease, the parties must be
 7 contemplating, amongst the spectrum of possibilities,
 8 not the only one, because you can have just some, as
 9 I said, local outbreak of measles or mumps, but in the
 10 spectrum they will be contemplating that a disease could
 11 emerge which could become notifiable and which could --
 12 MR JUSTICE BUTCHER: Then you are doing better, Mr Edelman,
 13 aren't you, by reference to the trends clause, than you
 14 are by reference to the primary insurance clause?
 15 Because if the disease has caused interference or
 16 interruption with the business before the restriction,
 17 for the purposes of the basic insuring clause, why do
 18 you do better under the trends clause by taking out that
 19 part of the deterioration in the business for that
 20 clause?
 21 LORD JUSTICE FLAUX: It is the same point, isn't it, as in
 22 relation -- you said it is a timing point, but I mean if
 23 we say, let's just fix for the moment and let's just say
 24 that under this wording which we are looking at, the
 25 Hiscox wording, that the restrictions imposed by

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1 a public authority, the first relevant restrictions are
 2 on 20 March. By 20 March there is already a downturn in
 3 the insured's business, but the various conditions for
 4 cover are not satisfied until 20 March. On orthodox
 5 principles I would have thought that you cannot recover
 6 under the policy for the downturn in the business before
 7 all the various components of the insurance were
 8 satisfied.
 9 MR EDELMAN: That is right. I'm not saying that you can
 10 recover from it. But when you are assessing what the
 11 loss is from 20 March -- this is the point -- when you
 12 are assessing the loss from 20 March, do you take into
 13 account as your starting point that there had been
 14 a reduction in turnover because of what I would call the
 15 lead up to that all being triggered?
 16 I fully accept --
 17 LORD JUSTICE FLAUX: It wasn't insured. Until 20 March it
 18 wasn't insured. It is a different factual scenario, but
 19 why is it different from your example of the Michelin
 20 star chef who hands in his notice three days before the
 21 relevant restriction is imposed? None of it is insured
 22 until 20 March, on this hypothesis. So don't you have
 23 to compare the position as it was immediately before,
 24 with what has happened?
 25 MR EDELMAN: That depends on what one infers as to the

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1 contractual intent when within the peril that you are
 2 insuring is something like a notifiable disease.
 3 I accept entirely my Lord's point about the chef,
 4 and for most situations things that happen that affect
 5 your turnover before the peril as a whole bites have to
 6 be taken into account.
 7 The question is: what would the parties be
 8 contemplating when they are insuring this sort of peril?
 9 What they would be contemplating is that diseases,
 10 unlike the chef leaving, diseases are not just not there
 11 one day and there the next. This is necessarily, if
 12 it is contemplating potentially an epidemic, not only,
 13 but potentially, that's within its purview, it is
 14 necessarily contemplating that the disease itself will
 15 be an emerging thing.
 16 The loss isn't payable until the emerging thing
 17 causes the various stipulated effects. Then it is
 18 a matter really of inferred intention when one comes to
 19 the asset adjustment. Is it then intended -- because
 20 you have obviously got something that has become so
 21 serious, either locally or nationally, so serious that
 22 restrictions are being imposed which make you unable to
 23 use your premises to the extent my Lords decide that
 24 phrase applies.
 25 So it is necessarily contemplating an emerging

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1 situation. Very unlike all the other perils, which will
 2 be suddenly occurring, and you can say: well, before it
 3 it was like this, and after it it is like that. That is
 4 why I said this is a very different and unique sort of
 5 peril. And if one says all these disease-type
 6 emergency, danger, are contemplating something which
 7 could be an emerging problem which grows and grows until
 8 it reaches a stage where it is so serious that the
 9 authorities have to intervene, and intervene in a way
 10 which affects your use of the premises or access to your
 11 premises, then what are they contemplating about the
 12 insurance cover? Because if they say: ah well, yes, we
 13 appreciate that for it to have got to the stage where
 14 the authorities are intervening it must have got really
 15 serious, either locally or nationally, but actually for
 16 your business interruption, although it doesn't start
 17 until the ingredients are there, we are going to take
 18 into account all of the effects of this emerging
 19 problem, so you get virtually nothing for your
 20 indemnity, or you get 50% of your loss going forward.
 21 We would say, and you know, it's a matter of
 22 expressly, there is no law that one can use for it, but
 23 it is really what the policy is contemplating, the sort
 24 of problem, and how the business interruption
 25 calculation is supposed to apply.

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1 Once you have identified that you are taking out the
 2 disease, isn't the logical thing to be taking out of
 3 account the effects of the disease of the same epidemic
 4 prior to the date of notifiability as well? Because
 5 that is something that everyone would have contemplated,
 6 an emerging of --
 7 MR JUSTICE BUTCHER: I see that, Mr Edelman, but this is
 8 a stage further.
 9 LORD JUSTICE FLAUX: Yes, I don't --
 10 MR JUSTICE BUTCHER: Supposing I am prepared to go along
 11 with you that we take everything out, which is the
 12 insured peril, and we take it all out, this is
 13 nevertheless a further argument, it's a step further.
 14 MR EDELMAN: Yes, it is. Absolutely, 100% a step further.
 15 LORD JUSTICE FLAUX: Therefore, two things about it. We
 16 will be assisted by the Hong Kong case you referred us
 17 to, will we?
 18 MR EDELMAN: The point wasn't argued there. They just
 19 argued about the application of the trends clause --
 20 sorry, of the standard revenue. They had the standard
 21 revenue and they were arguing about the date of it. So
 22 they didn't get on to, the parties in that case didn't
 23 actually argue: even if that is the date, you shouldn't
 24 be depressing the turnover. So you won't be helped by
 25 it because the point didn't arise.

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1 LORD JUSTICE FLAUX: So this is an Edelman point, as it
 2 were. There is no authority to support it.
 3 MR EDELMAN: No.
 4 LORD JUSTICE FLAUX: The other thing, can I just say this
 5 about it, obviously we will have to think about it,
 6 although at the moment it seems to me to be quite
 7 ambitious, if you don't mind my saying so, some of the
 8 wording -- I forget whose wording it is -- in RSA one of
 9 the wordings actually talks about, actually backdates
 10 the notifiability point to an earlier date.
 11 MR EDELMAN: Yes, it is, it is RSA3, my Lord. And the
 12 important point is that is the strongest possible
 13 evidence of insurers' understanding of what sort of
 14 peril they are dealing with.
 15 LORD JUSTICE FLAUX: It might also be said that if you are
 16 right, then you are only right in a situation where the
 17 parties have expressly contemplated that, as they have
 18 in that wording.
 19 MR EDELMAN: My Lord, what that is doing is it is backdating
 20 the inception of cover.
 21 LORD JUSTICE FLAUX: Yes.
 22 MR EDELMAN: That is the first point.
 23 LORD JUSTICE FLAUX: Yes.
 24 MR EDELMAN: What that is doing is saying: although we only
 25 cover for notifiable disease having this effect, we will

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1 reverse New World Harbourview and treat the disease as
 2 being notifiable from an earlier date. So it's the
 3 trigger, it is the trigger date.
 4 LORD JUSTICE FLAUX: So if all other matters were
 5 satisfied --
 6 MR EDELMAN: RSA4, I think it is, not 3.
 7 LORD JUSTICE FLAUX: -- your point would work on the express
 8 wording of that clause.
 9 MR EDELMAN: You wouldn't need to -- because I think that is
 10 just a notifiable disease.
 11 LORD JUSTICE FLAUX: I follow the point. I follow the
 12 point.
 13 MR EDELMAN: It wouldn't matter.
 14 LORD JUSTICE FLAUX: Anyway, we have probably taken up
 15 enough time on that.
 16 MR EDELMAN: Can I just briefly finish Hiscox, because we
 17 have a lot of policies to get through today.
 18 Perhaps if I briefly say something about the NDDA
 19 clause, the counterfactual on that. The question arises
 20 again as to whether the denial or hindrance in access
 21 resulted from an incident within 1 mile of the vicinity.
 22 So the difference here is that where the occurrence of
 23 a disease refers to the disease incidence, here we have
 24 not got -- we have got an incident, and we say that
 25 either the incident is a national one, or if it is

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1 a local one the same issues apply. And we say the
 2 government orders plainly did result from the broader
 3 incident.
 4 But I think we ought to move on and I will let
 5 Ms Mulcahy take over with Arch. I think I have probably
 6 said as much as I should say about Hiscox and I will let
 7 her take over.
 8 (10.35 am)
 9 Submissions by MS MULCAHY
 10 MS MULCAHY: My Lords, I am dealing with Arch and I am going
 11 to start with a very brief preliminary matter.
 12 Paragraph 23 of Arch's skeleton, which is at
 13 {1/7/11}, if we can bring that up on the screen, says
 14 that:
 15 "It is common ground that the main BI cover does not
 16 respond because there is no relevant damage to property
 17 and that the extension for disease does not respond
 18 because it applies to a closed list ..."
 19 Et cetera. As Mr Edelman pointed out on Monday,
 20 that is not common ground. These are simply points that
 21 are not being tested or advanced in this case, and it
 22 doesn't represent any concession that such clauses do
 23 not respond to COVID losses. It will be open to
 24 policyholders to test those elsewhere.
 25 On the issues that are being tested, there is in

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1 fact quite a lot of common ground between Arch and the
 2 FCA.
 3 It is agreed that all of the actions relied on by
 4 the FCA were actions or advice of government due to an
 5 emergency which is likely to endanger life.
 6 There is no vicinity requirement in the Arch policy;
 7 it covers emergencies anywhere.
 8 There is no interruption or interference
 9 requirement, and Arch doesn't seek to imply one, unlike
 10 the property damage BI clause that we will look at in a
 11 moment.
 12 So it is insuring loss resulting from prevention of
 13 access, and there is no dispute that COVID-19 was an
 14 emergency; or as to the date from which the FCA alleges
 15 that there was an emergency, 3 March of this year, that
 16 is admitted.
 17 There is no suggestion that if a disease is not on
 18 a list in the disease clause that it is excluded from
 19 cover under that clause and under the clause relating to
 20 government action; and we will compare the arguments
 21 made by Zurich later in that regard.
 22 So there is a lot of common ground. There is
 23 a limited dispute and it relates to two matters.
 24 The first what is amounts to a prevention of access.
 25 Arch says you can only have a prevention of access where

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1 there is full closure, and the FCA says part closure
 2 will suffice.
 3 The second issue is causation. Arch's
 4 counterfactual seems to be that it involves removing the
 5 government action causing prevention of access to all
 6 premises nationwide. So they accept there is an
 7 inextricably linked point that the national action is
 8 what should be removed, not just action as applicable to
 9 the insured premises. The FCA says the same should also
 10 apply to the emergency, that you should assume there is
 11 no emergency nationwide.
 12 With that introduction, let's look at the policies.
 13 Arch's policies relate to all categories other than
 14 category 6, so there is no holiday accommodation, but
 15 other than that it applies to all the other businesses.
 16 There are three wordings on materially the same, or
 17 similar cover terms. There are some differences on
 18 quantum machinery and trends, but they are essentially
 19 materially the same.
 20 The lead policy is the commercial combined policy,
 21 and that is at {B/2/1} in the bundle, and the relevant
 22 section on business interruption, which is entitled
 23 "Revenue Protection Insurance" is on page {B/2/33} of
 24 that tab.
 25 We can see at the top it is applicable only if

24

1 stated in the schedule.
 2 The premises property damage BI cover appears on the
 3 next page, {B/2/34} of this tab, and you will see under
 4 "Gross Profit":
 5 "In respect of each item in the schedule, we will
 6 indemnify you in respect of any interruption or
 7 interference with the business as a result of damage
 8 occurring during the period of insurance by ..."
 9 Any cause not excluded, or a defined contingency.
 10 That is the main property damage cover. There is an
 11 extension, we see on the next page, towards the top of
 12 the second column, for additional increased cost of
 13 working.
 14 Then we come to the extensions, which is again on
 15 the right-hand side under "Clauses" where it is said:
 16 "We will also indemnify you in respect of reduction
 17 in turnover and increase in cost of working as insured
 18 under this section resulting from ..."
 19 Then there are a number of extensions. The
 20 "turnover" definition is back on the previous page,
 21 page 34, towards the top on the left:
 22 "Money paid or payable to you for:
 23 "(a) goods sold and delivered.
 24 "(b) services provided.
 25 "in the course of the business at the premises."

25

1 Both of those are defined by reference to the
 2 schedule. So it is the "business" in the schedule at
 3 the "premises" in the schedule.
 4 So this is insurance for lost revenue of
 5 a particular type of business at particular premises.
 6 If we can go back to page {B/2/35}, towards the
 7 bottom we will see that one of the extensions relates to
 8 disease, and it includes at (3)(c):
 9 "Notifiable human infectious or contagious disease
 10 within a 25-mile radius."
 11 If we go back to page {B/2/33} we can see there is
 12 a list of a notifiable human infectious on the rights
 13 towards the bottom, which doesn't include COVID. And
 14 the FCA is not seeking to argue that that is not
 15 exhaustive but, as I have said, it is open to
 16 policyholders to do so.
 17 If I turn now to its clause that is being tested,
 18 it is clause 7, on page {B/2/36} entitled "Government or
 19 Local Authority Action", at the top right.
 20 We can see there, as I said the previous page made
 21 it clear that it is covering loss of turnover, reduction
 22 in turnover, increased costs of working, resulting from,
 23 and then we have:
 24 "Prevention of access to the premises due to the
 25 actions or advice of a government or local authority due

26

1 to an emergency which is likely to endanger life or
 2 property.
 3 "We will not indemnify you in respect of:
 4 "Any incident lasting less than 12 hours.
 5 "Any period other than the actual period when the
 6 access to the premises was prevented.
 7 "A notifiable human infectious or contagious disease
 8 ... occurring at the premises."
 9 Then:
 10 "The maximum mull we will way under this clause is
 11 £25,000, or the business interruption sum insured or
 12 limit shown in the schedule ..."
 13 So there is a sub-limit.
 14 Turning to the first issue, which is prevention of
 15 access, the trigger includes advice. So "prevention"
 16 must take a meaning that allows for it to be satisfied
 17 by advice. That is agreed.
 18 The clause doesn't say whose access must be
 19 prevented, so it can be anyone where it results in
 20 reduction in turnover; it can be owners, it can be
 21 employees or it can be customers.
 22 It is, of course, prevention of access to certain
 23 premises in the context of revenue protection for
 24 a business carried out at the premises. So it must be
 25 read commercially; the access has to be relevant to its

27

1 effects on revenue.
 2 The FCA's case is the same as in relation to Hiscox.
 3 It is that the stay at home requirement and the other
 4 restrictions from 16 March were prevention of access for
 5 all businesses. Arch disagrees with that.
 6 The FCA's case is also that where businesses were
 7 ordered to close or cease business, whether that was on
 8 20, 21, 23, 24 or 26 March, including the regulations,
 9 the 21 and 26 March regulations, we say that that
 10 counts, and there is some limited agreement in relation
 11 to this.
 12 So looking at Arch's position, it makes a number of
 13 very sensible concessions. If we can start with
 14 paragraph 38 of its skeleton, it is {1/7/15}. Arch, at
 15 paragraph 38, accepts that prevention of access does not
 16 literally require that access is prevented, in the sense
 17 of being physically impossible or obstructed. It's
 18 accepted that it rather relates to whether it stops
 19 access to the premises for the purposes of carrying on
 20 the business.
 21 Arch also accepts that being ordered to cease
 22 business amounts to prevention of access, even though
 23 the premises are not literally closed. We can see that
 24 from paragraph 67 on page {1/7/22} of this document. So
 25 for example, they accept that with category 2 cinemas,

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1 theatres, et cetera, the 20 March instructions, the 21
2 and 26 March regulations amounted to a prevention of
3 access because it is ordered to cease carrying on
4 business.

5 It is also accepted that category 4 shops, those are
6 non-essential shops offering goods for sale or hire, and
7 category 7, places of worship, have access prevented by
8 the 23 March instructions. That is their skeleton at
9 paragraph 66, and it is also set out in annex A in
10 relations to categories 4 and 7.

11 They also accept that there is prevention of access
12 for category 1 businesses, these are the restaurants,
13 pubs, et cetera, where they did not previously carry out
14 a take-away business and when they were ordered to close
15 on 20 March or in the two sets of regulations, it is
16 accepted that that is prevention of access.

17 Where the parties differ, and Arch says there is no
18 prevention, is where a business continued a pre-existing
19 take-away or it had a pre-existing take-away business.
20 We see that from Arch's skeleton at paragraph 68, which
21 is on the screen {1/7/22}, or where a category 4
22 business continued a mail order business, even if it was
23 only part of their business.

24 It is also said if a business was permitted to stay
25 open despite the stay at home orders prohibiting

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1 customers from attending, and the other social
2 distancing requirements, for categories 3 and 5 it says
3 there was no prevention of access.

4 Again, in relation to school, it says if they were
5 teaching critical workers' children or vulnerable
6 children there was no prevention of access, and it says
7 that in relation to annex A, category 7.

8 Mr Edelman has addressed this already in relation to
9 Hiscox, and we say that position is entirely
10 unrealistic. For example with category 1, Arch is
11 saying no prevention if a restaurant continued an
12 existing take-away business, because what is said is
13 that the policyholder, this is paragraph 64 {1/7/21}
14 because the policyholder could continue part of the
15 insured business from the premises, and access to the
16 premises was not prevented. But if you had a bar which
17 would sell the occasional sandwich to customers, and
18 they decided not to stay open in order to sell those
19 occasional sandwiches to customers, then there is
20 a prevention of access to the premises. So we say that
21 there is still a prevention of access, notwithstanding
22 that there may have been a part of the business which
23 does take-away.

24 In relation to category 2, Arch accepts there is
25 a prevention of access by the 20 March instruction and

30

1 by the regulations. What the 26 March regulations did,
2 and they did it for the first time and following the
3 instruction and following 21 March regulations, was they
4 introduced an exception. They introduced an exception
5 for broadcasting to viewers outside the premises and for
6 hosting blood donations.

7 So if we assume that a small part of the
8 pre-existing business included broadcasting outside the
9 premises, what is Arch saying, that there was only
10 recovery for five or six days from 20 March until
11 26 March, when that part of the business is allowed to
12 be resurrected? We would say, why should a small
13 sideline of that kind lose the insured all cover? Its
14 core business of being a theatre, having customers come
15 and watch events, is over.

16 So far as category 4, non-essential shops, is
17 concerned, it is the same principle. The 23 March
18 announcement said that they must close and that was
19 unqualified. The qualification permitting mail order
20 was then included in the 26 March regulations, and arch
21 says that the shops which already had a mail order
22 business have suffered no prevention. That is in
23 annex A, category 4.

24 So if we posit an independent bookshop in a village,
25 which may have no website but has a telephone and

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1 receives a couple of telephone orders a year from an
2 elderly man who cannot easily leave his home, then it is
3 being said, in effect, that the 26 March regulations
4 allow access to the shop, because of those two telephone
5 orders a year, whereas if there had been no orders,
6 access would have been prevented. And query whether
7 a willingness to take telephone orders means there is
8 a continuing part of the business even if it had no
9 orders in fact.

10 It may be said this is de minimis, and try to apply
11 some sort of line of that kind, but we say it is the
12 same principle; whether the telephone orders were 20% or
13 50% or 70% of the business, there was still a prevention
14 of access to the premises for a part of its business.
15 The percentage merely affects the degree of loss.

16 Similarly in relation to places of worship, there
17 was an exclusion and exemption for funerals. Arch isn't
18 taking that point, but its logic would say that there is
19 no prevention of access because you could still access
20 for the purposes of conducting funerals.

21 Schools. Mr Edelman has covered this point already.
22 It was announced that schools would close other than for
23 teachers, key workers' children and vulnerable children
24 for the purposes of teaching those pupils. But the
25 schools closed to the vast majority of pupils. If

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1 a school is, in this context, unlucky enough to have to
2 teach a key worker's child or vulnerable child, then
3 they have no prevention of access. If they don't have
4 to do so, there is no access.

5 Arch says full versus partial closure is a clear
6 line in the sand. They say this in annex C, page 3 in
7 the bottom line. But we would say that is absurdly
8 formalistic, especially when Arch sensibly accepts that
9 prevention of access doesn't mean physical impossibility
10 for all purposes.

11 Another difficult aspect to understand is why it is
12 being said that it is only if category 1 or category 4
13 businesses previously provided take-away or mail order
14 services that its business is prevented. That is said
15 in paragraph 63 of Arch's skeleton.

16 If a business, and it has a duty to mitigate its
17 loss, we can see that from condition 1(a) on page
18 {B/2/38}, it is obliged to take any action reasonably
19 practicable to minimise any interruption of or
20 interference with the business or to avoid or diminish
21 its loss, so if it introduces a take-away or a mail
22 order business to mitigate its loss in order to try and
23 maintain some revenue, on the logic of the rest of
24 Arch's case that has ended its prevention of access.

25 It should be noted, if we go back to the insuring

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1 clause on page 36, exclusion 2 excludes indemnity for
2 any period other than the actual period when the access
3 to the premises was prevented.

4 So we say it is illogical. This is not a clear
5 dividing line, it is illogical. Why, on Arch's case, is
6 a business starting take-away or mail order to mitigate
7 its loss not also losing its prevention of access by
8 virtue of doing that? It doesn't make sense.

9 Categories 3 and 5 Mr Edelman has dealt with, and
10 the same point arises. Customers could only make
11 essential trips to hardware stores, et cetera. So you
12 might be able to go in and buy a light bulb or
13 a battery, but you couldn't go and just buy DIY products
14 unless they were essential. So there would have been
15 a reduction in trade.

16 Similarly, for the service industries, you couldn't
17 travel or have contact unless it was essential. And
18 query how often a visit to a financial adviser or an
19 accountant at that point in time was likely to be
20 essential.

21 So we say that the prevention of access was caused
22 by the advice of the 16 March, repeated subsequently and
23 leading to regulation 6 on 26 March in the regulations
24 to avoid non-essential travel and contact. We say there
25 just is no line in the sand. Partial prevention of

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1 access is prevention of access to the premises for the
2 purposes of carrying on the business at the premises;
3 and, as Arch accepts, it doesn't have to be the case
4 that access is physically impossible, it is about
5 whether the premises could not carry on the business,
6 and we say that is the normal business of the premises.
7 If it is able to carry on in part, that goes to reduce
8 loss as a matter of quantification, but there is still
9 cover.

10 The only other issue on prevention of access is the
11 date, where we say 16 March was when everybody was told
12 to stop non-essential contact and stop all unnecessary
13 travel and to avoid going to pubs, clubs and theatres;
14 and the purpose of that was to prevent people from going
15 to pubs, clubs and theatres and not to travel.

16 So we say the government took action, or at least it
17 was advice, by instructing them not to do so, and the
18 public followed that advice and that prevented access.
19 This is not wordplay, it is the ordinary meaning of the
20 words. Prevention wasn't a mere by-product of the
21 government action, it was the whole point. And if a pub
22 was empty by 17 March, that was because its customers
23 had been prevented from accessing it. And since Arch
24 accepts that even a recommendation counts as
25 a prevention, we say there was a prevention of access

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1 from 16 March.

2 I turn now to the final issue, which is causation.
3 Arch accepts that where premises were required to be
4 closed, which, as I have said, it accepts occurred for
5 at least category 2, the cover is engaged save for
6 causation of loss.

7 So it accepts that for some businesses there was
8 prevention of access to the premises due to actions or
9 advice of a government due to an emergency anywhere or
10 everywhere which is likely to endanger life. So no
11 vicinity requirement in relation to where the emergency
12 must occur. So it is effectively accepting that the
13 policy responds to the national emergency, to the
14 national pandemic.

15 It doesn't dispute that the prevention was due to
16 actions or advice, or that actions or advice were due to
17 the emergency. But what they say you do is you remove
18 the insured peril of the government action preventing
19 access, but not the emergency or its other consequences.

20 We can see that most closely in its defence at
21 paragraph 7.12 to 7.13, it is at {A/7/5}. They make it
22 clear there:

23 "The burden of proving a right to an indemnity is on
24 the policyholder. On the proper construction of Arch 1
25 and on established principles of causation, where

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1 a policyholder has shown the government ... action
 2 clause has been triggered by reason of a qualifying
 3 prevention of access, the policyholder must then
 4 establish on the balance of probabilities that the
 5 prevention of access (the insured peril) [it says] has
 6 caused business interruption loss ... At a minimum, the
 7 policyholder must show the prevention of access to the
 8 premises is a 'but for' cause of loss.

9 "For these purposes, the appropriate counterfactual
 10 scenario is where there was no insured peril ..."

11 Then it says:

12 "... ie no government or local authority action or
 13 advice preventing access to the premises, but where all
 14 other factors remain unchanged."

15 Then it sets out a list, including that COVID-19
 16 existed in all or most parts of the UK; various other
 17 control measures remained enforce, including advice on
 18 social distancing, the lockdown, self-isolation
 19 requirements; and then the control measures affecting
 20 employment, consumer behaviour, economic activity,
 21 confidence, et cetera.

22 So they are saying all of that public authority
 23 action falling short of prevention means, for the
 24 purposes of the counterfactual, it is all still there.
 25 Then it is alleged that the loss would have been

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1 suffered anyway. We see that in Arch's skeleton at
 2 paragraphs 127 to 131, which is at {1/7/36}. We have
 3 addressed this before, so I am going to take this very
 4 briefly.

5 LORD JUSTICE FLAUX: This is essentially the same argument
 6 as is being run by all the insurers, isn't it?

7 MS MULCAHY: It is exactly the same. A different clause,
 8 but the same argument.

9 LORD JUSTICE FLAUX: There is a trends clause, is there?

10 MS MULCAHY: There is a basis of settlement clause which we
 11 accept applies, despite referring to damage.

12 LORD JUSTICE FLAUX: Where is that?

13 MS MULCAHY: That is --

14 LORD JUSTICE FLAUX: Page 34, I think.

15 MS MULCAHY: Yes, that is right. That is right. And we
 16 have the insurance on gross profits is limited to loss
 17 due to reduction in turnover and increase in cost of
 18 working. Then it explains what it will pay. And it has
 19 the words "which but for such additional expense would
 20 have taken place due to the damage". So ...

21 MR JUSTICE BUTCHER: Your basic point here is that once you
 22 have got the restriction of access it becomes really
 23 impossible to distinguish between these things, and
 24 indeed it is not really the fault of the insured that
 25 they didn't distinguish between these things because it

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1 is a government regulation in the first place.

2 MS MULCAHY: We say there are three elements here. We have
 3 the prevention of access, element 1; due to actions of
 4 advice or government, element 2; due to an emergency
 5 likely to endanger life, element 3. They have said if
 6 you want to be formalistic about it, the peril is the
 7 prevention of access. So they say, fine, you have
 8 stripped that out.

9 They then go on and remove element 2 as well, they
 10 take out the government action or advice; but not just
 11 the government action and advice affecting the insured
 12 premises, they also take out all government action
 13 nationwide as it applies to all premises.

14 We say you must also remove element 3, the emergency
 15 likely to endanger life; it is a further requirement for
 16 cover, it is the underlying cause which forms part of
 17 the trigger chain, and it results in the government
 18 action which then results in the prevention of access.

19 So we say it is not the case that you leave that in,
 20 you remove that too; you don't set it up as a rival
 21 competing cause for what is being said to be the insured
 22 peril.

23 Just going back to Mr Edelman's lorry spill example,
 24 we say a clause like this should be read as providing
 25 cover where the emergency is of sufficient seriousness

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1 as to cause there to be action by the authorities, and
 2 if that then has the specified effect on the insured
 3 it is covered; and any counterfactual that then seeks to
 4 treat only the action by the authorities as insured is
 5 wholly artificial, and it would render cover illusory
 6 for the sorts of serious emergencies that the cover is
 7 clearly contemplating. So we say the emergency is an
 8 integral part of the cover. It is contemplated. It may
 9 not be sufficient in itself to trigger indemnity,
 10 because you need all three elements. But just as action
 11 by the police or authorities having the specified effect
 12 wouldn't be sufficient in itself, without something that
 13 could be properly classified as an emergency. So you
 14 take them altogether.

15 LORD JUSTICE FLAUX: The prevention of access in the
 16 abstract is meaningless, isn't it?

17 MS MULCAHY: No doubt that is why they have married elements
 18 1 and 2 and then subtracted those. But as I said, in
 19 relation to element 2 they haven't just said it is
 20 action or advice affecting the premises, they have said
 21 it is nationwide action or advice. And we apply the
 22 same logic to element 3 and say it must be the
 23 nationwide emergency.

24 One other factor, it is said by Arch to be
 25 irrelevant, but we say, you know, this cover has

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1 a £25,000 limit and you have to bear that in mind as
2 well when you get into looking at what their case
3 entails. Effectively, you have to model a world
4 with the emergency still in it but without the
5 government action affecting access to the premises, and
6 how that would or would not have economically affected
7 the insured.

8 Arch shy away from addressing that by saying it
9 can't be resolved in the test case. If you look at
10 paragraph 135, I think it starts at page 38 and goes
11 across to page 39 of the skeleton in the document that
12 we are in {1/7/38}, it makes it clear that our case on
13 burden of proof is also incorrect, the policyholder
14 bears the legal burden:

15 "There is nothing in the Arch policies to suggest
16 the burden of proof is reversed."

17 I hope I have explained our case on that:

18 "How, in a particular case [if we could go over to
19 the next page] the policyholder may discharge its
20 burden, and how (as a matter of practice) Arch may seek
21 to show how the economic effects of the pandemic, the
22 economic downturn, et cetera, would have affected the
23 policyholder's business even if it had not been required
24 to close the premises, are not matters that can sensibly
25 be resolved in a test case ..."

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1 But that is where the analysis of the insurers
2 leads, the necessity for that type of economic
3 modelling.
4 LORD JUSTICE FLAUX: If they are right as a matter of
5 principle, then that would follow, wouldn't it? But you
6 say it's for us to decide in the test case whether they
7 are right or wrong as a matter of principle. If you are
8 right that the three elements you have identified all
9 have to be excised in order to do the counterfactual
10 exercise, then that is the conclusion that we will
11 reach, and what the effects of that conclusion are in
12 any individual case is, of course, not for this test
13 case.

14 MS MULCAHY: My Lord, exactly. The point I am making is
15 that for cover of £25,000 is it really contemplated that
16 one would have the sort of economic modelling evidence
17 that appears to be being suggested here.

18 LORD JUSTICE FLAUX: Yes, I understand.

19 MS MULCAHY: We would say deploy the low limit in aid of
20 that construction, is that really what is being
21 contemplated by the clause?

22 In practice, Arch says it is offering 35% to reflect
23 a guess, it seems, that 65% of the loss is caused by
24 what it says are uninsured concurring causes. We see
25 that at paragraph 14 of its skeleton on page 8, and it

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1 says that is a fair and reasonable gesture, in annex C
2 at row 463. But we can see it says it is paying 35%.
3 No basis is given for that figure, nor can insureds
4 dispute it.

5 Our response to that is that it is wrong as a matter
6 of principle. The emergency should be treated as part
7 of the insured peril for this purpose; alternatively,
8 not excised from the counterfactual because it is
9 contemplated by the insuring clause, and loss adjustment
10 is not supposed to be merely a discretion for an
11 insurer.

12 My Lords, those are my submissions in relation to
13 Arch, and I will hand back now to Mr Edelman, who
14 I think is dealing with QBE.

15 (11.06 am)

16 Submissions by MR EDELMAN

17 MR EDELMAN: My Lords, that is correct, if I can now start
18 dealing with QBE.

19 We have got three versions of policies for QBE. The
20 first is QBE1, at {B/13/31} for the relevant clause, is
21 7.3.9:

22 "Interruption of or interference with the business
23 arising from any human infectious or human contagious
24 disease [excluding certain diseases], an outbreak of
25 which local authority stipulated shall be notified to

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1 them manifested by any person whilst in the premises or
2 within a 25-mile radius of it."

3 QBE2 is at {B/14/29}, and it is similar language:

4 "Loss resulting from interruption of or interference
5 with the business in consequence of any of the following
6 events ... any occurrence of a notifiable disease within
7 a radius of 25 miles."

8 Then QBE3 at page 22, that is {B/15/22}, and that
9 lower part of the page:

10 "Loss resulting from interruption or interference to
11 the business as covered by this section ..."

12 Then (b):

13 "Any occurrence of a notifiable disease within
14 a radius of 1 mile of the premises."

15 You may recollect my referring to that distinction
16 and the fact that QBE's written submissions focus on
17 1 mile, without focusing on the 25-mile clauses.

18 The QBE defence is in fact principally one of
19 causation and there is only a little bit more that
20 I want to say about that.

21 There are no coverage points of substance aside from
22 a proof of occurrence, and I have dealt with that under
23 prevalence. There is a pollution and micro-organism
24 exclusion in the policy, but QBE doesn't rely on that.

25 They accept that there is an occurrence of COVID-19

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1 when a person contracts the disease and it was
 2 diagnosable; they accept that point. If you want it,
 3 that is paragraphs 201 and 202 of their skeleton.
 4 We understand them to accept that there is no
 5 difference in principle between "occurrence" and
 6 "manifestation" -- slightly different wordings, as you
 7 saw -- provided that an inference can be drawn from the
 8 available evidence that there were COVID-19 cases,
 9 whether diagnosed or otherwise, within the relevant
 10 area.
 11 But their particular point on causation is they say
 12 it's difficult to see how there could be a business
 13 interruption loss to an insured caused by an occurrence,
 14 in circumstances where the insured and its customers
 15 have no knowledge of the fact that, for example, someone
 16 with COVID had been at the premises or within the policy
 17 area.
 18 We say knowledge isn't required. If, as a matter of
 19 fact, the government has acted in part in response to
 20 the presence of cases within the requisite area, whether
 21 inferred or actually identified, then the resulting
 22 disruption is caused by the presence of the disease
 23 whether the policyholder or its customers know about it
 24 or not. This is the causation issue.
 25 Can I move on then to the particular terms of the

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1 clauses. If we go back to QBE1, which is {B/13/31}.
 2 It is important, we say, to analyse what this clause is
 3 about. It is setting a requirement for the disease to
 4 occur within the requisite area, and it is identifying
 5 that, we submit, as a qualifying condition for cover.
 6 So it is arising from any disease as long as it is
 7 manifested by a person within 25 miles.
 8 We are not arguing, as QBE suggests we are, that the
 9 effect of this is to provide cover for an occurrence of
 10 disease beyond the 25-mile radius zone. We recognise
 11 and accept that there is a qualifying condition that the
 12 disease must have manifested itself within the 25-mile
 13 radius. Where the disease outside that radius comes in
 14 is the circumstances in which the occurrence of what has
 15 occurred within the 25 miles can be regarded as being
 16 properly regarded as causative of the government's
 17 response to the outbreak and the ensuing loss to the
 18 insured's business within that zone.
 19 Before I turn to that, though, can I just deal with
 20 interruption or interference, which appears at the
 21 beginning of these clauses.
 22 QBE accepts that social distancing measures, closure
 23 measures and other human action could in principle cause
 24 interference with the business. So that appears to be
 25 common ground.

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1 QBE accepts that an insured premises does not have
 2 to be forced to cease all of its operations in order to
 3 satisfy the interference test. What they say, the
 4 reference is at {I/17/68}, what is required is an
 5 intermeddling with the business such that it cannot be
 6 operated by the insured as they had originally intended.
 7 We agree with that. So we don't have to get into
 8 a debate about what "interruption" means, because they
 9 have accepted, realistically and sensibly, what
 10 "interference" means. They don't advance any positive
 11 case on that aspect, therefore, to contradict our
 12 argument, but obviously that is all subject to their
 13 causation case.
 14 So can I now turn to the causation issue on QBE,
 15 much of which has been covered, there is only a little
 16 amount that I want to add.
 17 The starting point, and perhaps we can look at their
 18 skeleton for this, it is {I/17/13} -- no, it should be
 19 the next page then {I/17/14}, another page change with
 20 the references being added. It's paragraph 24. Sorry,
 21 the previous page. That was right. Paragraph 24, page
 22 14, please. It says:
 23 "In terms of the sort of circumstances that might be
 24 covered by the 'relevant policy area' aspect of the QBE
 25 disease clauses, the range of potential cases (generally

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1 but also in the particular context of COVID-19 crisis)
 2 are myriad. A localised outbreak of a notifiable
 3 disease, including COVID-19, might lead to a particular
 4 street or square mile (et cetera) being locked down,
 5 even though the rest of the country remains 'open for
 6 business'.
 7 That is what they say is the scope of operation of
 8 their policy. Their causation case appears to be built
 9 on this edifice, that that is what this policy is
 10 insuring.
 11 LORD JUSTICE FLAUX: That can't be right in relation to the
 12 25 miles though, can it?
 13 MR EDELMAN: No. That is "localised" is a bit of an odd
 14 word to use for an area which covers nearly 2,000 square
 15 miles. But let's deal with this even in relation to the
 16 1 mile policy, where it might make a little bit more
 17 sense.
 18 It has at the heart of it an important premise which
 19 needs to be analysed, because what it appears to be
 20 accepting, and is necessarily assuming, is that the
 21 disease will not be the direct cause, in the sense of
 22 the immediate cause, of any interruption or interference
 23 with the insured's business. That, with respect, is
 24 obvious.
 25 What these clauses are all contemplating, as

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1 Mr Howard seems to accept in paragraph 24, is that the
2 authorities will be doing something about it. That is
3 the critical point, because any interruption or
4 interference will be caused by virtue of the response of
5 the authorities to the outbreak, not by the outbreak
6 itself.

7 One can analyse this, and then one then asks
8 oneself: if one is talking about these clauses
9 contemplating that actually what will cause the
10 interruption or interference is the reaction of the
11 authorities to the disease, what is the function of the
12 25-mile or 1 mile restriction? Is it imposing
13 a locality limit or is it merely imposing a qualifying
14 condition, saying that if there is authority reaction to
15 an outbreak of a disease, and that authority action
16 impacts on you, you only have cover if that disease,
17 whether it is elsewhere or not, is present within the
18 defined radius from your premises?

19 That means, let's take Salisbury, I think I may have
20 given this example before, someone who is on the
21 outskirts, who is more than 1 mile from the centre of
22 Salisbury and let's say, you know, I know it is not
23 really a disease case but there is an outbreak of
24 a disease in the centre of Salisbury, and the
25 authorities think they've caught it quickly and there is

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1 only a handful of cases in the centre of Salisbury, but
2 to be on the safe side they shut down Salisbury and its
3 environs, and a business is caught up which is more than
4 1 mile from the centre of Salisbury, it is affected by
5 the government action, but the qualifying condition,
6 that the disease has occurred within 1 mile of the
7 premises, is not satisfied.

8 One can look at this in another way with the
9 notifiability requirement.

10 The notifiability requirement is another qualifying
11 condition. One doesn't construct a counterfactual for
12 the purposes of this clause, even if one was assuming
13 Mr Howard's approach of local outbreak, one doesn't say:
14 ah well, what if a government had not classified the
15 disease as being notifiable until 21 days after the
16 local authority acted? The local authority was quicker
17 off the mark in acting than the government. Or assume
18 that they would have been, as a counterfactual; assume
19 the local authority had acted before the government made
20 it notifiable. One doesn't use that as
21 a counterfactual, it would be nonsense, because
22 notifiability is just a qualifying condition. So ...

23 LORD JUSTICE FLAUX: Is that a convenient moment?

24 MR EDELMAN: Yes. My Lord, I have got very little to say
25 about QBE, so if I could possibly, my Lord, just finish

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1 this topic.

2 LORD JUSTICE FLAUX: Yes.

3 MR EDELMAN: Actually that would be more even in the halves,
4 we would have an hour and 25 minutes for the shorthand
5 writers on both sessions.

6 LORD JUSTICE FLAUX: That is fine.

7 MR EDELMAN: When QBE in the policy -- let's go back to
8 {B/13/31} -- when they use "arising from", let's put to
9 one side causal rules and so on, we know that what it is
10 actually contemplating is the disease outbreak being
11 causally associated with some response from the
12 authorities, and that response being actually what
13 causes the interruption or interference.

14 What we then have as the analysis is that the public
15 authority response, which causes the interruption or
16 interference in fact, is covered by the policy as long
17 as the disease to which the government is reacting is
18 one that is notifiable and it has manifested itself
19 within the 25-mile radius.

20 QBE's entire causation case is in essence premised
21 on the edifice that the entirety of the government
22 action can be put into the counterfactual, despite the
23 prompting role for that action that outbreaks all over
24 the country, including in QBE's relevant policy areas,
25 actually had.

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1 We say, as we have said before and I say this in
2 a sentence, the government was responding to one
3 indivisible occurrence or multiple occurrences which are
4 aggregated as part of a national occurrence to become
5 one combined cause. In reality, if all areas had not
6 been affected to a greater or lesser extent, one can
7 imagine that there wouldn't have been a national
8 lockdown. It was the national picture of all these
9 local outbreaks which caused the lockdown. And when the
10 court considers what caused the application of the
11 government's lockdown measures in any particular
12 locality, the causal effect of local prevalence of the
13 disease is part of that overall indivisible cause or
14 viewed individually by virtue of its contribution to the
15 overall picture, and is an effective cause of the
16 government action.

17 My Lords, I am looking through my notes, and if you
18 could bear with me for another two or three minutes
19 I will be finished QBE entirely.

20 LORD JUSTICE FLAUX: Right.

21 MR EDELMAN: Because I just wanted to say a little bit about
22 the quantification machinery and trends clauses. We
23 have made our submissions as to the application of the
24 adjustment machinery in writing, you have our
25 submissions on Orient-Express. I don't intend to add

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1 anything to that. So although we have made submissions
 2 about whether they apply, even if they do apply we
 3 submit that they are not relevant to this case at all.
 4 My Lord, those are my submissions on QBE.
 5 LORD JUSTICE FLAUX: Okay, we will have a break for ten
 6 minutes, until 25 to 12 then.
 7 (11.25 pm)
 8 (Short break)
 9 (11.35 am)
 10 LORD JUSTICE FLAUX: Are you ready?
 11 MR EDELMAN: Yes, my Lord.
 12 I usually try to avoid coming back to points that
 13 I have argued earlier, but can I just add one further
 14 illustration to try and persuade my Lord of the Edelman
 15 point on prior downturn by giving you an example. And
 16 I hope the fact that it is a Mr Edelman point doesn't
 17 make it all the worse in your eyes.
 18 Let's assume for the poor owner and, if my Lords
 19 decide, the hard done by owner of the hotel in the
 20 Orient-Express case, that prior to the arrival of the
 21 hurricane there had been hurricane warnings, and guests
 22 who were due to stay at the hotel prior to the arrival
 23 of the hurricane cancelled their bookings, and let's say
 24 that, contrary to the result in the case, there was
 25 actually to be a calculation of the loss of turnover of

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1 that hotel, and for that purpose you needed to work out
 2 what its turnover had been prior to the occurrence of
 3 the damage.
 4 Of course, although hurricane would, under that
 5 policy, have been an insured peril in the sense that it
 6 wasn't excluded, the policy is not triggered until it
 7 causes damage to the hotel. But the hurricane is
 8 trundling along through the Gulf of Mexico on its way
 9 towards the hotel and that causes people to either leave
 10 the hotel or not pursue their bookings for periods prior
 11 to the damage.
 12 When the loss assessor is calculating his starting
 13 turnover to use as a comparison to the turnover
 14 following the damage, does he take into account when he
 15 does the 12-month period, it may only be a modest
 16 difference but does he take into account the fall in
 17 turnover that was in those last few days, or does he
 18 say: well, it would be a nonsense to take into account
 19 those few days, so I am going to treat those few days as
 20 if they were standard turnover, because obviously that
 21 was affected by the imminence of the arrival of the
 22 hurricane.
 23 If we --
 24 MR JUSTICE BUTCHER: I agree with you, Mr Edelman, that
 25 highlights the question. I'm not sure it answers it,

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1 but it does --
 2 LORD JUSTICE FLAUX: I agree.
 3 MR JUSTICE BUTCHER: Does Riley deal with this at all or
 4 not?
 5 MR EDELMAN: My Lords, I don't think so, because most things
 6 that happen to buildings are pretty instantaneous; they
 7 are fires, floods, they are things like that, that is
 8 the everyday occurrence, certainly in this country.
 9 Even when we have a storm, a terrible storm, I think we
 10 were told there's nothing to worry about and everything
 11 is going to be all right; the 1987 storm.
 12 So it is a very unusual situation. But I drew that
 13 analogy because, really, if that is the right answer for
 14 the hurricane case, then that is my analogy to this
 15 case.
 16 LORD JUSTICE FLAUX: I understand your point. I'm not sure
 17 I accept it. Speaking for myself, my reaction is it
 18 wasn't insured. But I follow the point. I follow the
 19 point.
 20 MR EDELMAN: No, don't get me wrong, I am not saying that
 21 the loss of turnover in those two or three days before
 22 the hurricane causes damage is insured.
 23 LORD JUSTICE FLAUX: No, but --
 24 MR EDELMAN: That loss and turnover has to be borne by the
 25 insured uninsured. It is the question of when you are

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1 calculating the standard turnover or adjusting the
 2 standard turnover under these clauses, what would be the
 3 parties' intention? That is the question. How is this
 4 intended to operate?
 5 LORD JUSTICE FLAUX: But the effect of calculating it in the
 6 way in which you suggested it should be calculated is
 7 that the insured does recover for something he wouldn't
 8 otherwise have recovered for, does he?
 9 MR EDELMAN: No, no, he never recovers for the lost turnover
 10 in that --
 11 LORD JUSTICE FLAUX: Because you say you ignore the fact
 12 that there has been a reduction in bookings as
 13 a consequence of the imminence of the hurricane in
 14 assessing what the turnover was. So let's say for the
 15 sake of argument up to that point it is a million
 16 dollars, and after the hurricane comes it is zero, so he
 17 gets a million dollars.
 18 But if in fact, as a result of the cancellations of
 19 bookings in the two weeks before the hurricane hit,
 20 it is only \$900,000, and that has to be taken into
 21 account and at the end of the day it is zero, then he
 22 gets \$900,000. So it does affect the amount of the
 23 indemnity.
 24 MR EDELMAN: Of course it affects the amount of the
 25 indemnity but he is not getting the 100,000 loss.

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1 LORD JUSTICE FLAUX: That is debatable, I think, on your
2 argument.
3 MR EDELMAN: What he is getting, my Lord, is he is getting
4 the indemnity for, let's say the ordinary day-to-day
5 turnover would have been a million, and from day one of
6 the damage he is getting loss based on that 1 million
7 not loss based on the 900,000 which was only
8 artificially reduced immediately prior to the damage by
9 the impact of the very thing that caused the loss. Or
10 in our case combined to cause the loss.
11 In a sense, the emergence of this disease is like an
12 approaching hurricane, because it is something that was
13 building up to a crescendo until it reached such a level
14 that the government had to act, and what the insurers
15 are saying is: well, you assume all of the impact of the
16 impending hurricane, and you take that into account when
17 you are assessing what the combined effect of the
18 hurricane and everything else caused; and we say that is
19 nonsense.
20 I had better move on. All I can do is leave the
21 points with my Lords and ask you to reflect on it.
22 LORD JUSTICE FLAUX: We will think about it, don't you
23 worry.
24 MR EDELMAN: Yes, my Lord. I hope you accept that even if
25 it is an Edelman point, it is quite a serious one.

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1 LORD JUSTICE FLAUX: I agree with you, Mr Edelman, it is
2 a serious point, and I see entirely the force of the
3 point, I really do. But I am not convinced that it is
4 necessarily right. But we will think about it.
5 MR EDELMAN: Yes.
6 My Lords, RSA. This is going to be a bit longer
7 than the other policies because there is quite a few
8 variants, not, I would emphasise, because we see there
9 as being any complexity.
10 RSA1 and RSA3 both contain only disease clauses, so
11 I will deal with those policies in full and address
12 those issues before I turn to RSA2.1, 2.2 and then RSA4.
13 So can I start with RSA1, and you will see it at
14 {B/16/1}, which is Cottagesure. It is aimed and
15 directed at holiday cottage owners who rent out their
16 property.
17 The disease clause we are interested in is on page
18 16 on this tab {B/16/16}, and extensions to cover, it is
19 item 2A:
20 "Loss as a result of:
21 "closure or restrictions placed on the premises as
22 a result of a notifiable human disease manifesting
23 itself at the premises or within a radius of 25 miles of
24 the premises."
25 There are some elements to the clause my Lords can

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1 see: closure or restrictions placed on the premises, as
2 a result of a notifiable disease manifesting itself
3 within 25 miles, and it has to result in loss.
4 This one doesn't actually specify, probably because
5 of the nature of the business, that there has to be an
6 interruption or interference; it is just talking about
7 loss.
8 Most of this we have already debated, but just some
9 points that particularly arise on this. My Lords will
10 note that there is a maximum amount of 250,000 on this
11 cover, you will see immediately to the right of the
12 clause. The only words that are really new are "closure
13 or restrictions placed on", but otherwise, as I say, it
14 is very similar. So can I have a look at those words.
15 It is common ground that "closure or restrictions
16 placed on the premises" were satisfied with effect from
17 1.00 pm on 26 March by regulation 5(3) of the 26 March
18 regulations. The references for that is the
19 regulations, we don't need to look at them so please
20 don't turn them up, {J/16/3} and the RSA skeleton,
21 appendix 1, page 5, paragraph 16.
22 So the only issue between the parties is whether
23 this was satisfied before then. RSA is effectively
24 taking the same line on this as Hiscox, albeit not the
25 same line as Arch or Ecclesiastical, arguing that

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1 closure or restrictions needed to have legal force to
2 apply.
3 So the first question is whether the word "placed"
4 applies to the word "closure". We say, you won't be
5 surprised to hear, that it doesn't. The word "placed"
6 is looking at closure. But in any event -- sorry, is
7 looking at --
8 MR JUSTICE BUTCHER: Sorry?
9 MR EDELMAN: The word "placed" is looking at restrictions.
10 I misspoke. But in any event, we say that doesn't
11 really matter.
12 LORD JUSTICE FLAUX: Grammatically it doesn't make sense,
13 because it would be "closure of or restrictions placed
14 on".
15 MR EDELMAN: Yes, maybe the word "of" is missing. But
16 "closure on" also doesn't make sense.
17 LORD JUSTICE FLAUX: "Closure is placed on the premises" I
18 suppose is a rather clunky way of saying it, but it
19 probably doesn't matter, does it?
20 MR EDELMAN: No, it doesn't. Because what I am saying is
21 "placed on", whether it applies to them or not, is even
22 weaker than "imposed". Do you remember we discussed
23 "imposed" in the context of Hiscox? And we submit that
24 what the government did, and you have heard all about
25 that, is sufficient to satisfy the words "placed on".

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1 LORD JUSTICE FLAUX: From when?
 2 MR EDELMAN: From 16 March is our date.
 3 LORD JUSTICE FLAUX: That is the Prime Minister's
 4 announcement or statement: stay at home, don't go away
 5 on holiday.
 6 MR EDELMAN: Exactly.
 7 MR JUSTICE BUTCHER: But the issue here is whether it is
 8 placed on the premises, isn't it?
 9 MR EDELMAN: Yes, and my Lord, effectively we say that one
 10 is looking at the practical impact of this. Is there
 11 a restriction or closure placed on the premises when you
 12 tell people not to go there? You are restricting the
 13 free travel.
 14 What RSA says is that the 16 March announcement did
 15 not restrict free travel in the UK. But what the
 16 Prime Minister in fact said, as my Lord has just said,
 17 "Now is the time for everyone to stop essential contact
 18 with others, avoid unnecessary contact of all kinds".
 19 And we submit that you do place restrictions on the
 20 premises if you place restrictions on the customers
 21 going to the premises. That's what they were doing.
 22 They were telling people, as my Lord just said, "Do not
 23 travel to holiday accommodation". That, we say, is
 24 placing a restriction on the premises, even if it is not
 25 directly identifying the premises as such. That is

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1 essentially our submission.
 2 Then RSA also say that the social distancing
 3 measures in regulation 6 are not relevant restrictions.
 4 Therefore, and this is its causation case, even though
 5 they accept regulation 5(3) on 26 March is a closure,
 6 they say, well, it didn't cause any loss, because
 7 regulation 6 prohibited all customers from travelling,
 8 and that is not restriction placed on the premises.
 9 That demonstrates, even if we put to one side the
 10 16 March government statement and announcement, it shows
 11 you now how artificially they are approaching this
 12 clause, that you are not placing a restriction on the
 13 premises if you tell me not to go there.
 14 That then becomes their counterfactual, that even if
 15 the government hadn't closed you, hadn't included you in
 16 the regulations on the businesses that were required to
 17 close, you've still got the regulations preventing
 18 people from going to you, so you would have suffered
 19 your loss anyway.
 20 The answer to that is, looked at realistically, the
 21 restrictions were imposed on the premises, were placed
 22 on the premises.
 23 LORD JUSTICE FLAUX: I suppose you might test it in this
 24 way, because it covers notifiable disease manifesting
 25 itself at the premises: so if there is a particular

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1 complex of holiday cottages, if you like, where there is
 2 an outbreak of Legionnaires' disease, and the government
 3 asks the owner to identify who is going to be going
 4 there in the next 3 weeks, and the government says to
 5 each of the people who is going there, "Don't go there
 6 because there is an outbreak of Legionnaires' disease",
 7 you would say that is a restriction based on the
 8 premises.
 9 MR EDELMAN: Absolutely. They are telling them -- they
 10 don't list every single holiday cottage you can't go to,
 11 they are telling them: don't go to any. In my Lord's
 12 example they were, but in case they were saying: don't
 13 go to any of them.
 14 LORD JUSTICE FLAUX: No, I follow. Yes.
 15 MR EDELMAN: Anyway, that's a short point but that is our
 16 point on that.
 17 LORD JUSTICE FLAUX: In the context of holiday cottages it
 18 might be said either you close them or the restrictions
 19 that are being referred to have to be something else,
 20 other than physical closure or physical prevention, as
 21 it were, from getting into the premises, because
 22 otherwise why have you got restrictions there at all?
 23 And you would say the obvious restriction placed on the
 24 premises is telling people: you can't go there.
 25 MR EDELMAN: Exactly, or how many people can go there.

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1 LORD JUSTICE FLAUX: Yes, okay.
 2 MR EDELMAN: Then the clause requires it to be as a result,
 3 loss as a result of the closure and -- sorry, the
 4 closure or restrictions to be as a result of notifiable
 5 human disease, which we have dealt with, that's the
 6 prevalence point, within the 25 miles.
 7 But there is one point on the "as a result of"
 8 notifiable human disease within a radius of 25 miles.
 9 This has been debated in the skeleton, and it is
 10 Mr Harrison's idea, example, the Chesil Beach example
 11 which we give in our skeleton, which quite nicely
 12 illustrates the point that RSA and other insurers are
 13 taking.
 14 My learned friends, it arises in particular on this
 15 one, because if you go to the next page, we don't have
 16 to worry about the precise terms, but on page {B/16/17}
 17 there is in fact a pollution of beach cover, and it is
 18 pollution of the beach within a 10 mile radius. I am
 19 not going to get into the solely attributable, sudden or
 20 accidental lapse stuff, but just so you know this is not
 21 an outlandish example, this is actually based on
 22 a provision in the policy referring to a 10-mile radius
 23 of pollution.
 24 So let's forget about the particular language of it
 25 and just imagine that there is a clause which is like

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1 this, which is loss as a result of pollution of a beach
2 within 10 miles, and there is an oil spill on
3 Chesil Beach which pollutes the entire beach. Three
4 miles of Chesil Beach is within a 10-mile radius of the
5 holiday cottage.

6 On insurers' counterfactual, there would be no
7 indemnity payable for any loss of business, because if
8 somehow, miraculously, that 3-mile stretch of Chesil
9 Beach escaped any pollution -- this is their
10 counterfactual -- the beach would still have been closed
11 because of the pollution elsewhere; and the customers
12 still wouldn't have come, because the whole of the rest
13 of the beach was polluted.

14 It rather shows how artificial the counterfactual
15 is. We submit that they really don't have an answer to
16 this. The event is you have suffered a loss, and in
17 that case because a beach within a beach within a
18 certain radius was polluted. It was. And talking
19 about, "Well, if that bit hadn't been polluted and only
20 another bit had", it is just as unrealistic, in our
21 submission, as the toxic lorry spill case. You are
22 contemplating a combination of events and that is
23 sufficient.

24 One other point on this. RSA say that the lockdown
25 measures, on the "as a result of", they say the lockdown

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1 measures weren't as a result of an incidence of COVID-19
2 but were preventative or pre-emptive. But that doesn't
3 accord with the facts on incidence and on the government
4 action, as we express them.

5 What we know is that the government was responding
6 to not just the known but also the known unknowns, and
7 I have dealt with that before. But I just thought
8 I would mention that that is a particular point that RSA
9 are taking.

10 Can I then move on to causation. In a sense we come
11 back to the Chesil Beach example again and think about
12 that, because the peril there, the pollution, is of
13 itself of a nature which is capable of affecting a wide
14 area, just as a notifiable disease is.

15 Just as there the section within the 10 miles would
16 clearly be part of the overall picture in the mind of
17 a holiday-maker deciding whether or not to book or
18 cancel a holiday at the guest house, so the outbreak
19 within the 25 miles is part of the overall picture that
20 the government has when it is deciding to make the
21 decision to impose restrictions on businesses and the
22 public.

23 But let's have a look at some of the particular ways
24 in which RSA operates the counterfactual, because what
25 they do is they subtract the whole of the clause; they

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1 subtract the closure, the restrictions and the disease
2 manifesting within 25 miles. So they don't make the
3 mistake we say that other insurers make, of arbitrarily
4 declaring that only the closure or restrictions are the
5 peril and not the disease, and they also don't seek to
6 remove only the restrictions placed on the premises;
7 they accept one must remove the nationwide restriction;
8 but their case is, and as I think I have already
9 foreshadowed, that the government restriction on travel
10 was a separate "but for" cause and is not excised.

11 We say there are a number of flaws. I have already
12 referred to the first flaw, but that is not treating
13 that restriction as a relevant restriction and that is
14 wrong. But secondly, it is an unrealistic and, we would
15 say, atomistic view of the regulations, where some of
16 the regulations are removed for the purposes of the
17 counterfactual and some are left in. We say they are
18 a package, and they either all stay in or they all need
19 to be excised.

20 Let's see what --

21 MR JUSTICE BUTCHER: That really ties in very much with your
22 first way of putting it, doesn't it?

23 MR EDELMAN: Yes.

24 MR JUSTICE BUTCHER: If you are wrong about that, then the
25 second argument has more force.

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1 MR EDELMAN: Although where one gets to is that if all the
2 other regulations are said to still be in force, one
3 still has everything else open that was permitted,
4 everything else, everything open within the same
5 category as the premises, as the holiday accommodation,
6 everything else closed, and then you have this
7 disease-free halo of 2,000 square miles in which you
8 then have a guest house with a total monopoly of
9 business. It's just fanciful and unrealistic.

10 We would say this is, I'm afraid, lawyers'
11 counterfactual and it is not the real world; it's not
12 the real world of this policy and what this policy is
13 aimed to achieve.

14 Now there is one point on the machinery. We have
15 made our submissions as to whether the machinery applies
16 or not, but at {B/16/73} under "Loss of Gross Revenue"
17 there is a point about what "solely" means and the
18 effect of it:

19 "Loss of Gross Revenue.

20 "The actual amount of the reduction in the gross
21 revenue received by you ... solely as a result of damage
22 to buildings."

23 And assume that we are manipulating that. But then
24 if my Lords can remember that, it's the problem of
25 looking at electronic copies, and if we look back to the

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1 clause itself now, on page 16 {B/16/16}, which is on the
 2 screen, we would then be reading into that clause,
 3 "Solely as a result of closure or restrictions placed on
 4 the premises as a result of human notifiable disease"
 5 et cetera, et cetera et cetera. It is the entire
 6 package.
 7 LORD JUSTICE FLAUX: Yes.
 8 MR EDELMAN: And it would not be operating, you can't say
 9 it's solely within a radius of 25 miles. That would be
 10 to insert "solely" at each stage of the causal link.
 11 LORD JUSTICE FLAUX: Your primary case is that the "loss of
 12 gross revenue" definition doesn't apply because there
 13 wasn't damage to buildings.
 14 MR EDELMAN: Exactly, my Lord, yes. We have put that in
 15 writing and there is limited time, and it is one of
 16 those arguments that there's not much orally that one
 17 can add to it, it is what it is. We say it is a good
 18 argument. But we would be putting the "solely" at the
 19 beginning -- if it was to be manipulated, what I think
 20 Mr Turner is trying to do is then put "solely" so that
 21 it operates "solely within a radius of 25 miles", so he
 22 is inserting it at each bit of the clause. Whereas all
 23 it means is that the loss must solely be as a result of
 24 the combination of these ingredients. And that still
 25 leaves open the question, the more general causation

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1 question, and doesn't affect that.
 2 My Lords, that is RSA1. Can I move on to RSA3.
 3 I will come back to RSA2.
 4 RSA3 is {B/19/38}. This is a commercial combined
 5 policy, you can see from the top of the page. Again,
 6 this one is, as we saw with QBE, a very simple disease
 7 clause, just two elements to cover, interruption or
 8 interference, and then following an occurrence.
 9 The key issues here are firstly what is meant by
 10 "following", and then there is also, on page {B/19/93}
 11 a rather convoluted exclusion. It is a contamination or
 12 pollution clause, at L, and:
 13 "The insurance by this policy does not cover any
 14 loss or damage due to [amongst other things, second line
 15 in the middle] epidemic and disease ..."
 16 Then it says in the second (a), it has two lots of
 17 (a) and (b):
 18 "If a peril not excluded from this policy arises
 19 directly from pollution and/or contamination any loss or
 20 damage arising directly from that peril shall be
 21 covered.
 22 "(b) All other terms and conditions of this policy
 23 shall be unaltered and especially the exclusions shall
 24 not be superseded by this clause."
 25 Bear in mind I will come back to that exclusion

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1 exclusion, but I just wanted to show you what we are
 2 going to have to be addressing. Go back to the clause
 3 now at page {B/19/38}, "interruption or interference",
 4 nothing much to be added to that. Then we have got the
 5 word "following" at the end of the first line. We have
 6 made our submissions in Hiscox on the meaning of the
 7 word "following" as a causal connector, and we say only
 8 a loose causal connection is envisaged. No need to
 9 establish "but for" causation; it is enough that the
 10 disease is part of the causal background, which a
 11 disease within the relevant 25-mile radius plainly is.
 12 Ms Mulcahy will also be addressing this further in
 13 relation to the Zurich policy.
 14 RSA suggest that other terms in the extension
 15 indicate that a proximate cause test is intended by the
 16 word "following", relying on references to "affected in
 17 consequence of", "directly affected", words like that in
 18 the policy. But in our submission, if the draftsman had
 19 meant "directly affected" and he has used it elsewhere
 20 in the policy, that is what he would have said.
 21 It may be the point is academic because our case is
 22 fine whether "following" is proximate cause or not,
 23 something stronger or not, but it may have been
 24 selected, and we say probably was selected, by the
 25 draftsman as a more appropriate term in recognition of

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1 a point I have made before, that the interruption or
 2 interference was likely to be caused by health
 3 protection measures following an outbreak of a disease.
 4 So it is an implicit recognition that there will be
 5 something intermediate happening to cause the
 6 interruption or the disease.
 7 One sees the word "following" in the context of
 8 these disease clauses used quite frequently. And just
 9 putting to one side its causal connotations, it does
 10 have that important recognition that it is recognising
 11 that unlike other sorts of perils, this one will not be
 12 having a direct effect of its own on the business, it
 13 will be causing something else to happen which will have
 14 an effect on the business. And that rather explains the
 15 looser use of the word "following".
 16 It also, we submit, undermines the insurers'
 17 approach to this counterfactual.
 18 There is one other provision that I should have
 19 highlighted for you but I forgot, and I should have done
 20 so. There is on page {B/19/39} at item 4, there is this
 21 exclusion, right at the end of the clause above
 22 "Professional Accountants":
 23 "We shall only be liable for the loss arising at
 24 those premises which are directly affected by the
 25 occurrence discovery or accident [and it says] maximum

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1 indemnity period shall mean three months."
 2 So it is premises directly affected. There is
 3 a similar clause in Arch and in Amlin 1 and 2.
 4 In a rare moment of accord, Amlin actually agree
 5 with our analysis of this clause, which is that it is
 6 actually there to prevent the loss, including what
 7 I would call the knock-on effect loss at another set of
 8 premises owned by the insured which are not impacted.
 9 So, for example, if there's an outbreak of disease,
 10 let's say there is in a locality, and the local
 11 authority says that anyone who has worked at that
 12 locality cannot work, cannot go and work anywhere else,
 13 they have got to be quarantined, and the people who work
 14 at that may be, for example, some cleaning staff who
 15 clean all that insured's holiday cottages, and another
 16 holiday cottage is outside the 25-mile radius and cannot
 17 be cleaned. The loss from that holiday cottage can't be
 18 included; it is not the premises directly affected.
 19 That is what this is aimed at.
 20 But RSA take a rather more dramatic view of this,
 21 because they say that this actually prevents people --
 22 this applies so that it has to be something directly on
 23 the premises. They say that this clause requires the
 24 staff at the premises to be infected or the premises to
 25 require a deep clean because of the disease or its

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1 effect.
 2 So it is looking at making sure the premises are
 3 directly affected, as opposed to the, those premises
 4 which are directly affected, which we say is far too
 5 restrictive. It is effectively removing the 25-mile
 6 cover and supplanting this with a cover that only
 7 operates when there is a disease on the premises. So we
 8 say that is just simply a misreading of the exclusion.
 9 Now if I can move on to the pollution and
 10 contamination exclusion, which is this tab, page 93.
 11 {B/19/93}. Just putting "epidemic" to one side for
 12 a moment, and we say "epidemic" and "disease" is
 13 obviously within the ambit of the disease clause,
 14 because that is what some notifiable diseases are
 15 capable of being and that is what notifiable disease
 16 encompasses. But even putting to one side the epidemic
 17 point it is obvious, we submit, that the word "disease"
 18 in that clause cannot have been intended to take away
 19 the cover given by the infectious diseases extension.
 20 And one then asks oneself: if that is the answer, how
 21 does one get there?
 22 There are two ways of doing that. Under (a), the
 23 second (a):
 24 "If the peril not excluded from this policy arises
 25 directly from pollution and/or contamination any loss or

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1 damage arising directly from that peril shall be
 2 covered."
 3 Then one has to treat pollution and/or
 4 contamination, although they are in bold they are
 5 undefined, as having been intended to be a reflection of
 6 the title to this clause, "Contamination or Pollution".
 7 It would have been easier if there had been a definition
 8 which defined it in accordance with subparagraph (a),
 9 but there isn't, so one has to make sense of it and that
 10 would make perfect sense.
 11 The other way is to say at (b):
 12 "All other terms ..."
 13 MR JUSTICE BUTCHER: Sorry, I don't understand quite how
 14 that works, Mr Edelman. Could you just explain it.
 15 MR EDELMAN: Yes.
 16 MR JUSTICE BUTCHER: The second (a):
 17 "If a peril not excluded from this policy arises
 18 directly ..."
 19 MR EDELMAN: From epidemic or disease.
 20 MR JUSTICE BUTCHER: So you then look to see whether the
 21 infectious disease cover arises directly from epidemic
 22 or disease.
 23 MR EDELMAN: Yes.
 24 MR JUSTICE BUTCHER: Yes.
 25 MR EDELMAN: There is an obvious intent here. I mean, they

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1 are obviously not intending by this exclusion at the end
 2 to override an express grant of cover, so one has to
 3 read this sensibly.
 4 The other way through to it is:
 5 "All other terms and conditions of this policy shall
 6 be unaltered and [in brackets] (especially the
 7 exclusions) shall not be superseded by this clause."
 8 The words "shall not be superseded by this clause"
 9 must be intended to indicate the terms and conditions
 10 shall be unaltered, to indicate that if there is an
 11 express grant of cover in relation to any of these
 12 topics, this exclusion is not negating an express grant
 13 of cover.
 14 What it is doing, essentially, is making sure that
 15 perils that don't specifically state what they are going
 16 to be caused by aren't caught up with this.
 17 LORD JUSTICE FLAUX: I mean, you could look at it, if you go
 18 back to the insuring extension at page {B/19/38}:
 19 "We shall indemnify you in respect of interruption
 20 or interference with the business following any
 21 occurrence ..."
 22 And then "attributable to food or drink supplied
 23 from the premises". So that would seem to be covering
 24 food poisoning.
 25 MR EDELMAN: Yes.

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1 LORD JUSTICE FLAUX: If you go to the exclusion, it talks
2 about it doesn't cover any loss or damage due to
3 poisoning.
4 MR EDELMAN: Yes.
5 LORD JUSTICE FLAUX: It's a circular point, isn't it?
6 MR EDELMAN: Yes.
7 LORD JUSTICE FLAUX: Your point about (b) is probably the
8 answer really. (a) is a bit impenetrable.
9 MR EDELMAN: Yes, it is. It is all a bit impenetrable. But
10 I think when one looks at this as a whole, and one gets
11 this with insurance policies, sometimes one has to
12 actually work out what the draftsman is getting at.
13 LORD JUSTICE FLAUX: Yes.
14 MR EDELMAN: And what he must be getting at is: there is
15 some general exclusion but I am not intending to
16 override any express grant of cover, it's just if there
17 isn't something express for these topics.
18 LORD JUSTICE FLAUX: They are extensions, aren't they?
19 MR EDELMAN: Yes. And it is fine, it works as it stands.
20 But then "epidemic" and "disease" go together, because
21 a notifiable disease is something which has the capacity
22 to be an epidemic.
23 I think what Mr Turner wants to do is to carve out
24 "epidemic" and say: ah, this is an epidemic exclusion.
25 But that is inconsistent with the nature of the peril,

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1 and, you know, it says "all other terms and conditions
2 ... shall be unaltered". So it goes back to the policy.
3 And if, as a matter of construction, by covering
4 a notifiable disease it covers something which is
5 capable of being an epidemic and develops into one, then
6 the exclusion doesn't apply. Just as with my Lord's
7 example of food poisoning. You have the exclusion, but
8 if you look at the clause and on true construction of
9 the clause that falls within the ambit, it's not
10 excluded.
11 My Lord, RSA3, there is nothing more for me to add
12 on causation and counterfactual or on the trends clause,
13 so unless there is anything more on that policy I was
14 going to move on to RSA2, and there are two forms of
15 that.
16 The first one is {B/17/1}. I will just show you
17 what that is, it is a restaurant, wine bars and pubs
18 policy. Then {B/18/1}, a shops policy. These are the
19 lead policies, but they just show you essentially what
20 these are about.
21 Let's go to the key element of cover. Let's take
22 that at {B/17/36}.
23 LORD JUSTICE FLAUX: This is RSA2, is it?
24 MR EDELMAN: Yes, this is 2.1, there is RSA2.1, which is
25 this one, the restaurants, wine bars and public houses;

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1 and RSA2.2, which is the shops policy, that is the one
2 at tab 18.
3 MR JUSTICE BUTCHER: They have the same prevention of access
4 cover.
5 MR EDELMAN: Yes. That is why they have been grouped
6 together.
7 LORD JUSTICE FLAUX: So we only need to look at one, do we?
8 Page {B/17/36}.
9 MR EDELMAN: Yes. It's "Prevention of Access -- Public
10 Emergency":
11 "The actions or advice of a competent Public
12 Authority due to an emergency likely to endanger life or
13 property in the vicinity of the Premises which prevents
14 or hinders the use or access to the premises."
15 Again, similar to clauses you have seen before.
16 There is an issue in relation to 2.2, where there is
17 a different exclusion, so there is one difference.
18 There is no difference in the cover clause, but there is
19 a difference in the exclusion.
20 The exclusion to 2.1 is as a result of diseases
21 specified in extension A(a) "Diseases". We needn't turn
22 it up, but it is a list of diseases and obviously this
23 one isn't there. Then there is below it "Any amount in
24 excess of 10,000".
25 Then if we go to the clause in 2.2 at {B/18/51} one

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1 can see that there is a different exclusion and it
2 reads, and it reads perfectly naturally:
3 "As a result of infectious or contagious diseases
4 any amount in excess of 10,000."
5 So this has got a different disease exclusion.
6 Instead of excluding only specified diseases, it
7 excludes all of them, and the words "any amount in
8 excess of 10,000" are printed as part of that exclusion.
9 In other words, capping any indemnity under this public
10 emergency clause to £10,000. We don't dispute that that
11 is so capped.
12 But, as you have seen, RSA's submission is that
13 there is an obvious error on page {B/18/51}, and the
14 obvious error and the obvious correction to it is to
15 remove the words "any amount in excess of 10,000" and
16 place them as though they apply to all the cover under
17 this clause.
18 One can see that is what the draftsman did on 2.1,
19 but that would not be obvious to the reasonable reader
20 as a mistake on this clause. There is nothing wrong
21 with it at all. Perhaps I will deal with this point
22 while we have got the page open.
23 One can see that the clause above has no sub-limit
24 at all. The one below does have an overall sub-limit.
25 And as one goes through the clauses one sees a mixed bag

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1 on it. If one goes to the previous page {B/18/50} the
 2 first one has no sub-limit, the second one does have
 3 a sub-limit, and the third one (c) does have
 4 a sub-limit. But as I have shown you, and it goes over
 5 the page, the fourth one, "failure to supply" doesn't.
 6 It is a mixed bag. It is not an obvious error.
 7 One can well imagine why diseases might be singled
 8 out for a sub-limit of 10,000. That makes perfect
 9 sense. Whereas what Mr Turner wants you to do is to
 10 read this as though there is an absolute exclusion of
 11 all infectious diseases from the clause, and we submit
 12 that simply is not tenable. It's not obvious that there
 13 is an error, and the moving of the words "any amount" to
 14 give them a false, to give them a capital A, and the new
 15 line is not an obvious correction.
 16 I think Mr Turner, he will forgive me if I have made
 17 a mistake about this, I am trying to recollect
 18 submissions, I think he made some point about there
 19 being no comma after the word "diseases". If you look
 20 carefully through the policy, the use of a comma does
 21 not seem to have occurred to the draftsman in any
 22 clauses at all. It's not a form of punctuation that --
 23 LORD JUSTICE FLAUX: No.
 24 MR TURNER: I'm not sure that's a point we have taken.
 25 MR EDELMAN: Then I apologise for that. But if a point was

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1 to be taken, that one would expect a comma if I was
 2 right, there aren't any commas anywhere.
 3 While we are on the subject of exclusions, there is
 4 one other exclusion that I should deal with. Let's go
 5 back to page {B/17/36}, and there is an exclusion (b):
 6 "During any period other than the actual period when
 7 access to the premises was prevented."
 8 This seems to be relied on to argue that only
 9 prevention of access is covered. So one ignores the
 10 words "prevents or hinders the use or access to the
 11 premises" in the insuring clause. So you give with one
 12 hand and you take away with the other.
 13 Of course exclusions can cut down the scope of
 14 cover, but it would be remarkable if the intention of
 15 the draftsman when this exclusion was inserted, having
 16 conferred cover for prevention or hindrance of use or
 17 access, was, by an exclusion, then to cut it down to
 18 prevention of access only.
 19 If that is what was intended, he would have simply
 20 said "which prevents access to the premises" in the
 21 insuring clause. What this is obviously intended to do
 22 by a shorthand is to say that you cannot have indemnity
 23 for the after-effects of a prevention or hindrance of
 24 access.
 25 What you get is when there was prevention or

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1 hindrance of use or access, when that was actually
 2 operating you can get your loss; but the minute that
 3 stops, that is when your indemnity period stops, and you
 4 can't say: well, because of that it took me a while to
 5 recover my business. That is the simple explanation for
 6 that, and the draftsman has simply used a shorthand,
 7 "prevention of access", to encompass all the concepts
 8 that he has put in the insuring clause.
 9 If one goes back now, having dealt with the
 10 exclusions, to the clause itself, their preamble
 11 I should have shown you at page 35 {B/17/35}:
 12 "Cover provided by this subsection is extended to
 13 include interruption or interference with the business."
 14 Then page {B/17/36}, interruption and interference
 15 has been addressed, it doesn't seem to be disputed this
 16 will be satisfied.
 17 We have "actions or advice of a competent public
 18 authority"; there is little debate, little if any debate
 19 here. It is important to recognise, though, that RSA
 20 acknowledges that advice from the government can be
 21 coercive in its effect.
 22 That is an important contextual point, if people
 23 say, "Well, none of this could have been anticipated,
 24 and it is hard luck on the insured if the government
 25 didn't impose things in a legally binding way, instead

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1 of just imposing them by guidance", but this policy
 2 actually contemplates that there will be, amongst other
 3 things, a prevention of use or access resulting from
 4 advice of government.
 5 Obviously whether that has happened and is causally
 6 linked will be a question of fact in different types of
 7 case, but it shows a recognition that governments and
 8 authorities sometimes act in an advisory way which
 9 really is coercive, even if not legally coercive.
 10 Directly legally coercive, I should say.
 11 On the "emergency likely to endanger life", we have
 12 covered that before, but RSA, unsurprisingly, accepts
 13 that the COVID-19 epidemic was a general public health
 14 emergency. Ms Mulcahy has addressed that on Arch 1.
 15 Then "in the vicinity", we have addressed that as
 16 well under Arch. Arch have a vicinity limit, I correct
 17 myself. The emergency occurred in all areas, and
 18 therefore will have occurred, we submit, in the vicinity
 19 of the premises. The epidemic, and in this case in the
 20 context of an emergency it's not just the actual cases,
 21 but the emergency is the serious risk of its further
 22 spread and development throughout the population, is of
 23 itself an emergency, and that was a nationwide emergency
 24 and therefore necessarily occurred in the vicinity. And
 25 the clause doesn't say that the emergency has to be only

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1 in the vicinity of the premises. All it needs to do is
2 to be an emergency which is likely to endanger life in
3 the vicinity of the premises, and it was. The COVID
4 emergency was likely to endanger life in the vicinity of
5 everywhere in the country. So we say that's satisfied.

6 But even if the emergency has to be in the vicinity,
7 for the reasons I have given that is also satisfied.

8 We understand that RSA's case is that the emergency
9 wasn't in the vicinity, but that, for reasons I have
10 given, ought to be rejected. It presupposes that the
11 emergency contemplated can only be local. That is not
12 what the policy says. Really what RSA is doing is
13 insert the word "only" in the clause to: an emergency
14 likely to endanger life only in the vicinity of the
15 premises. And that is not a permissible approach to
16 construction.

17 The authority action was due to the emergency.
18 We have dealt with the causal relationship between the
19 actions or advice of the competent authority and the
20 emergency.

21 We then have prevention and hindrance of use. We
22 have RSA again on this policy drawing a distinction
23 between what they term "closure measures" and "social
24 distancing measures". So the distinction is based on
25 the content of the measures, rather than their legal

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1 force. They accept that the closure measures did
2 prevent use of all premises to which they apply, but
3 they deny that the social distancing measures caused any
4 kind of prevention or hindrance of access.

5 You have our case on this. Preventing customers
6 from accessing premises is, we submit, prevention of
7 access; and, similarly, the social distancing measures
8 also amounted to hindrance of access.

9 We then have the counterfactual, and I think we have
10 really dealt with this but just so you are aware of it,
11 RSA's primary case is that you only subtract the
12 endangerment in the vicinity. Here the Scilly Isles is
13 used as the knight in shining armour by the RSA, an
14 island of disease-free safety, still subject to the
15 restrictions, and they say that the counterfactual
16 requires you to imagine that each holiday cottage
17 enjoyed that same immunity. You have our submissions.

18 LORD JUSTICE FLAUX: This is restaurants or pubs, isn't it?

19 MR EDELMAN: Yes.

20 LORD JUSTICE FLAUX: Hotels, restaurants, pubs.

21 MR EDELMAN: Yes. It is just utterly fanciful, in our
22 submission. It doesn't tie in with the clause, but
23 it is utterly fanciful.

24 Then you have got our case on the trends clause, our
25 case on the trends clause is in writing.

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1 I need to press on, so if my Lords are content
2 I will move to RSA4, which is at {B/20/1}.

3 You can see it is a Marsh form, but there is
4 a clause in it which says it to be treated as RSA's
5 form. Three clauses to consider: a notifiable disease
6 clause, an enforced closure cause and a prevention of
7 access clause.

8 Page {B/20/6} is the material damage insuring
9 clause. That is just to show you where that is. Then
10 clause 2.3 on {B/20/7} is the business interruption
11 clause:

12 "In the event of interruption or interference to the
13 insured's business as a result of ...

14 "(viii) Notifiable diseases and other incidents:

15 "(a) discovered at an insured location."

16 Not relevant for us, obviously. But:

17 "(d) occurring within the vicinity of an insured
18 location,

19 "during the period of insurance."

20 We also have prevention of access at (xii):

21 "Prevention of access - Non-damage"

22 At the end:

23 "Within the territorial limits, the insurer agrees
24 to pay the insured the resulting business interruption
25 loss."

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1 You will those definitions firstly at page 23, for
2 business interruption loss, which is, the top left-hand
3 corner, reduction in turnover.

4 Then you have notifiable disease on page {B/20/29}.
5 This is quite an important one. This is RSA4, which had
6 the backdating one. (ii):

7 "Any additional diseases notifiable under the Health
8 Protection Regulations (2010), where a disease occurs
9 and is subsequently classified under the ... regulations
10 such disease will be deemed to be notifiable from its
11 initial outbreak."

12 As I mentioned before, there are two points about
13 this clause. Firstly, it overrides the New World
14 Harbourview point about when you get indemnity if there
15 is a delay in it being made notifiable. But secondly,
16 and we say more significantly and of general
17 significance to all these policies, is it is expressly
18 contemplating, it must be, it is said by RSA to have
19 been intended to override the New World Harbourview
20 decision, which was a case about a newly emerging
21 disease, SARS in the Far East., and this, if nothing
22 else, demonstrates that within the ambit of these
23 notifiable disease risks, insurers must be taken to know
24 that they are at risk of providing indemnity in respect
25 of losses arising from newly emerging diseases which

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1 become notifiable .
 2 Those newly emerging diseases could be anything, but
 3 we all know which are the ones in recent times have
 4 caused a degree of panic, things like SARS and Ebola.
 5 Whether they go anywhere or not, or how far they go,
 6 depends on the nature of the disease .
 7 But anyway, you will see that part of the definition
 8 of " notifiable diseases " is any additional diseases
 9 notifiable under ... and it has a list of any additional
 10 diseases , so that is not an exclusive list . Then (v):
 11 "... any other enforced closure of an insured
 12 location ..."
 13 So under the " Notifiable Diseases and Other
 14 Incidents " cover, going back to page 7, one has those
 15 two ingredients , {B/20/7}, an additional disease
 16 occurring within the vicinity , or any other enforced
 17 closure of an insured location by any government
 18 authority .
 19 Then we have, going on to the definitions at page
 20 {B/20/30}, the "Prevention of Access - Non-Damage"
 21 clause . Actions or advice, governmental authority or
 22 agency in the vicinity of the insured locations -- this
 23 is 87 on the right-hand side, just below the middle --
 24 which prevents or hinders use or access of the insured
 25 locations .

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1 For reasons which we explain in our skeleton , we
 2 accept that the claim, the trends mechanism and all that
 3 applies to this policy, so I needn't go into that.
 4 There is also one other definition I need to take
 5 you to, because it is significant . {B/20/35}
 6 " Vicinity " . We say this is a good working definition of
 7 what " vicinity " should mean.
 8 "... an area surrounding or adjacent to an insured
 9 location in which events that occur within such area
 10 would be reasonably expected to have an impact on an
 11 insured or the insured's business ."
 12 Then one has to consider the nature of event, and
 13 whether or not it is in the vicinity .
 14 Our submissions on that is " vicinity " is a flexible
 15 concept and, if necessary, the country could be in the
 16 vicinity of the premises for the purposes of an
 17 epidemic. But we don't need to go that far , because we
 18 have got our causation arguments about outbreaks of
 19 disease in a vicinity . And in the particular context of
 20 COVID, the causal role that occurrences of the disease
 21 in any relevant policy area, whether it is a vicinity or
 22 a mileage limit , has. But you have our submissions on
 23 that .
 24 No further points additional to other insurers arise
 25 on the first head of cover, going back to page

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1 {B/20/29}, that is diseases in the vicinity , that is the
 2 same arguments as before.
 3 We then have, under 5, enforced closure . There is
 4 just a couple of points here. RSA admits in its defence
 5 that if and to the extent that premises insured under
 6 this policy were ordered to close in full or in part,
 7 that amounted to enforced closure . The reference for
 8 that is their amended defence at paragraph 50,
 9 subparagraph (d). That includes orders , and not only
 10 legislation . But also the government announcements on
 11 20, 23 and 24 March. So it accepts that a partial
 12 enforced closure applies and is covered by the clause .
 13 LORD JUSTICE FLAUX: Presumably that is because the actual
 14 insuring clause begins with the words:
 15 "In the event of interruption or interference to the
 16 insured's business ..."
 17 MR EDELMAN: Yes, but they are not seeking to argue that
 18 enforced closure requires closure of the whole lot .
 19 LORD JUSTICE FLAUX: Enforced closure of the whole lot is
 20 inconsistent with interference . That's the point.
 21 MR EDELMAN: Exactly, yes.
 22 Having said that, if we can now go to {1/18/77}.
 23 I think I have got the right reference . It is 24(a) of
 24 their skeleton argument. Because they have then got
 25 a rather convoluted example that they give. A

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1 restaurant has space for 10 diners , predominantly used
 2 as a take-away. Other than at weekends, the seats are
 3 solely used by take-away/ collection customers to wait
 4 for their food. The 21 and 26 March regulations
 5 required the dining/waiting area to be shut. The
 6 customers could enter the premises one-by-one to collect
 7 their take-aways. The 21 and 26 March regulations
 8 permitted chefs to continue cooking food in the kitchen
 9 as before.
 10 The next page {1/18/78}, (iii):
 11 "Even if the FCA were to maintain that there is some
 12 form of 'enforced closure' in relation to premises which
 13 were palpably not closed, the fact that chefs can work
 14 in the kitchen and the public can come into some
 15 (closed) dining area to pick up their food, contradicts
 16 the possibility that it could be for 'health reasons or
 17 concerns'."
 18 Let's go back to the clause again, {B/20/29}. This
 19 is the for "health reasons or concerns". I have to
 20 confess that we really do not understand that
 21 submission. Everything that happened to that restaurant
 22 was due to the COVID outbreak, everything that he is
 23 describing , and that is --
 24 LORD JUSTICE FLAUX: But if one of the health concerns of
 25 the government is if people get within less than

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1 2 metres of each other they might contract COVID, and if
2 that is what has led to the partial enforced closure and
3 it is accepted, then, as you say, the example would seem
4 to be fairly and squarely within the terms of the

5 policy, wouldn't it?
6 MR EDELMAN: My Lord, yes. And there is a partial closure,
7 because the dining area is closed for dining. The fact
8 that people may be allowed to enter one-by-one to
9 collect their take-aways does not cause the restaurant
10 area to cease to be closed as a restaurant area.

11 LORD JUSTICE FLAUX: No.

12 MR EDELMAN: The other points that are made in relation to
13 this policy, I think I have already dealt with.

14 We then come to the final clause, which is the
15 non-damage denial of -- the "Prevention of Access --
16 Non-Damage", and that is at page 30. If we can move
17 forward to page 30 {B/20/30}.

18 The only apparent dispute is whether the coming into
19 force of the Act and the designations made on 4 April
20 were "actions" or "advice", perhaps we will wait to see
21 what Mr Turner says about that in his submissions, but
22 the fact that advice is there recognises that advice can
23 be coercive, even if not carrying a legal obligation.

24 Then we have again got in this clause "in the
25 vicinity of the insured locations". But we have dealt

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1 with that. There is an issue again as to whether the
2 government's social distancing measures prevents or
3 hinders use or access to premises, but I have dealt with
4 that in relation to Hiscox and you have our submissions
5 on that.

6 Then finally, counterfactuals. Our case is the same
7 as it is in other cases. What RSA say is that you only
8 remove the regulations as are applicable to the premises
9 but keep the same regulations nationally. So it is as
10 if the regulations apply to these premises and no one
11 else. They also say, so you have got all the other
12 closure measures and the social distancing measures
13 remaining in place. That is their counterfactual.

14 We say that is ridiculous. You can't cherry-pick
15 like that. It is either government action or advice or
16 not. You can't start salami slicing it into these
17 ingredients, and they are not relevant salami slicings
18 for the purpose of the clause.

19 That is all I want to say about RSA. Unless my
20 Lords want to break for lunch now, I think Ms Mulcahy
21 was going to make a start on Zurich.

22 LORD JUSTICE FLAUX: We have eight minutes, so perhaps it
23 would be sensible if she made a start on Zurich.
24 (12.52 pm)
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1 Submissions by MS MULCAHY

2 MS MULCAHY: I will take it as far as I can, my Lord.

3 LORD JUSTICE FLAUX: Yes.

4 MS MULCAHY: As we will see, Zurich is something of an
5 extremist compared to the other insurers, and has taken
6 a number of points that have not been taken by other
7 insurers. So I am going to try and focus on those
8 points and avoid repetition, where possible, of matters
9 we have covered already.

10 Just to introduce the policies, Zurich has two
11 types, we have labelled them type 1 and type 2. We
12 don't need to look at it, but the representative sample
13 document shows that the two types have materially the
14 same wording. Zurich 2 as five non-lead wordings. We
15 now know that between the wordings all seven categories
16 were covered, but there is a heavy leaning towards
17 category 5, so those are the service businesses but also
18 would encompass manufacturing.

19 I think I have lost my Lord, Lord Justice Flaux at
20 the moment.

21 LORD JUSTICE FLAUX: Only because I'm getting the Zurich
22 policy file.

23 MS MULCAHY: The Zurich 1, if we go to it, the Zurich 1
24 policy, it is in the main bundle at {B/21/1}.

25 If we go to just look briefly at the property damage

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1 BI, that is at page 14 of that document {B/21/14} and we
2 have "Business Interruption 'All Risks', section B1, and
3 section B2.

4 There is then a schedule, which appears at page 41
5 {B/21/41} of the same document, "Combined All Risks
6 Policy Schedule". If we go forward to {B/21/43}, we can
7 see there, it is redacted but there is a summary of
8 cover, and we can see that it shows BI is included for
9 this insured at B1 and B2, and the business is blacked
10 out but you can see that the business would be
11 identified by name towards the top.

12 The "Extensions" cover clause starts on page
13 {B/21/50}, if we go forward to that, and explains:
14 "Section B1.

15 "The business interruption cover is subject to the
16 extensions shown below:

17 "Any loss as insured by this section resulting from
18 interruption of or interference with the business in
19 consequence of accidental loss destruction or damage at
20 the undernoted situations or to property as undernoted
21 shall be deemed to be an incident, provided that, after
22 the application of all other terms and conditions of the
23 policy the liability under the extension(s) in respect
24 of any one occurrence shall not exceed ..."

25 Then we have a percentage limit.

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1 So that wording is drafted with property damage in
2 mind. But if we go forward to the next page, we see the
3 relevant extension at the top of {B/21/51} which is
4 entitled "Action of Competent Authorities". It has been
5 referred to as the AOCA clause by Zurich. That covers:

6 "Action by the police or other competent local,
7 civil or military authority following a danger or
8 disturbance in the vicinity of the premises whereby
9 access thereto shall be prevented provided there shall
10 be no liability under this section of this extension for
11 loss resulting from interruption of the business during
12 the first six hours of the indemnity period."

13 In Zurich 2 that is provided for three hours, so
14 it is slightly different:

15 "For the purposes of this extension:

16 "a) the limit is 4.8%.

17 "b) the maximum indemnity period is 3 months."

18 In Zurich 2 it is 12 months, so there is again
19 a slight difference there.

20 The wording here is very similar to the MSAm1
21 denial of access clause, which we will be coming on to
22 after Zurich, just to note the similarity.

23 The first issue I need to deal with relates to
24 action by a civil authority. As I mentioned on Monday,
25 unlike Amlin, Zurich denies that "competent local, civil

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1 or military authority" includes the government. It is
2 the only insurer to deny that the government falls
3 within its wording. What it argues is it is not
4 national government, it is the
5 Health & Safety Executive, it is the CAA, the Fire
6 Service, but it is bodies that fall below the level of
7 national government. They say that that is supported by
8 the local nature of danger or disturbance in the
9 vicinity and the exclusion for the first few hours of
10 the interruption.

11 Now, given my Lord Lord Justice Flaux's indication
12 on Monday I am going to leave this point for a reply if
13 it is pursued. I think you have the gist of our point
14 on this. We say "civil" is broad generally, it is
15 contrasted with the military authority.

16 LORD JUSTICE FLAUX: It would mean that, for example, if the
17 relevant action was an action by Public Health England
18 it was covered, if it was an action by the Minister of
19 Health it wasn't, or the Secretary of State for Health
20 it wasn't, which is surprising.

21 MS MULCAHY: Yes. We say "civil" is broad generally,
22 government naturally falls within it, as well as
23 government executive organs like the HSE.

24 LORD JUSTICE FLAUX: Yes.

25 MS MULCAHY: So that is civil authority.

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1 As to "action", Zurich pleads that action does not
2 include advice or guidance. We can see that from its
3 defence at paragraph 39.2(b) but also its skeleton at
4 paragraph 80. Perhaps if we can go to the latter, it is
5 {I/19/37}. It sets out there a case that action must be
6 more affirmative than advice, referring to mandatory
7 actions taken or orders issued, which will invariably
8 have the force of law.

9 Indeed, at paragraph 85, which is on page {I/19/38}
10 over the page, it says:

11 "Only the 21 and 26 March regulations were action."

12 So that is its position.

13 MR JUSTICE BUTCHER: That is also quite difficult, isn't it?

14 Action by the police; if the police officers, after the
15 disturbance in the locality, were saying, "I advise you
16 not to go down that street", that is not action
17 apparently, on this.

18 MS MULCAHY: Apparently so.

19 LORD JUSTICE FLAUX: Or if there is a danger or disturbance,
20 as a result of which the police put one of their blue
21 lines across, that is not actually -- as I understand
22 it, it is not legally enforceable, but to say that
23 wasn't action by police would be rather surprising.

24 MS MULCAHY: Yes. I can only endorse that, my Lord. We
25 would take the same position and say that "action" is

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1 much broader than that, and includes, particularly in
2 the context of a public authority, pronouncements and
3 guidance where they -- much public authority action is
4 done through announcements and pronouncements.

5 LORD JUSTICE FLAUX: You say that the Prime Minister's
6 statement on 16 March was clearly action by a civil
7 authority.

8 MS MULCAHY: Indeed.

9 LORD JUSTICE FLAUX: Is that a convenient moment to break?

10 MS MULCAHY: It is, exactly. I was just going to say it is
11 1 o'clock.

12 LORD JUSTICE FLAUX: 2 o'clock.

13 MS MULCAHY: Thank you, my Lord.

14 (1.00 pm)

15 (The short adjournment)

16 (1.58 pm)

17 LORD JUSTICE FLAUX: It's just before 2 o'clock, Ms Mulcahy,
18 but if you are ready to go, why don't we?

19 MS MULCAHY: I am ready to go.

20 I just want to finish this point on action, briefly.
21 If I go to the Oxford English Dictionary definition put
22 in by the defendants, it is at {K/222.1/2}.

23 It may be that we haven't got the person operating
24 the RingCentral system yet.

25 LORD JUSTICE FLAUX: No, here we are.

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1 MS MULCAHY: Here we are. The definition of "action" which
 2 is set out there is:
 3 "The process or condition of acting or doing in its
 4 wider sense; the exertion of energy or influence."
 5 And we would say that acting or doing, in its wider
 6 sense, and the exertion of influence would encompass
 7 government advice, government pronouncements of the kind
 8 here.
 9 There is a policy point I would like to make as
 10 well, which is to have a look and contrast the way in
 11 which this is dealt with in the disease clause, which is
 12 a page {B/21/52}, with the extension we are looking at.
 13 If you look at the disease clause, which insures
 14 loss resulting from interruption of or interference with
 15 the business carried on by the insured at the premises
 16 in consequence of any occurrence of notifiable disease
 17 at the premises, and then if we go down to under 3:
 18 "which causes restrictions on the use of the
 19 premises on the order or advice of the competent local
 20 authority."
 21 Now, "action" which we have in the relevant
 22 extension on page {B/21/51} is naturally broader and can
 23 include, as we say, speech acts such as instructions and
 24 orders being given, even if they are not legally backed,
 25 and rules, and it is deliberately, we would say,

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1 intended to be broader than "order".
 2 But this is important, because Zurich's proposed
 3 meaning, "mandatory action with the force of law" is
 4 almost synonymous with "order", but that word wasn't
 5 chosen for the extension that we are looking at. We
 6 would say that therefore it is broader and it
 7 encompasses all acts of government, including those done
 8 by announcement.
 9 We saw on Monday that the government language mixed
 10 "requests" with "orders", but they were all to be taken
 11 as authoritative and as amounting to government action.
 12 So we say the short of it is the government was
 13 acting; it had an action plan on 3 March. And on
 14 16 March, when it told people to stop inessential
 15 contact of all kinds, and to stop all unnecessary
 16 travel, and to work from home wherever possible, the
 17 Prime Minister said that it was necessary to take
 18 drastic action. And on 20 March the Chancellor
 19 explained its actions, saying it had taken steps to
 20 close schools. Now, that wasn't backed by legislation
 21 other than to give a power to close schools, but they
 22 were saying "We have closed schools and these steps are
 23 necessary to save lives".
 24 So by all these things, by its statements up to and
 25 including 20 March, the first regulations happen the

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1 next day, we say this was all action.
 2 Moving on to the second topic, "prevention of
 3 access", Zurich's case on prevention of access to the
 4 premises is that one needs physical obstruction or
 5 physical impossibility or, alternatively, a complete
 6 cessation of the business. We can see that from
 7 paragraph 95 of its skeleton, at {1/19/44}, where it
 8 sets out that case.
 9 It takes the extreme position that there is no
 10 prevention of access even by the 21 March and 26 March
 11 regulations. We can see that from paragraph 116 of its
 12 skeleton, on {1/19/51} of the same document, where it
 13 says:
 14 "As to [both sets of] regulations:
 15 "(1) They do not on fair phase prevent access to
 16 premises; and
 17 "(2) They do not have the effect of preventing
 18 access to premises.
 19 "Both of these points are unsurprising because the
 20 regulation were not aimed at preventing access; rather
 21 they were designed to reduce the degree to which people
 22 gathered and mixed, particularly indoors."
 23 Now, we say that that is a complete misreading of
 24 the regulations. Even for category 2 businesses, and
 25 even where they have been ordered to cease operations

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1 entirely in the 26 March regulations, which we can see
 2 if we go to them, it is {J/16/3}, and it is regulation
 3 4(4) towards the top, that:
 4 "A person responsible for carrying on a business ...
 5 in part 2 of schedule 2 must cease to carry on that
 6 business or to provide that service during the emergency
 7 period."
 8 They say that that was not ordered to cease
 9 operations entirely, and they rely on regulation 4(5)
 10 and the fact that paragraph 4 doesn't prevent the use of
 11 premises used for the purpose of broadcasting
 12 a performance to people outside the premises. They say
 13 that is sufficient, there is no prevention of access,
 14 there is no complete closure.
 15 Now, as I have already made clear with Arch, that is
 16 not a point that Arch is taking, but Zurich takes that
 17 case; that is its primary case, that there was no
 18 closure even for category 2. And it is said in relation
 19 to, for example, a retail business, a non-essential
 20 retail business, category 4, that regulation 5(1), which
 21 as you can see provides that:
 22 "A person responsible for carrying on a business
 23 [must] cease to carry on that business [and] close
 24 any premises [and] cease to admit any person to its
 25 premises ..."

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But even there they say that that is not prevention of access, because an employee can attend the business for the purposes of meeting any mail order business.

Its case in that regard is set out in paragraph 120(2) and (3) of its skeleton, that is {1/19/53}.

It says at paragraph 83, which is on page {1/19/38} that this is the true battleground between the parties, and it spends 12 pages of its skeleton on this point.

Now, I have already discussed these issues in relation to Arch and we would say the same points apply, and they are a response to Zurich's 12 pages in relation to this.

Zurich are seeking to rely on what US courts have held in some six US decisions, applying US policies with different language, for example "prohibition", and the they are applied to a particular US situation, different from here, in relation to restricted vehicular access and closed bridges and so on.

Now, we will deal with those in reply, having heard what Zurich say about it, but we say they don't change the position here. And, as with Arch, our case is that all the actions relied upon in substance prevented access to the premises.

The third issue I am going to come to now is "danger

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or disturbance in the vicinity of the premises", and these are issues specific to Zurich, so I will address them.

Zurich has three main points here. The first point is that "danger" cannot be disease, because there is a separate clause relating to disease. Its second point is that "vicinity" does not mean locality, it means "immediate locality". And its third point is that to be a danger in the vicinity the danger has to be only in the vicinity.

To take the first point first, we would say that what they are saying is that danger from disease cannot have been intended to fall within the government action clause.

We would say there is no presumption against overlap. The starting point, as Zurich itself accepts is its natural meaning if one looks at its skeleton at paragraph 129, on page 57 of {1/19/57}, is that disease is plainly a danger. That is accepted as part of its natural meaning. It is also accepted, if we go to paragraph 73 of the skeleton on {1/19/35}, it is accepted that the extensions are not mutually exclusive they can potentially overlap. That is accepted by Zurich.

We can see if we look at the clauses, if we go back

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to the disease clause at {B/21/52}, they are triggered in different circumstances. So apart from the fact that this is responding to a notifiable disease at the premises, we can see it is about causing restrictions on the use of the premises on the order or advice of the competent local authority. So it is restrictions on use, but in the AOCA clause it is prevention of access.

The clauses may have greater or smaller lengths of indemnity, of sub-limits and different premia, according to the schedule in any particular case and according to how those risks are perceived.

Zurich relies in its skeleton, it is paragraph 132, on an Irish case called *Welch v Bowmaker*. It is an Irish case about a debenture -- sorry, I should have given the reference, but I think it has been brought up on the screen anyway. Yes. It is paragraph 132 at the top {1/19/58}, and they say:

"... it is unlikely, as a matter of common sense [in circumstances where the policies contain a notifiable diseases extension] that the reference to 'danger' in the AOCA extensions is intended to encompass an outbreak of disease, let alone an outbreak of a notifiable disease."

Then we have a quote from *Welch v Bowmaker*:

"When you find a particular situation dealt with in

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special terms, and later in the same document you find general words used which can be said to encompass and deal differently with that particular situation, the general words will not, in the absence of an indication of a definitive intention to do so, be held to undermine or abrogate the effect of the special words which were used to deal with the particular situation."

The quotation relied on continues, and I will give you the reference but I won't go to it, I will just read you the one sentence that follows on, it is at {K/66/5} it says:

"This is but a common sense way of giving effect to the true or primary intention of the draftsman, for the general words will usually have been used in inadvertence of the fact that the particular situation has already been specifically dealt with."

We would say that colours the context in which the part quoted at paragraph 132 is to be read. Plainly it cannot be suggested that Zurich had forgotten about one extension, when drafting another one page later.

So we say the fact that there is a disease clause does not mean that there is no cover for disease, if it is a danger under the AOCA clause.

I turn now to the second point, which is that it is said that "vicinity" does not mean locality but

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"immediate locality". We would say that the implication of the word "immediate", which is what Zurich is seeking to imply here, is impermissible.

Elsewhere in the wordings the exact phrase "immediate vicinity" is used, but it is not used in the AOCA clause. We can see that at {B/21/31}. It is condition 1(1) and we see the words:

"The area in the immediate vicinity of the work ..."

Zurich say that is a different context, but nonetheless one would expect that if it was intended that "vicinity" mean "immediate vicinity", that those words would have been used in the AOCA clause as well.

Our case is that "vicinity" is such area as would reasonably be expected to affect the insured's business in relation to a particular danger or disturbance. That could be a whole city or a whole country, if the danger is an infectious disease.

MR JUSTICE BUTCHER: There, Ms Mulcahy, you are getting a long way away from the ordinary meaning of the word "vicinity", aren't you? "Vicinity" means a close area.

MS MULCAHY: We say it is a flexible concept. As Mr Edelman showed you with RSA4 and the definition of "vicinity" there, we say that is a sensible, workable definition; it is one that takes account of whether a danger somewhere could be reasonably expected to impact on the

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premises in question.

In some ways Zurich accepts that it may not be just at the premises, because they note, if one looks at footnote 128 on {I/19/61}, they accept that for some premises "vicinity" might be 10 miles away, because a rural business can be affected by danger at that distance.

But in any event, COVID-19 was a nationwide danger, as Arch accepts, in terms of it being a nationwide emergency from 3 March. And as I told you on Monday, by for example -- I mean, danger is all about risk, but by 16 March almost every local authority had actual cases. 317 local authorities, all but 19 of them had reported cases, and you have seen the SAGE minutes leading up to the announcement on 16 March about the concern as to the true number.

So even if "vicinity" is more local, it is more of a fixed distance, query what that is, but even if it is more local to the premises we would say here it is satisfied, there is a danger within the vicinity.

Then the third point that Zurich make, which is that to be a danger in the vicinity the danger has to be only in the vicinity; they say even if there was COVID at the premises and all the neighbouring premises, there was no danger in the vicinity because there must be a specific

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local danger. It is their skeleton at paragraphs 135 to 136, at {I/19/58} to page 59.

This is similar but slightly different to Hiscox's implication that a case would have to be preponderantly within the vicinity, and we would say, for similar reasons, that's not so.

Zurich acknowledges as a matter of ordinarily natural meaning and logic "within the vicinity" does not prevent the danger from also being outside it. If we go forward to paragraph 138 of its skeleton, we can see that there {I/19/59} that it can arise in relation to inside and outside such vicinity as is specified.

We would say the required nexus is supplied by the wording; it must prevent access, it must follow the danger and it must be present in the vicinity. And there is no room, therefore, for the further implication of a specific local danger only, ie effectively of an epidemic exclusion, if one is talking in relation to disease.

That was what I wanted to say about the issue of danger or disturbance in the vicinity of the premises.

The last issue is causation. This is the first case I think we have had where the word "following" is disputed in terms of its meaning. As you have seen, the civil authority action has to be following the danger in

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the vicinity.

Zurich's argument in relation to that is in its skeleton at paragraph 9 on page {I/19/5} of this document, but also at 75 to 76 at page {I/19/36}.

For this issue to arise, it must have been found that COVID-19 was a danger in the vicinity. And Mr Edelman has addressed Hiscox 4, where the question of restrictions following occurrence of a disease within 1 mile arose.

Now Hiscox, and we would say rightly, accepts that "following" is a looser causal connection, although it requires more than simply a temporal successiveness or a temporal connection.

Zurich disagrees. Zurich argues "following" means proximate cause, in the same manner as "resulting from". We see that in its skeleton at paragraph 147 on {I/19/62}.

In any case, they say that the government response did not follow any danger in the vicinity because it was a nationwide response. They say that at paragraph 148 {I/19/63}. We have already addressed the latter argument in relation to Hiscox and the jigsaw argument and I am not going to repeat that, and we have dealt with it in our skeleton in relation to Zurich. But as to the former point, the point about whether "following"

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is a strong causal connection, ie a proximate causal connection, we would say that it isn't. It is a looser connection, that is obvious given its primary natural meaning. We don't need to turn it up but the dictionary definition at {K/222/1} is "to come after, or to succeed". And yes, in this context it imports a causal connection, but not one that requires a direct and "but for" link, rather it is more of a causal contribution.

I mean, Zurich clearly doesn't like this word "following", instead 14 times in its skeleton it replaces it with its own, and we would say not synonymous, term "in response to", which it prefers, because it suggests more of a nexus with the part of the danger that is in the vicinity. But we say that is rewriting the clause. It refers to "following" and that is looser in its natural language and its effect.

The other thing that we rely upon is the fact that the clause anticipates military or government action, which may well be reacting to wide area events. So it is contemplating exactly the situation arising here. If, contrary to our case, "vicinity" means in this context a small area, we are still talking about authorities where there is potential for the area to be much broader.

The other main argument is on the "but for" link

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between prevention and loss. Zurich adopts the points in the joint causation skeleton, but then itself, it's page 34 to 35 of this document {I/19/34}, in three pages it goes on and deals with these points.

These have already been addressed by Mr Edelman and they have been addressed in relation to Hiscox, where although there was "solely and directly" wording, including in relation to a vicinity clause, and I have addressed them in relation to Arch where there wasn't a vicinity requirement.

What Zurich is saying is that most or all of the loss is irrecoverable because it is caused by wider disease-related effects, including other government measures.

We see this in Zurich's skeleton at paragraph 165 on page {I/19/67}. If we can go over the page {I/19/68}, these are the list of other factors, the wider circumstances. I took you to this when I was dealing with concurrent causes yesterday, and you can see the list there: nationwide pandemic, which resulted in individuals contracting COVID self-isolating, shielding; and/or the response of the public to COVID; and the adverse impact of the above matters on economic activity; and then government measures responding to COVID other than those that the court might find

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prevented access to the premises.

Then if we go to 166, it is said:

"Each of the above matters was and is an independent cause of policyholders' losses ..."

A cursory glance at the list of causes there identifies that effectively they are all simply COVID-19, or intermediate direct effects of COVID-19, the public and government behaviour in response to it. They are not independent of each other or the insured peril, in the ordinary sense of the words; they are all interlinked. Indeed, if one looks at (3), it is "The adverse impact of the above matters", so they are clearly interlinked with each other.

What Zurich is saying must be removed for the purposes of the counterfactual is the national government action which prevented the access, so they are saying the regulations which are found to prevent access. And it is said, for example, footnote 149 probably makes this clearest on page {I/19/74}, where it is said we had misunderstood Zurich's case, and it says:

"On Zurich's case, it is the nationwide application of the regulations which prevent access which falls to be removed. However, it is only the danger in the vicinity which, on Zurich's alternative case, falls to be removed from the counterfactual, not danger outside

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the vicinity."

So it is essentially seeking, and similarly in its skeleton at paragraph 200, to reverse such regulations as might be found to prevent access to the premises, and it says that that is the insured peril, paragraph 197. On its alternative case it would also remove danger in the vicinity {I/19/86}.

We have addressed this already, so I am going to take this very briefly, but essentially by accepting that the national action is to be removed, Zurich is accepting that one does not just look to the narrow insured peril approach, and that some things, national government action, are inextricably linked or indivisible. And once you accept that, you move past interruption. Once you accept, you move past interruption to action of the civil authority, why do you not also include the danger that is part of the chain in the clause?

The reason Zurich doesn't remove the danger is because you would then have to accept to remove the national danger, not merely the part within the vicinity. Because like the national civil action, the thing as a whole would need to be removed, not merely the part that causes interruption.

And Zurich accepts the absurd windfall result of its

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1 construction, that there is no danger in the vicinity
2 but there is a danger everywhere else. If we look at
3 paragraph 214 on page {B/19/91} it says that that is
4 apparently fine. It says:

5 "In principle, there may be scope for recovery of
6 such 'windfall' profits ..."

7 It goes on to say they are "unlikely to arise".

8 We would say that is not the result, that's not the
9 answer. It shows the construction is not what is in
10 fact intended. And on the facts Zurich suggests nobody
11 would have flocked to a danger-free or restriction-free
12 area. But we would say that is simply contrary to
13 common sense, and such profits are likely to arise in
14 relation to that scenario.

15 The other thing they seek to do is whilst it is
16 accepted that the national actions that prevented access
17 should be removed from the counterfactual, they don't
18 accept the full scope.

19 So the 26 March regulations, we would say were an
20 indivisible action that must be assumed not to have
21 occurred. But what Zurich seeks to do is to redraft
22 them or to redact part of them and leave the rest in for
23 the purposes of the counterfactual, redacting only the
24 parts that are found to have prevented access, on its
25 case. We say that that is just inappropriate.

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1 Then I am not going to address it substantively but
2 just to tell you where it is, the trends clause is on
3 {B/21/55}, it is next to "Rate of gross profit" and
4 "Standard turnover" on the right-hand side, and you will
5 see there:

6 "To which such adjustments shall be made as may be
7 necessary to provide for the trend of the business and
8 for variations in or other circumstances affecting the
9 business either before or after the incident or which
10 would have affected the business had the incident not
11 occurred ..."

12 Then there is the adjustment which but for the
13 incident would have been obtained.

14 We accept the machinery applies. There is a debate
15 about what "had the incident not occurred" means, and
16 that is dealt with in our skeleton at paragraphs 694 to
17 709, and we say that it wasn't intended to modify the
18 result absent the clause. But insofar as "incident" is
19 concerned, we say it means "but for the interruption"
20 and that is the incident that is being referred to here.

21 My Lords, those are my submissions on Zurich and
22 I am going to have been back now to Mr Edelman to turn to
23 Amlin.

24 (2.26 pm)

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1 Submissions by MR EDELMAN

2 MR EDELMAN: My Lords, Amlin policies come in three types.

3 Firstly we have Amlin 1 {B/10/1}, called the policy,
4 commercial combined policy. There are two clauses of
5 interest. Page {B/10/65} which is a competent authority
6 clause:

7 "Loss resulting from interruption or interference
8 with the business following action by the police or
9 other competent local, civil or military authority
10 following a danger or disturbance in the vicinity of the
11 premises."

12 Familiar territory again, and I am not going to
13 repeat all the submissions that have been made about
14 that form of clause.

15 You will see it is a €50,000 limit of cover.

16 Then the next page, {B/10/67}, again a fairly
17 familiar type of clause:

18 "Consequential loss as a result of interruption of
19 or interference with the business carried on by you at
20 the premises following ..."

21 Then (iii):

22 "Any notifiable disease within a radius of 25 miles
23 of the premises."

24 There is a limit of indemnity here of €100,000.

25 The consequential loss, you will see that is at

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1 page {B/10/11} the top of the page.

2 "Loss resulting from interruption of or interference
3 with the business carried on by you at the premises in
4 consequence of damage to property ..."

5 My Lord --

6 MR JUSTICE BUTCHER: That is effectively the exactly same
7 effectively as QBE2, isn't it?

8 MR EDELMAN: Yes.

9 Then Amlin 2, {B/11/1}, it is a retail policy. Then
10 you will see the clauses: at page 47, consequential
11 loss, notifiable disease; and at 48, the prevention,
12 1 mile radius. Again, you have seen clauses like that.
13 Denial or hindrance of access.

14 Finally, Amlin 3, tab 12, page 1, {B/12/1} it is for
15 forges. There are currently no claims under this one,
16 but there may be policies like it in these words, so it
17 is worthwhile looking at it. Page 50 I think it is now.
18 {B/12/50}. There you have it, it just has the
19 prevention of access clause. Threat or risk in slightly
20 different language:

21 "Following threat or risk of damage or injury in the
22 vicinity of the premises."

23 But you will see that that they contemplate disease
24 by a limited disease exclusion at the bottom of the
25 page.

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1 So, as you have seen, the prevention of access
2 clause, particularly in Amlin 2, is materially the same
3 as Hiscox's clause, and Amlin have adopted Hiscox's
4 submissions on that, so I will say no more about that at
5 all.

6 Amlin 1, we have got the definition of "notifiable
7 disease" on page 58 of tab 10. {B/10/58}. It is.

8 "Illness sustained by any person resulting from any
9 infectious or contagious disease, an outbreak of which
10 the competent local authority stipulate shall be
11 notified to them."

12 Now let's go back to the clause itself, which is at
13 page {B/10/66}. In fact I should say there is
14 a pollution and contamination exclusion, which is not
15 relied on by Amlin. So we have got the elements to the
16 clause, which you will be familiar with, and we have got
17 the concessions -- sorry, I should take the prevention
18 of access clause first. {B/10/65}.

19 Amlin concedes that the UK Government and parliament
20 is an authority for this clause. There was a previous
21 caveat, but that has now been jettisoned. Full
22 concession that government is covered by the reference
23 to "public authority". They also concede that "action"
24 covers any acts or things done by the government, thus
25 including advice and guidance, as well as regulations,

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1 the whole gamut. That is their skeleton at 135.1 and 2
2 for those two concessions I have referred to. Four
3 issues: what government action led to prevention of
4 access; the meaning of danger in the vicinity; whether
5 the government action was following a danger or
6 disturbance in the vicinity; and potentially
7 interruption or interference.

8 Firstly, prevention of access. You have had
9 argument on this before, but just so you know what
10 Amlin's position is, as I understand it they say it
11 depends on the premise that "prevent" requires
12 a technical legal prohibition.

13 We say that simply is not right. It is wrong to
14 suggest that we only have a prevention of access where,
15 as Amlin contends, see paragraph 154.3, it is physically
16 or legally impossible.

17 Then if we can go to what they say about this, in
18 {I/12/94}, paragraph 160, or it must be the next page
19 I think. {I/12/97}, they say:

20 "The FCA's fallacy is to equate access with use and
21 to equate prevention with hindrance. If you can gain
22 access to premises, even if not all parts of the
23 premises are accessible, that is not a prevention of
24 access but it may be a prevention (or hindrance) of
25 use."

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1 This is an example of a professional I gave; as long
2 as you can gain access to the premises, it is not
3 prevented. That is a lawyer's answers to a question
4 which is a practical one which is posed by this policy.

5 I will come back to one point. I have just had
6 a message to correct something.

7 We say this puts the test far too high. It will
8 almost never be physically or legally impossible to
9 access any part of a premises for any purpose at all.

10 What Amlin are saying is the fact that theoretically
11 someone could have had a reasonable excuse for entering
12 premises, a barrister to go and collect some papers,
13 means that they are not prevented access for the
14 purposes of this clause.

15 That is obviously not what this is about. If what
16 they are saying is yes, you might be able to go in and
17 get some papers you can't work without, but you can't
18 actually sit at your desk and work if you can take those
19 papers home and work on them, which these days we all
20 can, either with the assistance of a vehicle or we can
21 use the documents electronically.

22 Their own case is somewhat incoherent about this.
23 If we look at 162 on that page {I/12/97} they say:

24 "Any kind of local emergency involving a cordon or
25 blocked access roads or similar would trigger the cover

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1 and those are precisely the types of situation that the
2 clause was clearly designed to meet."

3 My Lord Lord Justice Flaux referred earlier to the
4 status of a cordon anyway, but cordons are -- there is
5 no police there to turn you back, you can go under or
6 over if you choose.

7 Is Mr Kealey saying: well, unless it is an actual
8 physical barrier that you physically can't get past,
9 there is no prevention of access? This is entirely
10 unreal.

11 MR JUSTICE BUTCHER: I mean, this is probably not very -- he
12 says a legal prevention would be sufficient, doesn't he?

13 MR EDELMAN: Yes. So if you can physically get there but
14 you are breaking some rule by going there. Well --

15 MR JUSTICE BUTCHER: It may in fact be the case, I don't
16 know, but it may be the fact that it is actually illegal
17 to cross a police cordon, for want of a way to put it.
18 But it probably doesn't matter.

19 MR EDELMAN: No, it doesn't, because we say this is just
20 wholly unreal. He gets this idea from some authorities
21 that he cites at 155.5, which I think is probably two
22 pages back, on 95, I hope. One more page back,
23 {I/12/94}, he says:

24 "The ordinary, natural meaning ... not matters of
25 legal authority. However, it is notable that a range of

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1 authorities also refer to access in its ordinary way and
2 natural sense ..."

3 Let's look at the cases he cites on the next page.
4 The next page, please. There we are, got it {1/12/95}.

5 There's a crowd assembling outside the defendant's
6 theatre; that's an example of physical access. A case
7 relating to a house owner's right of physical access
8 from the house to the adjoining highway. And public
9 nuisance, where the access is obstructed.

10 Now, yes, of course those are all cases in tort, on
11 what constitutes a tort or a breach of a right of
12 access. We are dealing with an insurance policy which
13 is covering something which relates to a business and
14 business activities. It is an entirely different
15 context and these cases simply don't assist. If he is
16 trying to draw an analogy with these cases, it is
17 a false starting point.

18 They have an alternative case on access, which is
19 buried away at page 192, I hope this is the correct
20 reference, in an appendix. {1/12/192}. It is
21 paragraph A2.17:

22 "Without prejudice to [their] primary case [at the
23 bottom], this section ... addresses the extent (if any)
24 to which there was ever any legal prevention of access
25 in respect of different types of business."

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1 The next page, this is on the premise that it could
2 be prevented by legal impediment; then they go on to say
3 that they admit that only category 2 businesses forced
4 to close by the 21 and 26 March regulations suffered
5 a prevention of access.

6 They deny that pubs, cafes, bars and restaurants
7 suffered a denial of access -- I think that is probably
8 on the next page -- because they could theoretically
9 have turned themselves into take-aways. It is (iii)
10 {1/12/194}. So because you could go to the property and
11 run a take-away, then you have not prevented access.

12 We have dealt with it in other contexts, but these
13 submissions, we submit, are unreal as when one is
14 looking at the business that is insured. And being
15 prevented customers, we would submit, included being
16 prevented from accessing the premises for the purposes
17 of the business.

18 Can I move on to the next ingredient, danger or
19 disturbance in the vicinity. Amlin accept that there
20 was --

21 LORD JUSTICE FLAUX: Just before you do, Mr Edelman, do you
22 say there is any significance at all in the use of the
23 future tense in "will be prevented", rather than "is
24 prevented"?

25 MR EDELMAN: Well, my Lord, I have to confess that it's one

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1 of the difficulties. There are so many points, you miss
2 points sometimes.

3 That is obviously of significance, because my Lord
4 is it right, I think, that that is looking to the
5 prospective effect.

6 LORD JUSTICE FLAUX: It is looking at the prospective effect
7 of the ...

8 MR EDELMAN: Of the prohibition of the --

9 LORD JUSTICE FLAUX: Of the action.

10 MR EDELMAN: Yes, so there doesn't actually have to be, and
11 it is just when your business is interrupted or
12 interfered with. And it again comes back to the point
13 my Lord was making about the fact that you have got
14 "interference" encompassed here. Because if you can't
15 get to your premises at all, for any purpose at all, how
16 is your business is going to be interfered with? It is
17 impossible.

18 LORD JUSTICE FLAUX: Yes. Yes.

19 MR EDELMAN: It is giving with one hand and taking away with
20 the other.

21 Danger or disturbance. Amlin accept that there was
22 a danger from 12 March, but they say that it is
23 a question of fact as to whether that existed anywhere
24 in particular.

25 We say that the danger is everywhere in the country

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1 and therefore, necessarily, in the vicinity of the
2 premises. That is not taking the point that the country
3 is the vicinity, although we argue that; it is saying
4 that if it is everywhere, it is necessarily in the
5 vicinity of each set of premises.

6 Amlin, they characterise our case as saying that if
7 one person with COVID is in Trafalgar Square that means
8 there is a danger in the vicinity of most of London,
9 which is an unreal comment, because one proved case in
10 the vicinity, as we all learned to our cost, will
11 rapidly spread to others, and did rapidly spread. There
12 is certainly a danger of it spreading to others. And
13 given the evidence of prevalence and the rate of
14 transmission, the chance of being one isolated case in
15 a vicinity becomes vanishingly small.

16 Interestingly, one can say that the whole global
17 pandemic started probably from one infected person. Or
18 may have started from one infected person. But anyway,
19 it doesn't detract from the danger.

20 MR JUSTICE BUTCHER: Yes, because you say "danger" doesn't
21 here necessarily mean an occurrence of someone with
22 COVID --

23 MR EDELMAN: Exactly.

24 MR JUSTICE BUTCHER: -- but the potential for someone. And
25 if that exists, then that is the danger. That is what

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1 you say for this purpose.
 2 MR EDELMAN: Yes, absolutely. So there is not a prevalence
 3 occurrence issue here, unless they can show that you are
 4 in -- maybe the Scilly Isles, I don't know, but I am not
 5 going to make any concession in relation to the Scilly
 6 Isles because I am sure people would have said "It might
 7 not have any at the moment but there is a real danger
 8 that it will spread to the Scilly Isles unless we do
 9 something". But you would have to have maybe some
 10 remote Scottish island which has only a monthly ferry
 11 service and nobody can get to or from the island,
 12 I don't know whether such an island exists any more,
 13 then one might say there wasn't a danger on that island.
 14 But otherwise there is a danger everywhere.
 15 LORD JUSTICE FLAUX: Ironically, the more remote Scottish
 16 islands did in fact have occurrences of COVID. The
 17 Scilly Isles must have been lucky, given that there is
 18 a regular ferry, at least I hope there is, there
 19 certainly used to be a regular ferry from the mainland.
 20 And if you are looking at it in terms of danger, you
 21 would say there was clearly a danger in the Scilly Isles
 22 because it would only take one infected person to go
 23 across on the ferry, certainly in March, for there to be
 24 more people infected.
 25 MR EDELMAN: Yes, exactly, my Lord. Exactly.

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1 So all these danger clauses, and it is accepted that
 2 this is a danger, or an emergency for the other clauses,
 3 it is all over the place. It is everywhere.
 4 So, you know, you find someone in Trafalgar Square
 5 and you think to yourself: where did they get it from,
 6 who did they catch it from, where have they been? And
 7 actually, in March, that probably was a bit of a panic.
 8 But in fact there would have been probably quite a few
 9 people in Trafalgar Square with COVID in March,
 10 unfortunately.
 11 The other element of this clause is we have got
 12 "following", following a danger, and the attempt was
 13 made by Amlin to substitute "following" with the words
 14 "results from". The high point of their case is that
 15 "following" and "resulting from" are used
 16 interchangeably on one occasion in a 97-page policy.
 17 The example that Mr Kealey or one of his juniors or
 18 solicitors has come up with is that we have it here on
 19 {I/12/186}, paragraph A2.6. On the "welcome" page, that
 20 is page 4, the coverage was summarised as follows:
 21 "In return for the payment of premium shown in the
 22 schedule, we agree to ensure you against ..."
 23 If we could have the next page, {I/12/187}:
 24 "loss resulting from interruption or interference
 25 with the business following damage."

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1 By contrast, the business interruption clause at the
 2 start of section 6 promised to pay 'any interruption or
 3 interference with the business resulting from damage to
 4 property ..."

5 That, in a 97-page policy, is the edifice on which
 6 the argument is built that "following" has some stronger
 7 meaning.

8 Of course, one bears in mind, going back one page to
 9 {I/12/186}, that the passage they refer to is a general
 10 "welcome" page and actually the more detailed provisions
 11 are set out in the policy. We have counted up
 12 "following" is used 76 times in the policy, "resulting
 13 from" is used 14 times, they are often used in the same
 14 clause, like the cover clause we are concerned with, and
 15 they have identified one occasion, and we say what about
 16 the other 75 times that "following" is used? There is
 17 no basis for saying that they are interchangeable based
 18 on one instance alone.

19 MR JUSTICE BUTCHER: This isn't going to matter very much.
 20 If you are right about everything up to this point, that
 21 it is a danger in the vicinity --

22 MR EDELMAN: Yes.

23 MR JUSTICE BUTCHER: -- then the action will have been taken
 24 as a result of the danger in the vicinity.

25 MR EDELMAN: Yes. But obviously Mr Kealey thinks it is an

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1 important point, because he spends quite a chunk of his
 2 skeleton discussing the meaning of the word "following".

3 LORD JUSTICE FLAUX: A fortiori, if danger, as my Lord said
 4 a little while ago, imports the potential for
 5 occurrences as opposed to actual occurrences, then --

6 MR EDELMAN: Even less significant.

7 LORD JUSTICE FLAUX: -- it is even less significant.

8 MR EDELMAN: Yes. I think I said that at the beginning, not
 9 of this section but I think I have said it, whether it
 10 was Monday or Tuesday, that actually there is a debate,
 11 a hot debate that some of the insurers have raised about
 12 the meaning of "following", but it doesn't really
 13 matter.

14 Interruption or interference, there is no issue
 15 about that.

16 So that is the prevention of access clause, but
 17 I will move forward to the disease clause. That is
 18 page 59, if we are still in the same tab. No, that is
 19 the definition. Sorry, it is page {B/10/66}.

20 Most of this we have already dealt with before.
 21 I have shown you, we have been through various of the
 22 requirements and I have shown you the meaning of
 23 "consequential loss". On proof of the disease Amlin are
 24 adopting Hiscox's case, and I don't need to say anything
 25 more about that. As to proof of restrictions, the

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1 government restrictions followed the notifiable disease;
2 again, we have addressed that already. As far as
3 I know, there is no other issue in relation to a direct
4 effect.

5 There is a point on Amlin which they dealt with at
6 {1/12/114}, which is at paragraph 219. This is dealing
7 with a provision that requires the disease to be
8 excluding indirect loss of other premises. They
9 essentially agree with our analysis of that clause, as
10 I gave it to you, but what they say is it is all
11 a question of fact. Well, we agree it is unnecessary to
12 debate about factual scenarios, but it is important --
13 the point arises on RSA3 -- for the court to rule as to
14 the impact of provisions like that.

15 If I can now move on, my Lord, to paragraph 219
16 {1/12/114}. I have already got that on the screen. At
17 223, where they give their summary -- perhaps on the
18 next page {1/12/115} -- and they have the five country
19 house hotels example, a policy for each of the hotels:

20 "Does the loss of income in respect of each hotel
21 flow from proved cases of COVID-19 within a 25-mile
22 radius ... The answer is no. All the loss was caused by
23 the government legislation applicable nationwide, which
24 is a different cause altogether from locally proved
25 cases of COVID-19 ...

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1 "When the loss in respect of each hotel is tested
2 separately under a counterfactual [this is the important
3 point] assuming that the proved cases of illness
4 sustained within a 25-mile radius of the hotel in, say,
5 Herefordshire did not occur (but everything else remains
6 the same):

7 "(a) ... FCA cannot prove that, but for the proved
8 cases of illness within a 25-mile radius of the
9 Herefordshire premises, the government action would not
10 have applied to that location. Plainly it would."

11 Consequently, the insured have suffered no loss. So
12 this is a graphic illustration of insurer's argument
13 that you can have all the 25-mile radius areas in the
14 country, outbreaks of disease in all of them, and
15 insurers' positive case is that none of the policies pay
16 because they can always point to the other areas in
17 which the disease manifested itself.

18 It is rather like two insurance policies with
19 matching other insurance clauses, and insurers saying
20 neither of them pay because they both say: we don't pay
21 if there is other insurance in place. It is an
22 analogous point, but here you see it in black and white
23 what insurers' case actually is. Nobody pays, even
24 though the disease is everywhere, because they can
25 always point to it being somewhere else as well.

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1 Amlin 2 I don't think, in the time available, really
2 adds anything more. As I said, it is at {B/11/47}.
3 It is slightly differently worded but to the same
4 effect. But it doesn't have any reference at all to
5 interruption or interference here, it just says "pay you
6 consequential loss following" for that clause. And on
7 page {B/11/48} that one is only interruption, it doesn't
8 refer to interference, but interruption, it is your
9 financial losses. But it is the same point. But that
10 does have denial of access or hindrance.

11 MR JUSTICE BUTCHER: That one has "caused by an incident
12 within 1 mile".

13 MR EDELMAN: Yes. But that you have had submissions on, and
14 I am not going to -- so there are differences there, but
15 it has all been covered by previous submissions.

16 Finally, the counterfactual. Again, it is similar
17 to some of the stuff you have heard before. If we go to
18 Amlin's skeleton {1/12/159} at paragraph 302, the only
19 matter to be reversed on the counterfactual is the
20 action and the identified authorities of the qualifying
21 type, which results from a specified situation which has
22 the specified effect, viz access will be prevented. So
23 that is what you strip out.

24 They spend a lot of time arguing that the insured
25 peril under the prevention of access clause is only the

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1 government action. The remainder of the clause serves
2 to, as they put it, "define, refine, qualify and
3 restrict the type of action which qualifies". That is
4 in this section of their skeleton.

5 But Mr Kealey's usual outpouring of verbs and
6 reasoning, I won't apply an epithet to it, is required,
7 because MSA needs to go to extreme lengths to narrow the
8 scope of the insured peril for its own counterfactual
9 purposes. That is a misapplication of the policy and of
10 the correct approach to causation in the context of
11 a clause like this.

12 My Lords, on the trends clause there is nothing we
13 needed to add to what we have said in writing, so unless
14 there is anything more on Amlin I am going to move
15 forward to Ecclesiastical.

16 It has two wordings. They have been referred to as
17 1.1 and 1.2., and they start at {B/4/1}, please. As you
18 might guess from the title "Parish Plus", it is for
19 churches, it is "Put our faith in us" unless you make
20 a claim under your insurance in current circumstances,
21 in which case your faith will be misplaced.

22 {B/5/1} is the other main policy. Two lead
23 policies. That is, as you can guess from the picture,
24 for nurseries. so in this category there are nurseries,
25 churches and other businesses. Ecclesiastical's

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skeleton says that as far as they are concerned it is categories 1, 2, 4, 6 and 7, but in a table prepared by insurers it says 3 and 5 as well. So other policies issued by Ecclesiastical appear to cover all categories, but anyway we are looking at these ones.

The relevant form of clause is a prevention of access clause. Let's take the Parish Plus policy at page 45 {B/4/45}. Thank you. The main dispute relates to prevention or hindrance, its access to use the premises being prevented or hindered by any action of government, police or local authority due to an emergency which could endanger human life. You will see it is covering for loss resulting from interruption or interference with your usual activities.

There is a relevant exclusion which there is an issue about, "closure or restriction in the use of premises" on the right-hand side, number 3, "due to the order or advice of the competent local authority as a result of the occurrence of an infectious disease or other issues such as food poisoning, defective drains or other sanitary arrangements". There is also, needless to say, the same causation arguments.

Since the FCA served its skeleton, we have had Ecclesiastical's skeleton which, as we understand it, accepts that there was an emergency from 12 March but

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not before.

Hindrance of use of churches is accepted but not before 23 March. So they don't accept that anything prior, including the 16 March announcement, amounted to a hindrance. And hindrance of schools is now accepted but again not before the 23 March, and they don't accept prevention of access, but that doesn't really matter because of the hindrance.

They do now accept that actions include the whole government, the whole gamut of government action. Let me rephrase that. They don't accept that actions include the whole gamut, but they appear to accept that there is hindrance at least from those actions which they accept do qualify. The limits you will see here in this one, it is £10,000, and in Ecclesiastical 1.2, it is as scheduled.

What I need also to show you in the Parish Plus policy is the definition of "income", which is at page 43. Sorry, page {B/4/42}. That gives you the provision for loss of income. And "income", 42, means:

"The money paid or payable to you including donations, collections, rent and hire charges."

So that is what this policy for churches covers.

Of significance to the construction exercise is also extension 6 on page 46 {B/4/46}, and that has a list of

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diseases, and over the page {B/4/47} what is covered:

"Any occurrence of a specified disease ..."

Needless to say, COVID nor is SARS on that list, although it was a notifiable disease, notifiable many years ago:

"Any occurrence of a specified disease being contracted by any person at the premises or within a range of 25 miles."

Below (d):

"Which causes restrictions in the use of the premises on the order or advice of the competent local authority."

I will come back to that extension in a minute. If we come back to the clause itself, there is the broadest terms here.

Firstly, we start with "interruption or interference with your usual activities", at the top of the page {B/4/45}.

Then we have "prevention or hindrance of access or use", so that is very broad.

We address schools at length in our written submissions, and I am not going to repeat it now. In its defence Ecclesiastical has denied that the announcement on 18 March that schools would close on 20 March was a prevention or hindrance because it had no

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legal force. It seems now to accept that educational premises, including schools and nurseries, did suffer a hindrance of access from 23 March, even though the legislation wasn't enacted to make that a legislative requirement.

So really the only question is whether the earlier date of Friday the 20th or Saturday the 21st perhaps should apply, because it was announced on 18 March that schools would close from the 20th.

So we say it should apply from the earlier date, it may make a marginal deference, but our position should be accepted; and Ecclesiastical doesn't explain why the instruction on the 23rd was a hindrance but the announcement of closure with effect from the 20th was not.

Now on to churches. I think we have referred already to the constitutional essay have had from Mr Kealey on the status of what the government has done. It is rather puzzling why he thought it necessary to do so, because Ecclesiastical now accept that the use of churches, and now schools, was hindered at least from 23 March 2020 by the lockdown announcement.

But we say, in fact, for churches the prevention or hindrance of action goes back to 16 March. I should record also that Ecclesiastical, and this is in their

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1 defence, have accepted that the clauses are focused not
 2 just on those employed within the church, the clergy,
 3 et cetera, but also the congregation.
 4 So this is a case where there is an insurer, perhaps
 5 more realistically than others, accepting that access by
 6 the customers is relevant, although they may say they
 7 are only admitting it because of use. So you can't use
 8 it if the customers can't get there. I use "the
 9 customers" perhaps as a general term, but obviously
 10 I would say the congregants, for the purposes of the
 11 church, although they may not be congregants, they must
 12 just be visitors. All of the public were given clear
 13 instructions to stay at home on from the 16th and to
 14 avoid all unnecessary social contact, stop unnecessary
 15 travel and that, we submit, is sufficient.
 16 But what Ecclesiastical say, if we go to {1/12/78},
 17 please at 120.4(b):
 18 "The FCA says that clear instructions were given on
 19 16 March 2020, well before the mandated closure. But it
 20 is quite apparent that what the FCA describes as 'clear
 21 instructions' were, in relation to churches, neither
 22 clear nor instructions. Churches were noticeable by
 23 their absence from what the Prime Minister said and
 24 it is entirely reasonable to suppose that reasonable
 25 churchgoers would not have interpreted what the

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1 Prime Minister said as requiring them not to go or
 2 discouraging them from going to their places of
 3 worship."
 4 People were told to stay at home and avoid social
 5 contact. I don't think how much clearer Ecclesiastical
 6 would want the government to express their wishes, but
 7 even if some people misinterpreted what the government
 8 said, it would be sufficient for our purposes that this
 9 caused a significant number of congregants not to go to
 10 church, because that would, at the very least, be
 11 a hindrance of access or use.
 12 There is also a reference in their skeleton to "mass
 13 gatherings", mass gatherings being addressed on
 14 16 March, but what was said on 16 March went well beyond
 15 mass gatherings and it was, as I have said, avoiding all
 16 unnecessary contact and travel.
 17 In other cases for other categories Ecclesiastical
 18 has not been drawn, but they have given some an example.
 19 If we can go to I --
 20 MR JUSTICE BUTCHER: Sorry, what have they not been drawn
 21 on, Mr Edelman?
 22 MR EDELMAN: Sorry. On how their policy applies to
 23 different categories. What they say about denial or
 24 hindrance of access to --
 25 MR JUSTICE BUTCHER: You mean other than churches or

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1 nurseries?
 2 MR EDELMAN: Yes.
 3 LORD JUSTICE FLAUX: Which policy wording do they insure
 4 other categories under? Because this policy we are
 5 looking at, Parish Plus, is clearly a churches-only
 6 policy.
 7 MR EDELMAN: Yes, my Lord.
 8 LORD JUSTICE FLAUX: And the other one looks to be
 9 a nurseries-only policy.
 10 MR EDELMAN: But there are some other non-lead policies.
 11 I am afraid I haven't had the time to go through them
 12 all, but they do accept that they do issue policies to
 13 other businesses. They haven't asked us to put any
 14 others as lead policies, so these are the terms that we
 15 are testing.
 16 LORD JUSTICE FLAUX: I would have thought that we have got
 17 more than enough to be getting on with lead policies,
 18 frankly. If Mr Kealey wants to tell us there is
 19 something else that he wants us to deal with, let him do
 20 so. But don't take up time dealing with it now, we
 21 still have Argenta to go.
 22 MR EDELMAN: I have an eye on the clock.
 23 LORD JUSTICE FLAUX: Also we need to have a break for the
 24 shorthand writers in about eight minutes' time.
 25 MR EDELMAN: I will desperately try to finish. Ms Mulcahy

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1 needs about 20 minutes to half an hour on Argenta.
 2 Maybe 20 minutes. We have a little bit more time,
 3 but ...
 4 LORD JUSTICE FLAUX: Okay.
 5 MR JUSTICE BUTCHER: You have got the moot question to deal
 6 with yet, Mr Edelman.
 7 MR EDELMAN: I will --
 8 LORD JUSTICE FLAUX: Competent local authority.
 9 MR EDELMAN: Yes, that is the one I am coming to now. I was
 10 about to say, you took the words, but I now come to the
 11 main event on this policy, because this is the unique
 12 and individual event, which is the exclusion to the
 13 policy.
 14 There is obviously a tension here between the
 15 insuring clause and the exclusion, and what Mr Kealey
 16 has done to rationalise the fact that the insuring
 17 clause refers to "government, police or local
 18 authority", whereas the exclusion only refers to
 19 "competent local authority", is to delve into the public
 20 health legislation, remembering these are policies
 21 designed for churches and nurseries, delve into public
 22 health legislation to suggest that anyone with
 23 a detailed knowledge of public health legislation would
 24 know that an order could be made for a local event by
 25 somebody that was either a local authority or some

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1 national agency.
 2 LORD JUSTICE FLAUX: Or a Crown Court judge.
 3 MR EDELMAN: Or a Crown Court judge.
 4 We don't dispute that that is the correct analysis
 5 of the legislation .
 6 LORD JUSTICE FLAUX: But that is not what the policy says.
 7 MR EDELMAN: No, it isn't.
 8 In some other context, and I want to be clear about
 9 this, in some other context his argument may stand up.
 10 But it is all about context. And you are looking at
 11 this clause from a reasonable reader's perspective .
 12 I appreciate that people are supposed to know the
 13 general law and they can't be said not to know their
 14 general law, but this is going way beyond the general
 15 law; this is intricacies .
 16 An ordinary reader would look at the words
 17 "government, police, local authority", see an explosion
 18 which refers to a "competent local authority" and
 19 conclude that it wasn't excluding government. At the
 20 very least it is ambiguous, and it's an exclusion . But
 21 we say that's what it means.
 22 Yes, you have got a list of diseases there, and I am
 23 not going to trespass upon any evidential grounds.
 24 LORD JUSTICE FLAUX: It is also of some significance, isn't
 25 it, that you have got to look at the entirety of the

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1 exclusion? The exclusion is --
 2 MR EDELMAN: Yes.
 3 LORD JUSTICE FLAUX: -- not only of infectious disease but
 4 food poisoning, defective drains and other sanitary
 5 arrangements. Those matters are clearly ones which
 6 would be dealt with by the local borough council.
 7 MR EDELMAN: Yes. Exactly, my Lord. There is nothing to
 8 alert you -- and then the next one, the next exclusion
 9 is the vermin one.
 10 So all of the subject matter, all of the other
 11 subject matter is purely local and parochial. There is
 12 not a lot to say about it really, because one looks at
 13 it and just gets an impression that one knows that in
 14 fact lots of people who might not be classified -- we
 15 know now; I didn't have a clue about this before -- but
 16 we know that other people have the capability of doing
 17 things. If you had a clause which had "competent local
 18 authority" and a 25-mile radius in the insuring clause,
 19 then you might say: oh well, does that really mean
 20 "local"?
 21 So I am making it clear that this is purely
 22 contextual for this exclusion in this particular policy.
 23 Other policies, where it is in the insuring clause,
 24 a different context may have a different meaning,
 25 because Mr Kealey is right about the authorities that

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1 can deal with disease .
 2 There is really no clue to it being different .
 3 I know he relies heavily on extension 6, but one has to
 4 look to see whether a reasonable reader of 3 would think
 5 that it meant something fundamentally different from
 6 what it appears to say. And 6, it has got diseases, but
 7 if you are now assuming a reader with intimate knowledge
 8 of all the public health legislation, you would think:
 9 yes, well these correspond to the notifiable diseases
 10 list, but hang on a minute, what is the most recent
 11 epidemic disease of a type that could, if it resurrected
 12 itself, spread across the country, it's SARS. And it's
 13 not there.
 14 I'm not saying it would be conclusive, but there is
 15 nothing here that drags you into saying that it's not
 16 local. If the list was unspecified in 6 and it was an
 17 insuring clause, one might say -- and that was a unitary
 18 clause, only dealing with disease, then you might say:
 19 if it is only purporting to cover notifiable disease and
 20 it's not limiting it, well maybe it could extend to
 21 something else. But that is not what we have here. We
 22 don't even have in the exclusion to the extension 3, we
 23 don't even have a reference to "notifiable disease", it
 24 doesn't invoke the "notifiable disease" concept.
 25 LORD JUSTICE FLAUX: No.

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1 MR EDELMAN: So --
 2 LORD JUSTICE FLAUX: Even though clause 6(a) contemplates an
 3 occurrence of a specified disease being contracted
 4 within a radius of 25 miles, it has to cause
 5 restrictions in the use of the premises on the order or
 6 advice of the competent local authority. So it is the
 7 local council or the local authority that restrict it.
 8 MR EDELMAN: Exactly. What I was saying was if you have
 9 a notifiable disease, an unspecified notifiable disease
 10 list, and 25 miles and this, it might be open to it.
 11 But we have got to look at the context in which this is
 12 all used.
 13 LORD JUSTICE FLAUX: Yes.
 14 MR EDELMAN: My Lord, that is all I really wanted to say
 15 about the exclusion. It is what it is, and it is a very
 16 short point on which the fate of churches and nurseries
 17 may turn, because they really are the sort of
 18 institutions that, you know, however low the limits of
 19 indemnity may be on this, £10,000 is actually quite
 20 a lot of money. It is covering things like, you know,
 21 you have lost your income from collections .
 22 LORD JUSTICE FLAUX: Yes.
 23 MR EDELMAN: Causation and counterfactuals, my last topic on
 24 this.
 25 Ecclesiastical say in their skeleton, paragraph 298,

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1 {1/12/158}:
 2 "The only matter to be reversed on the
 3 counterfactual is access to or use of the premises being
 4 prevented or hindered where such prevention et cetera
 5 has occurred:
 6 "for the specified reason ...
 7 "in specified circumstances ..."
 8 Then they say:
 9 "None of the other matters, including those set out
 10 in paragraph 296 above is to be reversed. Specifically,
 11 and importantly, the 'emergency endangering human life'
 12 to which the government action which caused prevention
 13 et cetera was a response is not to be reversed. That is
 14 not an insured peril in its own right."
 15 So you imagine that there was an emergency
 16 sufficient to generate the government action. Because
 17 it is only if there is an emergency of sufficient
 18 seriousness to provoke the government into action that
 19 it will act. But for your counterfactual you take out
 20 the government action and assume that it didn't react to
 21 the emergency which is contemplated by the clause.
 22 With respect, you know, if that is the
 23 counterfactual, it is cloud cuckoo land. From the
 24 contemplation of this clause, it is just undermining the
 25 clause completely, because you say: yes, the government

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1 may have acted but you assume that there was the
 2 emergency still. It is back to the salami slicing.
 3 You have got the arguments on this, we have
 4 reiterated them in relation to the policies, and the
 5 fundamental flaw in Mr Kealey's analysis is that he is
 6 suggesting that we are saying that this is cover for an
 7 emergency and unless you reverse, unless you treat the
 8 emergency as part of the counterfactual, you are
 9 treating the policy as if it is covering an emergency.
 10 But that is not right. We are looking for cover for
 11 the policyholders for the combination of events which
 12 has occurred, and that combination includes the
 13 emergency. If the government, like the insurers'
 14 favourite government, the Government of Sweden, had
 15 chosen not to act, although it did act in many respects
 16 but it didn't impose a lockdown, if it had chosen not to
 17 act, the clause would not be triggered. But it did
 18 choose to act. But the fact that it did choose to act
 19 doesn't mean that you assume it didn't act but there was
 20 still the emergency, and it behaved like Sweden for the
 21 purposes of a counterfactual.
 22 LORD JUSTICE FLAUX: There is a tension as well, it seems to
 23 me, Mr Kealey will no doubt deal with this, but if you
 24 look at 298 of his skeleton, the only matter to be
 25 reversed is "access to or use of the premises being

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1 prevented or hindered, where such prevention has
 2 occurred for the specified reason, by reason of action
 3 of the government, in specified circumstances, viz due
 4 to an emergency endangering human life", which seems to
 5 recognise that these are interconnected.
 6 MR EDELMAN: Yes.
 7 LORD JUSTICE FLAUX: And then says in 299: actually you
 8 don't reverse out the emergency, even though it is
 9 a specified circumstances. There is a tension there.
 10 MR EDELMAN: Exactly. What it comes down to is trying to
 11 identify -- and it is a fundamental error in approach to
 12 the operation of these insurances. It is trying to
 13 identify, in a clause which has a number of ingredients
 14 which are required for cover to be triggered, a single
 15 insured peril. And it is an over-rigorous approach,
 16 because it is like saying, well there has to be one
 17 single, unitary insured peril in here somewhere.
 18 Something has got to be the insured peril. And these
 19 clauses are quite unusual because, unlike in marine
 20 insurance or non-marine insurance for property where you
 21 would have it's either a storm, a peril of the seas, you
 22 expect one single peril to cause a loss, occasionally
 23 you might have two separate perils, which combine to
 24 cause a loss like in Miss Jay, Jay. But these are
 25 composite perils, and it is a conceptual problem which

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1 underlies all of insurers' approach to these sorts of
 2 clauses, that they are trying to find in there somewhere
 3 something they can single out as the insured peril.
 4 It's why they all come up with a different answer,
 5 because it is an artificial exercise. It is just simply
 6 the wrong exercise for something which is a composite
 7 package.
 8 MR JUSTICE BUTCHER: Yes, and because it is a composite
 9 package, it is quite impossible to know which bit of it
 10 had what effect, and that is just something which never
 11 happened. In a sense, that's what the insurance
 12 contemplates.
 13 MR EDELMAN: Yes, it is a package of things. They all
 14 combine together, A causes B causes C causes D, and you
 15 have got your interruption or interference.
 16 MR JUSTICE BUTCHER: But that is subject to any amount or
 17 any aspect where you can separate it out, for example
 18 temporally.
 19 MR EDELMAN: Yes, my Lord.
 20 MR JUSTICE BUTCHER: We have been through that, Mr Edelman,
 21 and you don't need to repeat what you say about it.
 22 MR EDELMAN: No. That is the classic point.
 23 LORD JUSTICE FLAUX: Is that a convenient moment,
 24 Mr Edelman?
 25 MR EDELMAN: I have just got three or four more sentences on

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1 trends clauses and then we can finish , and there is
 2 enough time for Ms Mulcahy, she asked 20 minutes for
 3 Argenta and I think we will be bang on time.
 4 Just on the trends clauses very quickly , we deal
 5 with those in our skeleton argument. There is a dispute
 6 about trends clauses at 1.2, but there is no specific
 7 trends clause in 1.1. But under the damage basis of
 8 settlement clause , you will see that , there is a "had no
 9 damage occurred" point. But you will see that in our
 10 skeleton . I don't have anything to add to what we have
 11 said in our skeleton .
 12 LORD JUSTICE FLAUX: Right.
 13 MR EDELMAN: My Lord, that is all I wanted to say about
 14 Ecclesiastical .
 15 LORD JUSTICE FLAUX: Very well. We will have a break for
 16 ten minutes, until 20 to 4.
 17 (3.30 pm)
 18 (Short break)
 19 (3.40 pm)
 20 Submissions by MS MULCAHY
 21 LORD JUSTICE FLAUX: Are you ready, Ms Mulcahy?
 22 MS MULCAHY: Yes, I am, my Lord.
 23 The last insurer is Argenta and I will seek to deal
 24 with that briefly .
 25 There are two wordings for Argenta. We don't need

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1 to go to them, but they are shown in the representative
 2 sample at {B/1/4}. They are on materially the same
 3 terms. The lead is the guest house and B&B policy.
 4 Both of them relate to category 6 businesses only, so
 5 catered and uncatered accommodation; although it is
 6 accepted that there may have been an impact from some
 7 category 1 measures, for example if there was a bar or
 8 a restaurant in the accommodation.
 9 Just to introduce the clause, the policy starts at
 10 {B/3/1} and then the business interruption clause is on
 11 {B/3/57}. It is page 56 of the policy itself . That is
 12 the main property damage business interruption clause --
 13 That covers interruption to the business at the
 14 premises, and "business" is defined on the previous page
 15 at {B/3/56} as "the provision of guest house
 16 accommodation, catering services and leisure facilities
 17 at the premises".
 18 Then if we go forward to page 57 of the policy and
 19 page {B/3/58} of the bundle, it sets out the extensions
 20 and the cover wording. So we can see from the top left :
 21 "The company will also indemnify the insured as
 22 provided in the insurance in this section for such
 23 interruption as a result of ..."
 24 We will come back to that in a moment. Then on the
 25 right-hand side "Section exclusions", which apply in

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1 addition to other exclusions :
 2 "The company will not be liable for ..."
 3 If we go forward a page we come to the relevant
 4 clause, which is "defective sanitation , notifiable human
 5 disease, murder or suicide". It is subparagraph 4(d)
 6 that is relevant for this purpose:
 7 "Any occurrence of a notifiable human disease within
 8 a radius of 25 miles of the premises."
 9 We can see the exclusion on the right-hand side:
 10 "For any amount in excess of €25,000."
 11 That is a €25,000 limit :
 12 "For any costs incurred in the cleaning repair
 13 [et cetera]
 14 "For any loss arising from those premises that are
 15 not directly affected by the occurrence ..."
 16 So this is a very simple clause; it is interruption
 17 as a result of occurrence of notifiable disease within
 18 25 miles. So it is similar to QBE, which has already
 19 been discussed .
 20 What I would like to do, rather than repeating
 21 points that have been made already, is just pick up some
 22 issues specific to Argenta.
 23 We have an admission by Argenta in relation to proof
 24 of disease, which is at paragraph 35 of its skeleton ,
 25 that is {1/11/16}. They admit the FCA case that there

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1 is an occurrence within 25 miles whenever a person
 2 within that area has contracted COVID-19, whether or not
 3 it is medically verified or they are symptomatic. So
 4 there is an agreement by Argenta for that purpose as to
 5 what is required to satisfy the requirement for disease
 6 within the 25-mile limit .
 7 There is very little disagreement between the
 8 parties about interruption . As we understand Argenta's
 9 case, I'm sure they will correct us if we have
 10 misunderstood it, but it is worth just noting the
 11 approach of Argenta in comparison to other insurers .
 12 Argenta in its skeleton , it is paragraph 41.2(a) and
 13 footnote 70, so it is {1/11/19}, it accepts that the
 14 21 March regulations resulted in interruption if there
 15 was a bar or a restaurant in the accommodation, other
 16 than solely for room service, which is permitted by the
 17 regulations . They would accept that if the bar or
 18 restaurant was closed, then effectively part of the
 19 business was interrupted .
 20 At paragraph 12, which is on page {1/11/8} they seem
 21 to accept that the 24 March instruction to holiday
 22 accommodation providers to close interrupted holiday
 23 accommodation.
 24 Then at paragraph -- I will give you the reference
 25 to the defence, it is 59.3 and footnote 7 in the

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defence, but it is expanded on in the skeleton at paragraph 41.2(b) to (c). It is accepted by Argenta that the 26 March regulations did cause interruption, subject to limited exceptions.

So they say there is interruption insofar as the bookings did not fall within any of the exceptions, such as travelling to a funeral or housing the homeless, et cetera.

So that appears to be an acceptance that in a guest house with, say, 30 rooms, where 20 or 25 of them were closed but the rest stayed open for these exceptional guests, there was still interruption; or if you had an occasional guest in a cottage, but huge voids in the bookings diary, it would appear to be accepted that there is interruption when it is not occupied.

So Argenta appears to accept, on our understanding, that interruption to part of the business is enough. We say that must be right, and agree.

So the real issue between the parties is yet again causation, and the main argument that is advanced by Argenta is this:

Although it accepts that the cover does respond where a disease is not simply only within 25 miles, but also goes beyond it, and we can see that from its skeleton at paragraph 48.1, which is on pages {1/11/21}

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to 22 of this bundle, it is also at paragraphs 64 to 65 {1/11/28}. So they accept the disease can go beyond the 25 miles, but they then go on and say, and it is in a number of places in their skeleton, paragraph 50 and paragraph 58, they say that the interruption was not the result of the disease within 25 miles but instead was the result of the broader pandemic and the government and public response to it, which is not sufficient to bring the loss within the extension.

Argenta's case, and it seems to be unique in this respect, at paragraph 79.4, so it is page {1/11/34} of this document, they say they will be paying no claims for interruption after 16 March.

Just pausing there, that seems to implicitly accept that from 16 March there was an interruption, that that announcement led to an interruption of holiday accommodation.

But just returning to causation, its argument is that even if there were no disease in this counterfactual, there was no disease within the 25 miles of a holiday location, and that obviously, if it is inland, a huge area, 2,000 square miles, we say that that would be a safe haven holidaymakers would flock to, what Argenta says is that there is no recovery because of what the Prime Minister and the government did, what

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they said, on 16 March, because they said you shouldn't travel for inessential purposes, and that, they say, resulted in the cessation of holidaying, so you don't have a cause by the occurrence within 25 miles; it is caused by the Prime Minister's speech instead.

Now, absent the government intervention the disease clause would have been triggered, but they say the government intervention prevents cover.

So the approach is therefore to say that the cover does respond where you have a notifiable disease going beyond 25 miles, but not where there is a public authority response which goes beyond 25 miles, despite the fact that they go hand-in-hand.

You will recall on Monday, and it might be worth just looking at it again, it is {J/10/1}, the explanatory note to the notifiable disease regulations makes it clear that a disease is being made notifiable, the regulations are placing obligations on various persons for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection.

So we say the very essence of a notifiable disease is that it contemplates public authority response, a public health response in order to control the spread of infection and reduce the spread of infection. So we say

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they go hand-in-hand, but Argenta seek to separate them out.

I'm not going to deal with the jigsaw argument again, we say there is a single disease or each part of the jigsaw was a concurrent cause and made its own contribution to the disease.

There's a specific point here with Argenta. They accept that the Leicester restrictions would trigger cover, because they say that that they are a local response. We can see that, it is footnote 20 on page 7 of their skeleton, it is {1/11/7}. But they also say it at paragraph 56.3, which is on page {1/11/25}, and at that paragraph they talk about how a local lockdown would respond but a broader lockdown cannot.

If we could go to {1/11/25} please, it is 56.3. They accept that targeted local restrictions such as those recently imposed in Leicester are capable of giving rise to loss caused by occurrence of COVID within 25 miles of some policyholders, and consideration of this type of local lockdown confirms the loss caused by national restrictions is not covered by extension 4(d).

That seems to acknowledge that the most obvious way for a disease to result in interruption is through a public authority response. But they are making a distinction between Leicester and the national

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1 response.

2 But what if one had a regional shutdown? What if

3 the whole region from Birmingham to Nottingham, through

4 Leicester to Peterborough, was shutdown; would it be

5 said that the shutdown was not the result of the many

6 cases in Leicester but the cases elsewhere in the

7 region? We say that is simply not reality. England is

8 made up of regions that for the purposes of the national

9 lockdown were all shut down. And if the Prime Minister

10 had said now is the time for everyone, including in

11 Bedford and Brighton and Leicester and Birmingham, to

12 avoid essential contact, and you should avoid pubs in

13 Bedford and Brighton and Leicester and Birmingham, then

14 presumably Argenta would accept that that was

15 sufficient.

16 But that is effectively what the Prime Minister did

17 in imposing the national lockdown. It was imposed in

18 every locale. They considered doing it in certain

19 areas, but they did it nationally because the shape of

20 the curve was very similar across the country.

21 LORD JUSTICE FLAUX: They were considering London and the

22 Midlands, weren't they?

23 MS MULCAHY: Yes, but they decided it --

24 LORD JUSTICE FLAUX: But in the end they imposed it

25 everywhere.

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1 MS MULCAHY: -- was everywhere. The shape of the curve was

2 everywhere. The height of the curve was different, but

3 the shape of the curve was everywhere so they decided

4 that it needed national action.

5 Argenta would seem to accept this in principle.

6 They accept at paragraph 52, if we go back to

7 page {1/11/23}, they make reference there to the

8 pandemic being the "widespread occurrences of COVID-19

9 across the country". And then they say that those

10 occurrences caused government action, which they define

11 as events B and C., you can see at 2(a) and (b). Then

12 they try to separate out the local occurrence, event E,

13 as also caused by the pandemic.

14 Perhaps we can go over the page with that, so you

15 can see the rest of that {1/11/24}. They talk about the

16 concern at event E, but that is dealt with at (4):

17 "In addition, the pandemic (event A) also caused, at

18 least in most cases, local occurrences of COVID-19

19 within 25 miles of the insured property (event E)."

20 So they are accepting the government response is

21 a response to occurrences of COVID-19 around the

22 country; we see that from the skeleton at 46, the last

23 sentence, page {1/11/21}. But plainly the many

24 occurrences within 25 miles, the 2,000 square mile area,

25 were part of that.

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1 So what we don't understand is when you come to

2 paragraphs 54, for example, on page {1/11/24}, but it is

3 also at 58 and 78, it is said by Argenta, repeatedly,

4 that the local occurrence is simply not in the causal

5 chain at all. We just do not understand that. Of

6 course it is. The response was a response to all of the

7 local occurrences, including the local occurrence that

8 would have been within 25 miles of any specific

9 policyholder.

10 Just briefly, there is a point being raised about

11 the exclusion to extension 4(d) for any loss arising

12 from the premises that are not directly affected by the

13 occurrence, discovery or accident.

14 Mr Edelman made reference to this already in the

15 context of Amlin. We say that that is a common clause

16 that is dealing with multi-premise businesses to avoid

17 recovery for lost revenue across the whole business once

18 there has been an interruption only to the business at

19 a particular premises. That is how Amlin also explain

20 it at paragraph 219 of their skeleton. It means that

21 the premises must be directly affected by the occurrence

22 of the COVID-19 within 25 miles.

23 The FCA accepts that the interruption must be

24 directly caused by the occurrence within 25 miles,

25 because the term "resulting from" imports a proximate

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1 cause test, as Argenta also says in its skeleton, so we

2 say this clause adds nothing. It can't be said that

3 "directly" adds anything to proximate cause.

4 Indeed, Argenta itself doesn't really seem to rely

5 on this as excluding anything, because in its skeleton,

6 for example paragraph 18 on page {1/11/10}, but it is

7 also at 62 on page {1/11/27}, it merely says it confirms

8 the case, absent the exclusion; and we don't really

9 understand what sort of exclusion merely confirms the

10 existing position. So we think this is a non-issue.

11 If it was the case that there had been a shutdown

12 across a number of holiday cottages because of vermin at

13 one, because of an interconnection, as Mr Edelman

14 suggested, because it affected those who went in and

15 cleaned the others, then that would be different,

16 because it couldn't be said that all of the cottages had

17 been closed as a result of the vermin. But it is

18 a different situation where you have cottages all over

19 the country being closed because of disease all over the

20 country, and we say that that really is not addressed.

21 Then just to note that there is a trends clause. We

22 say that this is a case where the machinery and the

23 trends apply, and we accept that the word "damage" has

24 to be made to work.

25 The basis of settlement clause is at {B/3/60}. If

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we can just bring that up on the screen, it's just to draw your attention to where it is. That deals with what the basis of indemnity is, and you will see the reference there to the amount by which gross income during the indemnity period falls short of the standard gross income due to the damage.

If we go back to page {B/3/56} we can see there the reference to the definitions of "gross income" and "standard gross income"; and you will note the adjustments language that you will see in the definition of "standard gross income" along with the words "but for the damage". So it is the same points as before and I won't repeat them. We say that doesn't make a difference to the principles of causation, but that is covered in our skeleton at paragraphs 946 to 950.

My Lords, those are our submissions on Argenta, and those are in fact the FCA's submissions, having taken you through the headline points from the policies generally, and on that note I will hand over to Mr Edey, who I think is up next for the hospitality industries action group.

LORD JUSTICE FLAUX: Thank you very much, Ms Mulcahy. (4.00 pm)

Submissions by MR EDEY

MR EDEY: My Lords, as you know, the interveners I represent

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are interested in QBE1-3, which your Lordships will find in bundle B at tabs 13 to 15, and also in RSA4, which is in bundle B at tab 20.

We adopt what the FCA says about those policies, and similar issues that arise on other policies in this test action, but there are a few points, my Lords, which we would like to make or emphasise, starting, if I may, with a couple of points about the nature of the notifiable disease clauses in both the relevant QBE and RSA4 policy. I then want to say something about the insured peril relevant to both cases, before dealing with the causation issue, which is the only real point on QBE, and then finishing with a few discrete RSA4 points.

My Lords, all of that will have to be at a serious gallop, I'm afraid, and as a result for the main part I am not going to take you to documents, I am just going to give you references to them, though no doubt when I do they will pop up on the screen.

My Lords, starting then with the general nature of the specific disease cover in the two cases. There are two points.

First, focusing, as insurers are inclined to do, on the word "pandemic", as if it is some magical thing, wholly distinct from a notifiable disease, is obviously

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a diversionary tactic. A pandemic is or may be simply a very widespread notifiable disease. It is nothing more. Put the other way, it is common ground that a notifiable disease could be or become a pandemic.

So we say, in response to a point QBE make at paragraph 51 of their skeleton argument {1/17/23}, and a similar point that all insurers make in their joint causation skeleton at paragraph 61.3, that cover relating to notifiable diseases is in fact extremely fertile ground for looking for cover which applies when there is a pandemic.

It is not, of course, our case that the policy provides specific cover for pandemics, which is the Aunt Sally set up in QBE's skeleton at paragraph 51; and that's the reference that I just gave.

Our case is simply that with a notifiable disease cover provided by the policy extends to a case where the notifiable disease becomes a pandemic, as well as to less widespread diseases.

In fact, QBE accepts that in theory the policies may provide cover in the event of a pandemic, because it accepts that cover is not, in its words, per se lost because the disease spreads more widely. It just says we can't prove causation.

My Lords, the second point is the question which

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seemed to be troubling your Lordships a little on Monday, which was the purpose of the area requirement. We say the answer to that is simple: it precludes cover if you don't have cases of the relevant notifiable disease in the relevant area. And that is an important purpose, albeit one which necessarily gives rise to the postcode lottery to which QBE refer on their case as much as ours.

The fact that in the case of a notifiable disease which is everywhere, including within the relevant policy area, and to which the government has responded because of the cases everywhere, including within the policy area, that there is, on our case, cover, that doesn't mean something has gone wrong, unless, that is, you start from the assumption which insurers make, that the radius was intended to achieve what they wanted to achieve. And that, of course, begs the very question which is before you. And indeed it gives rise to the more telling question: if the purpose of the area requirement was to preclude cover for pandemics, why on earth not just preclude cover for pandemics?

Can I then turn to the question of what the insured peril is. For both QBE and RSA, we say that the insured peril starts with the words "interruption or interference", and includes everything which follows.

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1 Just looking at QBE1, which is at {B/13/31}, I will
2 just ask you to note that it is common ground with QBE
3 that the words "loss resulting from" should be read in
4 before the words "interruption and interference". That
5 is their skeleton argument at paragraph 255.

6 However, in their defence and their skeleton
7 argument at paragraph 214, that is at {I/17/76}, QBE
8 mis-identify the insured peril, because they remove the
9 words "interruption or interference", and they then use
10 throughout the skeleton argument the term "BI loss" to
11 embrace "loss resulting from interruption or
12 interference".

13 RSA does the same thing, and you will see that in
14 its skeleton argument at paragraph 17 to paragraph 18
15 {I/18/74}.

16 We say, you'll see it there, 17, "The Insured
17 Perils":

18 "The peril insured against is ..."

19 Then they have omitted the words. And we say the
20 missing words are plainly part of the insured peril, as,
21 for example, Hiscox rightly identifies in paragraph 340
22 of its skeleton argument, {I/13/108} and indeed in
23 various other places in that document.

24 That it is also consistent, my Lords, with what is
25 said by all the insurers in their joint skeleton

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1 argument at, for example, paragraph 64. It is also,
2 notably, how RSA correctly pleaded the insured peril in
3 their defence. I just show you that, it is
4 paragraphs 86 to 88 at {A/12/29}, which stands in stark
5 contrast to the relevant paragraphs in their pleading in
6 their skeleton argument, where you will see have seen at
7 the first stages, you see the pleaded case, number 1,
8 "interruption or interference", contrast to what I just
9 showed you in the skeleton argument, where those words
10 have just been omitted.

11 We say this is not, as Mr Howard characterises it,
12 an arid debate or a matter of semantics. That is so
13 because it is important obviously to start from the
14 right place in the analysis to avoid in particular going
15 down the wrong path in we say three particular respects.

16 First, it may matter when you are considering what
17 causal link is required within the insured peril. The
18 starting point is not proximate cause, as their entire
19 argument, QBE's argument, on "arising from" or "in
20 consequence of", at paragraphs 216 and following in
21 their skeleton argument, wrongly presupposes.

22 That is the standard required causal link between an
23 insured peril or an excluded peril and loss. And that
24 is what the cases and the textbooks are talking about.
25 It is not orthodoxy the text that applies within the

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1 description of the insured peril.

2 Indeed again I just ask you to note what is said in
3 the joint causation skeleton at paragraph 21 {I/6/13}.
4 If it is not coming up I am just going to move on, my
5 Lords. Again, similarly Hiscox -- there it is,
6 paragraph 21:

7 "... enquiries as to proximate cause is only for the
8 purpose of answering one question: was the insured peril
9 the or a proximate cause of the loss."

10 Correct. It has nothing to do with the causal test
11 within the insured peril.

12 Similarly -- and I will just give you the
13 reference -- see what Hiscox say at paragraph 324 of
14 their documents, where they distinguish between what
15 Mr Gaisman calls true causation issues and "causation"
16 in inverted commas, his inverted commas, which are in
17 reality coverage points.

18 The second reason that it is important to start with
19 the right insured peril, my Lords, is that in order to
20 apply the "but for" test at the stage of determining
21 whether the loss is proximately caused by the insured
22 peril, to the extent that counterfactuals are helpful at
23 all -- and that is the point the FCA has addressed --
24 one has to posit a counterfactual that strips out the
25 insured peril entirely, including all elements of what

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1 establishes the insured peril.

2 If you omit the interruption / interference from the
3 description of the insured peril when you get to the
4 counterfactuals you are almost bound to go wrong, as QBE
5 do.

6 The correct question is not, as QBE poses: would the
7 BI losses, using their rolled-up formulation, have
8 happened "but for" and were they proximately caused by
9 the cases within the area. The correct question is:
10 would the loss have happened "but for", and was it
11 proximately caused by the proven, on this hypothesis,
12 interruption / interference arising from a manifestation
13 or occurrence of COVID cases within 25 miles or 1 mile.

14 Getting the insured peril right therefore helps you
15 see why you cannot possibly strip out the government's
16 unitary response to COVID-19 in the area in any relevant
17 counterfactual, because it is the unitary response which
18 gives rise to the interference or interruption, and is
19 an essential ingredient in the insured peril. You
20 cannot include in a counterfactual a key part of your
21 proven insured peril.

22 My Lords, of course if loss was proximately caused
23 by the insured peril, here for example the required
24 closure, then if insurers wish to say that the same
25 amount of loss or part thereof would have been suffered

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in any event by a different route, for example if the premises had not been closed by the government, then they bear the burden of proving it. That is the Dalmine case, with the cracks only in defective pipes there being here, for example, the shutting of businesses only when ordered to do so by the government.

Just as in Dalmine, the correct incidence of the burden of proof reflects the position in the pleadings. It is QBE who in their defence at paragraph 68.2(i) at {A/11/23} avers that the same loss would have been suffered in any event. I am sorry, it is over the page at {A/11/24}. Could you go back to 23; it spans 23 and 24. It is at the bottom:

"... would have been suffered in any event whether or not the insured peril occurred".

And it is for it to allege that and it to prove that.

It is important, my Lords, that you decide that for these insureds because they can't, we say, sensibly be expected to have to allege and then prove the negative.

In other words, even if they had not been required to shut they would not have lost the same revenue for some other reason.

In that context can I just correct one point in our skeleton argument at paragraph 167 {1/2/48}. We there

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refer in parenthesis to the Swedish point, and I am sure you know what I mean by that, as an example of the sort of point an insurer might want to raise, and we say would have to prove at this stage of the argument.

In fact, of course, that is obviously not a point relevant to disease clauses. If it is a point that arises at all, it might be relevant only in public authority cases. So I would ask you just to delete that.

The further reason we say identifying the correct peril matters is because it ensures one does not fall into the error of seeking to introduce the trends clause, if it applies at all, into the analysis of what is required within the insured peril, where it simply does not belong. That is the error which you will see in QBE's skeleton argument at paragraphs 77 to 78, for example, and 226.6. I am not going to take you there.

My Lords, that all said, I accept of course that none of that avoids the need to grapple with causation within the insured peril, and QBE, which is the key point to which I now turn.

That raises first a legal question and second a factual question, albeit the factual one takes account of the contractual context.

The legal question is what is the test required by

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the relevant causal link within the insured peril. In QBE1 that is "arising from" and in QBE2 to 3 it is "in consequence of".

We say they do not require satisfaction of the proximate cause test, but something looser than that, akin if you will to what the FCA says "following" means.

We give the reasons for that in our skeleton argument at paragraphs 138 and 142 to 143. I don't have time to go over that but can I just summarise very briefly; as I have already touched upon, the relevant words are part of the insured peril, not the causal link between the peril or excluded peril and the loss, so the starting point simply is not proximate cause. That is the test between insured peril and loss: see section 55 of the MIA.

While I am afraid I don't have time to go through authorities and textbooks relied upon by QBE on the meaning of "arising out of" or "in consequence of", when you do look at them, either with Mr Howard, as part of his four hours on this policy, or alone, you will see that none of them say the phrases mean proximate cause in the context of a description of the insured peril.

So, for example, the passage in MacGillivray which is referred to in their skeleton argument at paragraph 220 {1/17/77}, is in the context of the usual

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rule of proximate cause as between insured or excluded peril and loss.

There is a similar error, we say, in Arch's skeleton argument at paragraph 28. It is nothing to do with establishing any causal link required within the insured peril itself.

Second, outside of the context of defining the required causal link between insured or excluded peril and losses, there are many cases that treat "arising out of", which we say is akin to "arising from", as involving a relatively loose causal link.

We refer to those authorities at footnote 37 of our skeleton argument at {1/2/39}, which I will not ask you to turn up, but can I just give you one more, which is the Cultural Foundation v Beazley Furlonge case, which is in {J/137/1} at paragraphs 162 to 164.

The third point is that, as the cases make plain, everything depends on context. Contrary to the suggestion in QBE's defence at 226.5 {1/17/82}, that the relevant phrases here standalone, they plainly do no such thing, as we explain in our skeleton argument at paragraphs 142 to 143.

In that regard, can I just ask you to note that in their skeleton argument at paragraph 38.2, which is at {1/17/18}, QBE misstates what the test is under the

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1 primary property damage BI cover in QBE1 and 3. It does
2 not say "arising from, "caused by" or "in consequence
3 of". It refers, my Lords, in QBE1, to "resulting
4 directly from".

5 It is that distinction which is one of the features
6 on which we rely in support of this argument.

7 So we say, my Lords, it is not proximate cause test
8 in this part of the debate. It is looser than that.

9 But, in any event, moving to the factual question,
10 we say that as a matter of fact the proximate cause test
11 is satisfied and that is the right test.

12 The FCA has dealt with this at some length and
13 I only want to add a few points.

14 The FCA has identified some of the important
15 concessions made by QBE, and you will find a summary of
16 some of those at paragraph 238 of its skeleton. But
17 just note too that unlike Argenta QBE explicitly accepts
18 that government response caused by or arising from, or
19 in consequence of, a local occurrence of a disease will
20 be covered.

21 So there is rightly no suggestion from QBE that the
22 government response to notifiable diseases breaks the
23 chain of causation. You will find that in their
24 skeleton argument at 235.4 {I/17/85}.

25 But despite those concessions QBE argues that if

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1 there were cases within and without the relevant policy
2 area, and the government therefore lock down an area
3 including but larger than the relevant policy area, then
4 there would be cover only to the extent that the insured
5 could show that it was the case, that it was the cases
6 within the area that caused the response. That is
7 paragraph 239 of their skeleton argument. They say,
8 "Ah, the insureds can't do that, of course, because they
9 would have been in lockdown within the area even if they
10 didn't have the cases there, because once there were
11 cases outside and around the relevant area the
12 government would have locked down the relevant area in
13 any event."

14 We say that in the context of notifiable diseases
15 that simply makes no sense.

16 The facts on which our case on causation was
17 premised, are premised, as opposed to the conclusion, is
18 not even seriously in dispute.

19 If you look at paragraph 89 of their skeleton
20 argument {I/17/38}, paragraph 89 at the bottom of the
21 page, if you ignore, as you should, the reference to
22 "worldwide", since the government here was plainly
23 responding to what was happening here, those facts get
24 us where we need to go.

25 The FCA has explained why on those facts the entire

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1 thing, COVID-19 and the response to it, should be seen
2 as one indivisible thing on which the cases in the area
3 are a part, and if that is right then we are home.
4 I have summarised that no doubt inelegantly but you know
5 the point.

6 But the alternative case is that each occurrence of
7 COVID should be seen as a concurrent cause. Although,
8 with respect, on that alternative QBE in paragraph 89
9 goes wrong, we say, are the final words "by itself".
10 There is no need for the single piece, ie the single
11 case anywhere in the country, to be the sole cause
12 whatever causal test you apply.

13 Even if proximate cause is required it is satisfied
14 because each piece of the puzzle is as dominant and
15 effective as any other piece. It is only the
16 combination of all the pieces that as it were reveal to
17 the government the message on the jigsaw "Act now and
18 act everywhere".

19 There is nothing to suggest that any one piece was
20 more important than another. And QBE does not suggest
21 otherwise. Rather their case is effectively that none
22 of the individual pieces were a cause. Common sense
23 tells you that cannot possibly be right.

24 Just take my Lord Lord Justice Flaux's example he
25 gave a moment ago of London. The government even

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1 thought about closing down London and in fact also the
2 Midlands first, as you will recall, because they were
3 ahead of the curve. That is item 76 in the chronology
4 at {C/1/36}.

5 We know from the government data to which the agreed
6 facts refer that by 16 March every one of the 32 London
7 boroughs, making up the Greater London, had at least one
8 confirmed case of COVID. Ten of those 32 had over 50
9 cumulative cases. By 20 March nine of the 32 had over
10 200 cumulative cases.

11 On the basis of all that an insured in London must
12 plainly be able to say that a cause, indeed if necessary
13 a proximate cause, of the shutdown was the cases in
14 London.

15 The idea that there would have been a lockdown even
16 if there had been no cases in London, which is the
17 extreme position QBE is forced to adopt in its skeleton
18 argument at paragraph 247 {I/17/90}, is therefore
19 completely unreal.

20 Once that is accepted, as it must be, everything
21 else becomes obvious. Why didn't the government just
22 shut down London, because of the confirmed and
23 unconfirmed, expected but no less real cases, which had
24 spread everywhere else in the other cities, towns and
25 rural locations where there were cases confirmed or not.

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1 There is simply no basis, and I put it that high
2 before you, for a contrary assertion that even if there
3 had not been all of the cases that there in fact were,
4 including in the relevant policy area, the same measures
5 would have been taken by the government in any event.

6 That is why we say repeatedly and with no apology
7 that the case advanced by QBE defies common sense, not
8 only for the 25-mile radius, but also for the 1 mile
9 radius, always, always my Lords, on the assumption that
10 there was in fact at least one case confirmed or
11 otherwise within that area at the relevant time.

12 Mr Howard's Shops A to D prove, with great respect,
13 absolutely nothing the other way. Even with their
14 highly contrived facts there is cover for Shops B to D
15 for the reasons that Mr Edelman gave, and for the
16 reasons that I have just given.

17 My Lord, can I then turn to RSA4. If we are right
18 on QBE it will almost certainly inevitably follow that
19 there is also cover under at least the notifiable
20 disease clause in RSA4. That is because unless the term
21 "vicinity" in RSA4 is read as narrower than the radiuses
22 in the QBE wordings, which we would say is an impossible
23 reading, we can be no worse off under this notifiable
24 disease cover.

25 My Lords, the converse however is not true. Even if

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1 we were wrong on QBE1-3 we still would say there is
2 cover under RSA4 for essentially three reasons.

3 First, because under RSA4, the notifiable disease
4 clause, there is no fixed area within which the cases of
5 COVID must have occurred and from which the
6 interruption / interference results even if cases, as
7 opposed to COVID more generally, are required on this
8 wording. You have heard the FCA on that.

9 If cases are required they must have occurred within
10 the vicinity as defined at {B/20/35}. That is
11 a flexible definition to which the key is the area
12 within which events that occur within it would be
13 reasonably expected to have an impact on the insured or
14 its business.

15 We say the reference to events that occur can only,
16 it is on the right-hand side of 120, can only sensibly
17 be a reference to whatever event has in fact occurred in
18 respect of which the insured seeks to establish cover.

19 So here the relevant event would be the occurrence
20 of cases of COVID-19 or its emergence in the UK, and it
21 would be reasonably expected that cases of COVID
22 anywhere in the UK would have an impact on any insured
23 or its business: in other words, interfere with or
24 interrupt with their business.

25 By contrast, although RSA accepts that the

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1 definition is flexible up to a point it says that it
2 requires close spatial proximity to the premises; and it
3 varies only depending upon the nature of the business
4 and the location. As a result it says you can give no
5 answer to what "vicinity" means here; it all depends.

6 Save, it says, it cannot ever be the whole of the
7 UK, and it cannot even mean necessarily the village,
8 town, city or other development within which the
9 premises sit.

10 My Lords, RSA is wrong about all of that for the
11 reasons that we have given in our skeleton argument at
12 paragraphs 59 to 72.

13 Crucially RSA's approach gives no meaning at all to
14 the key part of the clause which reads, "in which events
15 that occur within such area would be reasonably expected
16 to have an impact".

17 Indeed, while at paragraph 29 of their skeleton
18 argument they are keen to tell you that it doesn't mean
19 what we say it means for a number of reasons, all of
20 which are bad, nowhere in their skeleton argument do
21 they tell you what it means or how they would apply it,
22 or how their spatial proximity definition works with it.

23 What is the event we are hypothetically talking
24 about if it is not the events which we are actually
25 interested in.

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1 I don't have the time, my Lords, given the time,
2 have time to go through the points that we would make in
3 response to the vicinity arguments, but truly my Lord
4 there is nothing in them. We will deal with them very
5 briefly in reply if we need to.

6 But for example to suggest that we are trying to
7 give a meaning to a clause after the inception of the
8 policy, we are doing no such thing.

9 The content and what fills that definition can
10 obviously change afterwards. Unsurprisingly
11 Mr Justice Popplewell, as he then was, in the Lukoil
12 case, says nothing to the contrary.

13 You can see that their close spatial proximity test
14 cannot possibly be right simply by looking at their own
15 57(b) at {1/18/95}, where they accept that it could
16 embrace an area of a 25-mile radius. In other words
17 almost 2,000 square miles. They say you just don't know
18 how far. 2,000 square miles is nobody's idea of close
19 spatial proximity, my Lords. Their test doesn't work.
20 It doesn't work with what they themselves accept, and
21 they do not give an answer as to how this works. The
22 answer is the one with respect that we have given.

23 My Lords, if we are right about that and it embraces
24 in this case all of the UK then we are home for that
25 additional reason.

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The second reason why we can get home on RSA is that there is cover for interruption as a result of government action or advice within the vicinity, which prevents or hinders the use of or access to the insured location, and there is really no answer to the claim under that clause in relation to the effect of social distancing measures or closure measures, no matter how wide or narrow is the area covered by the vicinity. The FCA has dealt with that.

But the suggestion, my Lords, that "within" means that there is no cover if the government, the national government, acts both within and without the vicinity, is simply untenable. It is not what it says anywhere.

Finally, my Lords, the third basis of cover under RSA is the enforced closure:

"Interruption / interference as a result of enforced closure by the government for health reasons or concerns in the vicinity".

Again there is not actually a sensible argument that there weren't health reasons or concerns in the vicinity no matter how close that is to the insured premises.

The attempt by RSA to get to a contrary conclusion by bringing in the concept of events taken from aggregation clauses and therefore to get the three particularities of place, time and manner into this

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clause, and then to say that the health concerns or reasons must relate to that, simply doesn't hold water.

Finally, my Lords, just one last point. We obviously say we have cover under RSA4 on three alternative bases.

In their skeleton argument at paragraphs 40 to 44 RSA make some points about what happens if there is overlapping cover. What they curiously don't mention is general condition 8(iii) at {B/20/20}, which makes it clear that under this policy there may well be cover under different provisions, and in that event only one limit whichever is the largest applies.

That puts beyond doubt what we say would in any event be the position, namely that RSA plainly cannot try to cancel out cover in respect of each insured peril by reference to facts which give cover on the basis of different insured perils.

LORD JUSTICE FLAUX: Right.

MR EDEY: Unless I can help you further those are the submissions on behalf of the interveners I represent.

LORD JUSTICE FLAUX: No, thank you very much indeed, Mr Edey.

We will finish for today now. Tomorrow we are sitting at 10.00 am again with I think Mr Lynch having half an hour on behalf of the Hiscox Action Group.

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There was a request to my clerk from Mr Gaisman to sit at 10.00 am on Monday. I don't know if the message has got through from my clerk but if it has not Mr Justice Butcher and I have discussed that and we are happy to sit at 10.00 am on Monday as requested.

Otherwise we will see you at 10 o'clock tomorrow. (4.32 pm)

(The hearing adjourned until 10.00 am on Thursday, 23 July 2020)

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