

BUSINESS INTERRUPTION INSURANCE TEST CASE

DRAFT TRANSCRIPT

OF SECOND CASE MANAGEMENT CONFERENCE ON 26 JUNE 2020

Pursuant to an agreement between the parties, approved by the court on 26 June 2020, what follows is a **draft** transcript.

A final transcript will be published when it is available.

OPUS2

The Financial Conduct Authority v Arch Insurance (UK) Limited & Others

Day 1

June 26, 2020

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Phone: +44 (0)20 3008 5900

Email: transcripts@opus2.com

Website: <https://www.opus2.com>

1 Friday, 26 June 2020
 2 (10.29 am)
 3 Case Management Conference
 4 LORD JUSTICE FLAUX: Good morning, everyone. Unless there
 5 is somebody who isn't in the hearing who should be, so
 6 far as I can tell from running down the list, it looks
 7 as though everyone is here.
 8 MS MATTHEWS: Thank you. Before we begin, could I remind
 9 everyone that this is a court hearing and as such as a
 10 criminal offence for anyone other than those authorised
 11 by the court to record the proceedings.
 12 In the matter of the Financial Conduct Authority v
 13 Arch Insurance (UK) Limited and Others.
 14 LORD JUSTICE FLAUX: Good morning, Mr Edelman.
 15 MR EDELMAN: Morning, my Lord. If you'd just allow me,
 16 I'm trying to add Mr Justice Butcher to my screen, which
 17 I've now managed to do.
 18 My Lord, I hope that you have received the agenda
 19 that was sent through with comments of the parties.
 20 LORD JUSTICE FLAUX: Yes, thank you.
 21 MR EDELMAN: Now, my Lords, I would ordinarily at the
 22 beginning of a hearing introduce the cast list. I tried
 23 to do that last time, but it was a very long list.
 24 LORD JUSTICE FLAUX: I think it would be completely
 25 exhausting for all of us. I think we know who the cast

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1 list are, and they will identify themselves, to the
 2 extent it's necessary, for them to speak.
 3 MR EDELMAN: My Lords, I hope that the list of counsel
 4 speaking to an issue would help the court to identify
 5 (inaudible) the submissions.
 6 LORD JUSTICE FLAUX: Yes.
 7 MR EDELMAN: My Lord, if I can get straight down to business
 8 on the agenda, the first item was due to have been the
 9 intervention applications, but Mr Howard, busy member of
 10 the Bar as he is, has another hearing which is due to
 11 conclude I think within an hour or so, maybe shorter,
 12 and he asks the court's indulgence to put that matter
 13 back, and we have no objection to that. So as long as
 14 my Lords are happy, then we'll move that item back.
 15 LORD JUSTICE FLAUX: Well, not over happy, but we'll have to
 16 be, won't we?
 17 MR EDELMAN: My Lords, I'm sorry about that. We tried to
 18 organise the agenda in a logical --
 19 LORD JUSTICE FLAUX: Well, if you had warned us earlier, we
 20 might have started at 10 o'clock, because those matters
 21 are matters which can be dealt with very shortly indeed.
 22 MR EDELMAN: Yes.
 23 LORD JUSTICE FLAUX: The other issue about that, which is
 24 problematic in a sense, is that there is an intervention
 25 by a gentleman called Mr Sheehan, I think, who is

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1 a publican in Isleworth who is a policyholder of RSA,
 2 whose counsel is on the line, I think, who wants to
 3 apply to be joined.
 4 Now, that obviously ought to be dealt with at the
 5 same time as the applications to intervene.
 6 I'm slightly concerned that his counsel is kept on the
 7 line for as long as he will be.
 8 MR EDELMAN: Well, my Lord, I am afraid we were only told
 9 very late last night of this difficulty.
 10 LORD JUSTICE FLAUX: Well, we didn't know until this
 11 morning.
 12 MR EDELMAN: Yes, I forget what time it was, but I think it
 13 was around 10.00 pm or maybe later.
 14 LORD JUSTICE FLAUX: Right. Well, I think Mr Hendron is
 15 there. If Mr Hendron is happy to wait for Mr Howard's
 16 availability then we will put him back until we deal
 17 with those applications as well.
 18 MR HENDRON: My Lord, I have no problem waiting.
 19 LORD JUSTICE FLAUX: Thank you very much, Mr Hendron.
 20 Right, Mr Edelman, where do we go from there?
 21 MR EDELMAN: Right, so we're on to the applications for
 22 permission to adduce factual evidence, which I hope, as
 23 far as items 3 and 4, can be dealt with briefly, but
 24 I don't know whether Mr Kealey has more to say.
 25 On item 3, I know it is Mr Lockey's application, but

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1 it's right that I record the position. They asked us to
 2 agree four facts. We have been able to agree three of
 3 them. There is a fourth fact which, for reasons
 4 I needn't go into, the FCA is unable to agree but does
 5 not dispute.
 6 LORD JUSTICE FLAUX: What is the fourth fact, Mr Edelman?
 7 MR EDELMAN: Well, my Lord, it's about authorities and so on
 8 in relation to this agreement, which the Chancellor
 9 referred to in a statement, and we don't dispute that.
 10 We can't -- we're not in a position to agree it, so what
 11 we are amenable to is not opposing the application, the
 12 witness statements go in, we don't challenge the
 13 evidence.
 14 LORD JUSTICE FLAUX: Right. Mr Lockey, do you want to say
 15 something about that?
 16 MR LOCKEY: My Lord, no. Mr Edelman has correctly
 17 summarised the position that we've reached by way of
 18 agreement yesterday evening.
 19 LORD JUSTICE FLAUX: Right, thank you very much. Okay.
 20 MR EDELMAN: So, my Lord, the application should be allowed
 21 on the basis that we don't agree it but we don't oppose
 22 it and that we don't -- the FCA will not challenge that
 23 evidence.
 24 LORD JUSTICE FLAUX: Well, that evidence, presumably, will
 25 be in the form of the witness statement from

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1 Ms Volda(?), is that right?
 2 MR EDELMAN: Yes.
 3 LORD JUSTICE FLAUX: It's not proposed that anyone give live
 4 evidence at the trial?
 5 MR EDELMAN: No, they're not being put to proof, they're not
 6 required to give live evidence.
 7 LORD JUSTICE FLAUX: Very good, I think we can take that as
 8 read in that case. Let's move on to the next one.
 9 Submissions by MR EDELMAN
 10 MR EDELMAN: My Lord, as far as we're concerned, the same
 11 applies to this application for witness evidence from
 12 Mr Kealey's clients, a similar position to Arch, and we
 13 are prepared not to oppose the application on the same
 14 terms. I hope that is sufficient for Mr Kealey. As far
 15 as we're concerned, that is the application that's made
 16 and that is the disposal of the application. Mr Kealey
 17 says more about the subject in his skeleton, but that is
 18 the sum total of his application and it's now dealt
 19 with.
 20 LORD JUSTICE FLAUX: Right. Well, the Scilly Isles point is
 21 now dealt with by a statement of agreed fact, isn't it?
 22 MR EDELMAN: Yes, that's been dealt with.
 23 LORD JUSTICE FLAUX: Mr Kealey, do you want to say something
 24 about the other part of your application?
 25

1 Submissions by MR KEALEY
 2 MR KEALEY: Yes, my Lord, I would. Mr Edelman is absolutely
 3 right we haven't made any other application than to
 4 adduce fact evidence in order to deal with this matter,
 5 but it is slightly more serious. It's a very small
 6 point, my Lords, but it's slightly more serious than
 7 I think the FCA gives credit for, and it's a serious
 8 issue of case management and the court has inherent
 9 jurisdiction in the exercise of its case management
 10 jurisdiction and functions to do essentially what it
 11 considers is appropriate for the fair disposal of any
 12 action. And this being such a special action,
 13 your Lordships should consider the exercise of your
 14 inherent jurisdiction in relation to this matter.
 15 LORD JUSTICE FLAUX: You want us to strike out the relevant
 16 part of his pleading because your clients weren't at the
 17 meeting, and there's a sort of slur about insurers
 18 should have basically told the government if they
 19 weren't going to play ball, if I can put it that way?
 20 I mean, Mr Justice Butcher and I have discussed
 21 this. We are singularly unimpressed by the pleading
 22 anyway, but we're not going to strike it out.
 23 MR KEALEY: Very well. Then I'm not going to trouble
 24 your Lordships any more.
 25 I'm just going to make one point, and you will tell

1 me off for making it.
 2 LORD JUSTICE FLAUX: I won't tell you off, Mr Kealey.
 3 MR KEALEY: I'm grateful. This is a case where time is
 4 precious and space is precious, and the fact that it
 5 lies on the pleading, and we expressly asked for what
 6 I call the incumbency point to be withdrawn and that was
 7 explicitly declined and it remains on the pleading.
 8 Now, my learned friend Mr Edelman wants to have
 9 a limit on the amount of paragraphs or pages in the
 10 skeleton argument. That's the first thing. He wants to
 11 have a limited amount of time, obviously, for insurers
 12 to make oral submissions, and he wants to have a mutual
 13 exchange of skeleton arguments.
 14 Now, I have to say, my Lord, I share your view about
 15 the quality of the allegation, but nonetheless it stays
 16 there.
 17 LORD JUSTICE FLAUX: Well, rest assured, you will not have
 18 to deal with this at the trial. Your clients were not
 19 at the meeting, so whatever the pleading may or may not
 20 amount to so far as insurers who were at the meeting are
 21 concerned -- and speaking for myself I can't see what
 22 it's -- other than knocking copy, if I can put it that
 23 way, I can't really see what its relevance is to the
 24 issues we have to decide.
 25 But so far as insurers like your client who weren't

1 actually at the meeting are concerned, it's totally
 2 irrelevant. You needn't spend any of your precious
 3 pages in your skeleton and your precious time in your
 4 oral submissions dealing with that point.
 5 MR KEALEY: On that note, my Lord, I will withdraw from the
 6 screen, and indeed orally, with my customary lack of
 7 grace.
 8 LORD JUSTICE FLAUX: Right, thank you very much, Mr Kealey.
 9 Well, there we are, Mr Edelman. You have heard what
 10 the court has said. But so far as the actual
 11 application is concerned, the application will be
 12 allowed and the evidence will go in uncontested.
 13 Submissions by MR EDELMAN
 14 MR EDELMAN: My Lord, can I just make two observations:
 15 firstly, as my Lords will appreciate, the FCA's position
 16 is that it wishes to put forward all of the arguments
 17 that policyholders would have wanted to put forward had
 18 they been in the position of doing so, and secondly,
 19 this may be relevant to whether or not certain actions
 20 or advice by the government should be treated as
 21 satisfying certain of the three requirements.
 22 LORD JUSTICE FLAUX: I follow that point, but the difficulty
 23 with these particular defendants -- we're not talking
 24 about people who were at the meeting. I see there's
 25 an argument. We understand that. But insurers who

1 weren't at the meeting, it doesn't seem to us that
 2 there's really much in the point. But we're not
 3 striking it out, so we don't need to trouble ourselves
 4 with it now.
 5 MR EDELMAN: As long as my Lord's comments are confined to
 6 those who were at the meeting.
 7 LORD JUSTICE FLAUX: Well, they were certainly intended to
 8 be, Mr Edelman.
 9 MR EDELMAN: I'm grateful.
 10 Then we move on to a contested application, which is
 11 RSA's application for permission to reduce the Aon Trio
 12 wording, and as you have seen from the skeleton, that is
 13 resisted on the grounds we have set out in both our
 14 initial skeleton and our supplemental skeleton, but it's
 15 Mr Turner's application, so I should hand over to him.
 16 Submissions by MR TURNER
 17 MR TURNER: My Lord, I hope you can hear me.
 18 LORD JUSTICE FLAUX: Yes, I can hear you, but I can't see
 19 you. I can see you now as well. Good.
 20 MR TURNER: Sorry about the latter, if not the former.
 21 In relation to this application, the relevant
 22 passage of the defence is paragraph 30(b), and the
 23 reference for that is bundle 1B, page 891-892. You will
 24 see there --
 25 LORD JUSTICE FLAUX: 891-892. Just bear with me a moment,

1 Mr Turner.
 2 MR TURNER: It's page 213 of the PDF. It's 30(b).
 3 LORD JUSTICE FLAUX: Right.
 4 MR TURNER: It's a plea of matrix.
 5 LORD JUSTICE FLAUX: Yes.
 6 MR TURNER: It's a very short plea, and if this matter were
 7 at trial, it would consume considerably less time and
 8 resource than it has consumed for the purposes of
 9 today's CMC.
 10 Subparagraph (b)(i) sets out an uncontroversial
 11 proposition, which your Lordship will recognise --
 12 LORD JUSTICE FLAUX: Yes.
 13 MR TURNER: -- and immediately know the source of that. And
 14 (ii) is unsurprising, and (iii), so far as it refers to
 15 wordings which sought to nullify or alter the reasoning
 16 in Orient Express Hotels, speaks for itself.
 17 LORD JUSTICE FLAUX: Why does it need evidence to support it
 18 then?
 19 MR TURNER: Because it is not accepted as a fact. It
 20 requires factual evidence to prove the existence of such
 21 wordings.
 22 LORD JUSTICE FLAUX: I think Mr Edelman says you were
 23 offered a fact or you were offered an agreed fact and
 24 you turned it down.
 25 MR TURNER: We were offered an agreed fact that would have

1 been entirely devoid of meaningful context because the
 2 agreed fact that was offered was that there was a single
 3 wording in existence which we said purported to change
 4 or alter the effect of the reasoning expressed in
 5 Orient Express Hotels without your Lordships being told
 6 as a matter of evidence in what respects the wording
 7 sought to alter the effect of the decision in
 8 Orient Express Hotels.
 9 So, as an offer goes, it was entirely
 10 unconstructive, and the framework agreement specifically
 11 requires the parties to cooperate and to do so in
 12 a constructive manner.
 13 LORD JUSTICE FLAUX: Yes.
 14 MR TURNER: The offer that was made would have left the
 15 court in ignorance as to the provenance of the wording
 16 in question, and we say that when one comes to consider
 17 the question of matrix and what is reasonably available
 18 to the parties to the contract, it is relevant, although
 19 this is an argument for trial, that this is a wording
 20 being put out there by one of the largest brokers in the
 21 country.
 22 LORD JUSTICE FLAUX: But we have to decide the meaning of --
 23 the meaning and construction of a whole series of
 24 wordings, Mr Turner, and amongst the issues you have to
 25 decide is whether, because of Orient Express, those

1 wordings have the effect that you contend they do have.
 2 The fact that there's another wording out there which
 3 deals with the Orient Express point, which isn't
 4 a wording we actually have to construe, doesn't seem to
 5 me to be of very much assistance to the court in the
 6 task that we face.
 7 MR TURNER: Well, my Lord, whether it is of great assistance
 8 or minimal assistance is, in my submission, a matter for
 9 trial. If your Lordship takes the view that it cannot
 10 be of any assistance, then I will end here and we can
 11 move on to the next agenda item.
 12 LORD JUSTICE FLAUX: Let us hear what Mr Edelman has to say.
 13 MR TURNER: Can I just finish my submissions?
 14 LORD JUSTICE FLAUX: Yes, sorry, I thought you had. Sorry.
 15 MR TURNER: Well, I was seeking to shortcut, if it were
 16 necessary to do so.
 17 In relation to the proposal that was made, we say
 18 that it is certainly relevant, if this is a fact that is
 19 admissible evidence in relation to matrix, it is
 20 relevant that the provenance was from Aon, and we say
 21 that the actual wording is relevant because it is
 22 relevant to say the wording sought not merely to alter
 23 the reasoning, but it sought to do so in a way that was
 24 more advantageous for insured, for policyholders. But
 25 neither of those features was encompassed in the offer

1 that was made by the FCA.
 2 In relation to the test for matrix, in their
 3 supplemental skeleton the FCA has suggested that the
 4 test is actual knowledge on the part of the policyholder
 5 or on the part of the insurers and, my Lord, that is not
 6 the test. The test is what was reasonably available to
 7 someone in the position of the policyholder and the
 8 insurer.
 9 LORD JUSTICE FLAUX: Yes.
 10 MR TURNER: My Lord, those are my submissions.
 11 LORD JUSTICE FLAUX: Thank you very much.
 12 Mr Edelman.
 13 Submissions by MR EDELMAN
 14 MR EDELMAN: My Lord, the full policies issued by the RSA,
 15 which are the lead policies in this litigation, are the
 16 Cottagesure policy for holiday cottage owners bearing
 17 the Gallagher logo and three other forms of policy
 18 covering, amongst other things, pubs, restaurants and
 19 retail facilities and bearing the logo of Eaton Gate,
 20 and a managing general agency.
 21 There's no argument advanced either the
 22 policyholders who purchased these policies or their
 23 brokers, if they used brokers, were aware or had any
 24 means of being aware of the particular wording, and only
 25 one wording has been produced, now relied on by RSA, and

1 there's no obvious reason why they should have been
 2 aware of it.
 3 So we say this just simply doesn't pass the test for
 4 factual matrix at all.
 5 Our offer to agree a fact was simply to avoid this
 6 sort of spat, and then we could have dealt with it very
 7 briefly at trial. But that's been turned down, so the
 8 matter is now being argued, and this just simply doesn't
 9 cross the threshold. It's another matter -- if
 10 Mr Turner had said: well, here's a standard market
 11 clause that any broker in the market should be aware
 12 of --
 13 LORD JUSTICE FLAUX: That's a different point, isn't it?
 14 MR EDELMAN: It's a different point. A different point.
 15 You've got a one-off example.
 16 There is also then the other issue to which we've
 17 alluded of introducing another wording into the policy,
 18 into the trial, because if one does introduce another
 19 policy wording, then one starts -- one ends up having
 20 a bit of satellite litigation in construing that policy
 21 and seeing what else it's doing.
 22 So I'm only giving brief reasons because we've dealt
 23 with it in writing, but in summary, those are our
 24 primary reasons for objecting to this.
 25 LORD JUSTICE FLAUX: Thank you. Thank you, Mr Edelman.

1 Mr Turner, do you want to say anything?
 2 Submissions by MR TURNER
 3 MR TURNER: Yes, very briefly on the last point, if I may,
 4 my Lord. Sorry, there's a bit of echo.
 5 We would have been content for the proposal that we
 6 advanced to have been adopted, which would have
 7 addressed Mr Edelman's concern about an entire wording
 8 going into the bundle. We would equally be content for
 9 just the front page and the relevant page from the
 10 definitions section of the policy to go into the trial
 11 bundle. No one is going to be seeking the court's
 12 ruling as to whether or not a claim under the Aon Trio
 13 wording would have been covered in these circumstances.
 14 LORD JUSTICE FLAUX: Okay, I'll ask Mr Justice Butcher to
 15 give our ruling as to this.
 16 (10.49 am)
 17 Ruling (pending approval)
 18 (10.51 am)
 19 LORD JUSTICE FLAUX: Thank you very much, there we are.
 20 MR EDELMAN: My Lord, I'm grateful. There was a momentary
 21 pause. I was turning my microphone on again to avoid
 22 echo, and just I would perhaps remind other counsel when
 23 they speak also to do so because I omitted to do so.
 24 When Mr Turner was speaking, I think that was the cause
 25 or may have been the cause of some echo, for which

1 I apologise.
 2 So, my Lord, I've now had a message from Mr Howard
 3 that he has arrived, and seeing as that is the end of
 4 a sort of mini section of the agenda dealing with
 5 matters related to factual evidence, it's perhaps now
 6 appropriate to deal with the interventions, if that's
 7 convenient for my Lords, and if that is, then those
 8 applications will be dealt with on behalf of the FCA by
 9 Ms Mulcahy.
 10 LORD JUSTICE FLAUX: Well, if Mr Justice Butcher is content
 11 we deal with the interventions now, then we will do so.
 12 MR JUSTICE BUTCHER: Yes, certainly.
 13 LORD JUSTICE FLAUX: Okay. All right, Mr Edelman.
 14 Mr Howard is there someone. I think, strictly
 15 speaking --
 16 MR EDELMAN: My Lord, apologies for interrupting. I realise
 17 that I omitted to give an introduction, which is that
 18 Mr Edey will be leading on introducing the application.
 19 So I think it is Mr Edey to go first.
 20 LORD JUSTICE FLAUX: Yes.
 21 Submissions by MR EDEY
 22 MR EDEY: Good morning, my Lords. My Lords, as you know,
 23 I represent various insureds under business interruption
 24 policies written by QBE and Aviva, whose claims under
 25 those policies for the losses they have suffered as

1 a result of what I will try and describe neutrally as
2 "the COVID situation" have been declined.

3 Those insured seek your permission under
4 paragraph 2.5(a) of PDM51M, which is set out in the FCA
5 skeleton at paragraph 52, to intervene in this test case
6 so that they can be heard at the trial on the test case
7 issues and only those issues, as those issues relate to
8 their policy wordings, and that is only then to the
9 extent that those policy wordings, or wordings on very
10 similar terms, are included for consideration in this
11 test case.

12 My Lords, it has been agreed between me and
13 Mr Lynch, who represents the Hiscox Action Group, who is
14 also, as you know, applying to intervene, that I will go
15 first, and in doing so I expect to pick up all or most
16 of the points that are common to us both, as well as
17 anything specific to us, and if convenient to
18 your Lordships, what we then propose is Mr Lynch will
19 say anything necessarily extra in relation to his
20 application. The FCA will then deal with both
21 applications before the insurers respond, as we
22 understand it through Mr Howard QC for QBE, who is
23 taking the lead in respect of our application, and then
24 Mr Gaisman QC for Hiscox, who is taking the lead in
25 relation to Mr Lynch's application.

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1 LORD JUSTICE FLAUX: Well, we'll hear all the submissions
2 and also from the sole applicant in relation to the
3 further intervention and then we'll rule on all of them
4 in one go.

5 MR EDEY: I'm grateful, my Lord.

6 My Lords, by their application, all that my clients
7 seek is the right to serve skeleton arguments at the
8 same time as the FCA and to make oral submissions,
9 opening submissions of no more than 30 minutes, if
10 necessary, on the issues that arise in relation to their
11 policies, and after the FCA has already made its oral
12 opening submissions, and then we ask for 15 minutes in
13 oral reply, again only if necessary and again only after
14 the FCA has made its oral reply submissions.

15 And to all of that, my Lord, the FCA has consented,
16 subject to one point on costs which was previously live
17 but we are no longer pursuing, so there is no point
18 between us and FCA in relation to our applications.

19 It has also been agreed with the FCA that we will,
20 if permitted to intervene, liaise closely with the FCA
21 and its legal team to ensure that duplication is avoided
22 where reasonably possible, and we anticipate that the
23 basis, my Lords, on which the FCA has so consented
24 includes the point made at paragraph 55 of its skeleton
25 argument, which I just ask you to turn up and read for

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1 yourselves. My Lord, I can read it out if you don't
2 have it immediately to hand. (Pause)

3 LORD JUSTICE FLAUX: Yes, we've read that.

4 MR EDEY: My Lord, that is in short form coming from the FCA
5 exactly what Ms Campbell had said she believed to be the
6 position at paragraphs 34-46 of her witness statement,
7 which I don't invite you to turn up, but you will have
8 found in volume 5, tab 1A, E17-20 in support of our
9 application and indeed what we submit in our skeleton at
10 paragraph 16.

11 But, of course, coming first-hand from the FCA, it
12 obviously has all the more force. Indeed, we say, with
13 respect, it really is the beginning and the end of the
14 debate, because paragraph 2.5(a) to which I referred and
15 under which our application is made provides that you
16 need to be satisfied that the arguments of all those
17 with opposing interests in relation to the issues in
18 question will -- and I emphasise that word; not "may",
19 but "will" -- be properly put before the court by those
20 represented, and it goes on to provide that for those
21 purposes, in appropriate cases, third parties affected
22 by the determination of the issues may, with the
23 permission of the court, be joined as a party or
24 otherwise allowed to be represented.

25 My Lord, that reflects what has been said in the

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1 authorities about test cases or academic appeals,
2 including by Lord Justice Aikens in the Rolls-Royce case
3 and before that by Sir Anthony Clarke, the Master of
4 the Rolls, in the Gawler case, to which we refer in
5 footnote 3 of our skeleton argument. If I can invite
6 my Lords to turn it up, it's in volume 9 at tab 21, and
7 the relevant paragraphs is reference I-487 and it's
8 paragraph 37 where the Master of the Rolls was dealing
9 with the circumstances in which the court should allow
10 an appeal which had by then become academic between the
11 parties, whether it should be allowed to proceed. And
12 he says, you see it at the beginning, it all will
13 depend -- does my Lord have that? Does my Lord,
14 Lord Justice Flaux, have that?

15 LORD JUSTICE FLAUX: No, give me the reference again.

16 MR EDEY: I'm so sorry, my Lord. It's bundle 9, tab 21.

17 LORD JUSTICE FLAUX: Yes, sorry, the problem is that bundle
18 came loose, as it were, and I'm not sure what I've done
19 with it.

20 MR EDEY: My Lord, I can read the relevant words out again,
21 if that's helpful.

22 LORD JUSTICE FLAUX: Yes.

23 MR EDEY: Essentially the bit I rely upon is paragraph 37
24 where what was said by the Master of the Rolls is:
25 "Whether an academic appeal should be allowed will

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1 all depend upon the circumstances, upon the facts of the
 2 particular case and in what follows I do not intend to
 3 be too prescriptive . However, such cases are likely to
 4 have a number of characteristics in addition to the
 5 additional requirement that an academic appeal is in the
 6 public interest . They include the necessity that all
 7 sides of the argument [and I underline the word
 8 necessity] will be fully and properly put."

9 Then there's a reference there to what
 10 Lord Justice Bingham, as he then was, said in
 11 National Coal Board v Ridgeway and the decision in
 12 Bowman v Fels. Then he goes on to say:

13 "It seems to me that in the vast majority of such
 14 cases, this must involve counsel being instructed by
 15 solicitors being instructed by those with a real
 16 interest in the outcome of the appeal."

17 LORD JUSTICE FLAUX: Yes.

18 MR EDEY: My Lord, we say the same is true of the test
 19 cases, as reflected indeed in paragraph 2.5(a) of the
 20 relevant Practice Direction , and of course my clients
 21 have the very strongest interest in the test case. It
 22 is effectively theirs , amongst other insured 's, rights
 23 that are actually being determined by this test case.

24 LORD JUSTICE FLAUX: Yes.

25 MR EDEY: Now, my Lord, once the FCA, as the party that is

1 otherwise putting the points for all insureds, has
 2 acknowledged, as it has at paragraph 55 of the skeleton
 3 argument that I've just shown you, that it may not be
 4 able to put all the points that the applicant might wish
 5 to put on their policies in relation to the test case
 6 issues , in our respectful submission, it becomes
 7 absolutely plain that my client should be permitted, and
 8 indeed we respectfully say must be permitted, to
 9 intervene in order to comply with 2.5(a), because
 10 otherwise, my Lords, the effect is that the court would
 11 effectively be saying to these insureds: we are going to
 12 proceed to determine certain issues in this test case
 13 which will determine in practice your rights under your
 14 business interruption policies in a case which insurers
 15 themselves rightly describe as of the greatest
 16 significance for policyholders -- and that's
 17 Mr Gaisman's skeleton argument for Hiscox at
 18 paragraph 20, where he also describes this case as
 19 "truly unprecedented" and he refers to the fact that the
 20 consequences of adverse rulings either way will be of
 21 the greatest importance for insureds and policyholders
 22 and has the highest level of public interest in its
 23 outcome. And you would be saying: notwithstanding all
 24 of that, and it is your clients who are the people
 25 affected , we are going to have the points dealt with

1 without the ability , necessarily , to hear all the
 2 points .

3 My Lords, we say that simply can't be right . It
 4 would be inconsistent with paragraph 2.5(a) of the
 5 Practice Direction . It would be inconsistent with the
 6 overriding objective . It would be inconsistent , we say,
 7 with our right to a fair trial under Article 6 of the
 8 ECHR, including the right to access to the court, the
 9 right to be heard and the right to equality of arms, and
 10 it would also be inconsistent with the authorities which
 11 I've just shown you.

12 So, my Lords, against that background, what do
 13 insurers say the other way? And the answer is , nothing
 14 of substance. Indeed, none of them even oppose the
 15 application , but they can't quite bring themselves to
 16 consent to it .

17 We served them with this application last Friday ,
 18 and then on Monday we asked them to indicate their
 19 position by midday on Tuesday. However, it was not
 20 until Wednesday afternoon that we first heard from
 21 Clyde & Co on behalf of five of the 18 defendant
 22 insurers , including RSA and Hiscox. And that letter ,
 23 for your reference , is in volume 5, tab 1D at
 24 page E57(a), and my Lords, you don't need to turn it up
 25 if you don't want to, I can deal with it --

1 LORD JUSTICE FLAUX: The reality is, Mr Edey, there is no
 2 principle objection to your intervention any more than
 3 there is to Mr Lynch's intervention . The points that
 4 are taken, insofar as points are taken, are really to do
 5 with case management at the trial , which, if we allow
 6 the interventions , is a matter for Mr Justice Butcher
 7 and myself.

8 MR EDEY: My Lord, with respect, that's exactly how we would
 9 put it . We've moved beyond the point of principle ,
 10 about which we would respectfully say there can be no
 11 doubt, and the case management issues that then arise we
 12 must then deal with .

13 In fact , as we see it , we are agreeing to almost
 14 everything we are being asked to agree to, with only
 15 a very few exceptions, including on the question of
 16 whose time our very limited oral submissions come out
 17 of, and really that's more a matter for my Lords, the
 18 FCA and the insurers .

19 We are, as it were, neutral whose time it comes out
 20 of. The FCA has obviously consented to our application ,
 21 including the time we're given, so the insurers will no
 22 doubt say it comes out of their time.

23 But, my Lord, we don't much mind. It's a case
 24 management question, perhaps, once the principle has
 25 been dealt with, which we say: it should be dealt with

1 in the way in which I've described.
 2 The only point which my learned friend Mr Howard
 3 raises in his skeleton, while not opposing, and it is,
 4 as he says in paragraph 7, they have no objection to us
 5 intervening, but say we would abide by the same rules as
 6 other parties. We're happy to do that. We're not
 7 asking for some special treatment.

8 But they do nonetheless say at paragraph 12: well,
 9 you haven't identified with precision -- this is
 10 paragraph 5 of the skeleton argument, QBE, Mr Howard's
 11 skeleton argument. He says we have not identified with
 12 any precision the argument or arguments which we say the
 13 FCA has failed to plead in its particulars of claim and
 14 which will therefore not properly be before the court.

15 My Lords, I hope I've already dealt with that by
 16 reference to what the FCA have themselves said, but we
 17 would also say this, my Lords: it is particularly
 18 surprising to find QBE even raising that query given
 19 that its own pleaded case, as my Lord will find in
 20 volume 1B, tab 6, page 858 at paragraphs 54 to 55 --

21 LORD JUSTICE FLAUX: Give me that reference again.

22 MR EDEY: Yes, my Lord. It's volume 1B, tab 6, page A858.

23 It's paragraphs 54-55, and the very point QBE make
 24 there is that the FCA has not pleaded its case in
 25 a policy-specific manner, and it says it may be

1 a problem to do with the fact that it has chosen to
 2 represent all the insureds under all the policies.

3 My Lord, I don't enter into the debate about whether
 4 that's right or not or whether it's a fair criticism,
 5 but what on any view QBE is saying is the court would be
 6 more assisted by a policy-focused argument. My Lord,
 7 that is exactly what we wish to give the court by
 8 reference to the policies of the policyholders who
 9 I represent.

10 So, my Lord, of course we are unconstrained in doing
 11 that by the consideration which, entirely
 12 understandably, will play a part in the way in which the
 13 FCA presents it.

14 My Lords, the only point, then, other than whose
 15 time it comes out of -- I don't know whether my Lord
 16 wants to hear anything on the case management issues.
 17 I've dealt with, I think --

18 LORD JUSTICE FLAUX: I think we feel very strongly that the
 19 case management issues are a matter for us at trial.

20 Trials are fluid events, in my experience, and
 21 I'm pretty certain that we will find the necessary time
 22 somewhere in a manner which doesn't inconvenience or
 23 prejudice anybody.

24 I mean, in principle I can see a strong argument
 25 that your time, as it were, should be carved out of the

1 FCA's time. If it transpires that we need to sit later
 2 one day, then no doubt we can do that. We're not saying
 3 we will, and we're not particularly enamoured of doing
 4 so, not least because combined experience, I think, is
 5 that these remote hearings are quite tiring compared
 6 with the real thing.

7 So I think case management really is best left for
 8 trial.

9 So far as skeletons are concerned, we've discussed
 10 that between ourselves and we have a strong view that
 11 your and Mr Lynch's client should be limited to 50 pages
 12 each, not between you, but 50 pages each, on the express
 13 understanding, Mr Edey, that if you want to apply to put
 14 in a longer skeleton, we will listen sympathetically.
 15 We're dealing with sensible counsel all round and we
 16 wouldn't expect sensible counsel to be repeating
 17 themselves and putting in points that were dealt with by
 18 other parties to the action.

19 MR EDEY: My Lord, on that basis, I'm not going to oppose
 20 a page limit at all. I was alarmed to see Mr Gaisman
 21 suggesting what he described as a "stringent" page limit
 22 for any interveners, notwithstanding the fact that he
 23 spent six pages in the skeleton argument explaining why
 24 there should be no page limit for him or anybody else,
 25 including on the basis you can trust all counsel in this

1 case. I wasn't quite clear why that didn't apply to me.
 2 But nonetheless, in the light of your Lordship's
 3 indication, I am content to accept 50 pages, my Lord.

4 LORD JUSTICE FLAUX: Well, for the moment, Mr Edey, you can
 5 take it that it's a rebuttable presumption that counsel
 6 in the case are sensible enough not to put in
 7 excessively verbose skeleton arguments.

8 MR EDEY: I'm grateful, my Lord.

9 Can I just deal with one final point, then, before
 10 I leave this, a principle which relates to me only and
 11 not to Mr Lynch. You will have seen in our application
 12 that we complained or Ms Campbell explained that we
 13 anticipate that the number of insureds for who we act
 14 will grow, and all we simply ask is they can be added as
 15 interveners without that in any way affecting the issues
 16 that arise, but simply that if we act for them, they, we
 17 say, should be, as it were, part of the intervention.
 18 Formally I will be acting on all their behalves.

19 Mr Howard appears to object to that at paragraph 6.1
 20 of his skeleton argument, without explaining why, and
 21 without knowing what I'm shooting at, I can do no more
 22 than -- (overspeaking) --

23 LORD JUSTICE FLAUX: We will hear from Mr Howard in due
 24 course on that point if it arises. Sorry, Mr Edey, I've
 25 cut across you. Is that it?

1 MR EDEY: My Lord, I don't think I have anything further in
 2 light of your Lordship's tentative indication of the
 3 direction of travel .
 4 LORD JUSTICE FLAUX: Would it be sensible if we heard
 5 Mr Lynch next?
 6 MR EDEY: My Lord, yes.
 7 Submissions by MR LYNCH
 8 MR LYNCH: My Lord, thank you. Can your Lordships hear me?
 9 LORD JUSTICE FLAUX: I can hear you and see you.
 10 MR LYNCH: My Lord, thank you. In light of my learned
 11 friend Mr Edey's very helpful submissions and
 12 your Lordship's tentative indication, I will be brief .
 13 If I could first point out what the Hiscox applicants
 14 seek is consistent with, in fact identical to, what
 15 Mr Edey's clients seek, and so that overtakes what was
 16 set out in the draft order appended to my client's
 17 application .
 18 We have attempted to send a draft order to
 19 your Lordships this morning, but I don't know if it has
 20 made it. But, in any event, what is sought is simply in
 21 accordance with what Mr Edey's clients seek .
 22 MR JUSTICE BUTCHER: For my part, Mr Lynch, I have not seen
 23 that .
 24 LORD JUSTICE FLAUX: No.
 25 MR JUSTICE BUTCHER: So what are the changes?

1 MR LYNCH: My Lords, the changes are the old order appeared
 2 at E394. So that is volume 5, which is, for letter E,
 3 draft order page 394. Your Lordships will see on
 4 page 395 that, if your Lordships are with me on the page
 5 reference --
 6 LORD JUSTICE FLAUX: Just getting there, Mr Lynch.
 7 MR LYNCH: My Lord, thank you.
 8 LORD JUSTICE FLAUX: 394, yes.
 9 MR LYNCH: My Lord, thank you. The body of it is at 395.
 10 LORD JUSTICE FLAUX: Yes.
 11 MR LYNCH: That has been overtaken. So point 1 remains,
 12 that the applicants seek to be represented at the trial ,
 13 but 2.1 has been overtaken to this extent: that what is
 14 requested is simply to file and serve a skeleton
 15 argument at the same time as the FCA, and subject to
 16 whatever page limit your Lordships indicate, and if
 17 your Lordships indicate 50 pages, well, then 50 pages it
 18 is .
 19 There should then be, either in 2.1 or within a new
 20 2.2, to file and serve a reply skeleton argument at the
 21 same time as the FCA.
 22 LORD JUSTICE FLAUX: Well, that depends on whether we are
 23 prepared to order reply skeletons, and we'll hear
 24 parties on that in due course .
 25 MR LYNCH: My Lord, absolutely. And that's an important

1 point of clarification, which is if the FCA are given
 2 that permission, then we would seek the same, but again
 3 limited to whatever page limits your Lordship indicate,
 4 if your Lordships give that permission at all. But if
 5 your Lordships don't, then we don't seek it either .
 6 2.2 remains, 30 minutes. 2.2 remains, 15 minutes.
 7 2.4 is removed entirely. I am afraid that was
 8 a misunderstanding. We do not seek to serve written
 9 closing submissions at all. No party, as I understand
 10 it, seeks permission to serve written closing
 11 submissions, and nor do we. I am afraid that should
 12 have been "reply skeleton arguments", but it got lost in
 13 the mix, I am afraid, so please strike that .
 14 So what my clients seek is the same as what
 15 Mr Edey's clients seek, and that is what the FCA has
 16 consented to, and so that was the --
 17 MR JUSTICE BUTCHER: And, Mr Lynch, that includes as to
 18 costs?
 19 MR LYNCH: It includes as to costs, exactly. No order as to
 20 costs of the applicant's application or their role in
 21 the trial .
 22 MR JUSTICE BUTCHER: All right.
 23 MR LYNCH: My Lord, as to practicalities, one important
 24 point is obviously timings, and we recognise time is
 25 extremely short. As I hope I will indicate now, I will

1 not repeat Mr Edey's points, there will be close
 2 collaboration between the interveners and the FCA and,
 3 as far as possible, amongst interveners, to avoid any
 4 repetition .
 5 Time is tight. To the extent that we are able to
 6 sit early or late, which I realise is another request
 7 that the FCA makes on your Lordship's time, then
 8 obviously we would be extremely grateful. But we
 9 recognise that there are limits, and there are
 10 difficulties in sitting early and sitting late, and we
 11 recognise that. But we would be very grateful for any
 12 time the court can permit.
 13 So that was just to clarify what we actually seek .
 14 A second point was a point of clarification as well,
 15 which is that your Lordships may have seen from our
 16 skeleton arguments that I have in various parts referred
 17 to the FCA as being neutral. To be clear about that,
 18 what was not meant was neutral as against the insurers .
 19 What was meant was neutral in the sense set out at
 20 paragraph 55 of the FCA's skeleton, and that is
 21 important precisely for the reasons that Mr Edey has
 22 already explained, and it's that element of neutrality,
 23 not another element of neutrality. But I hope that was
 24 clear, at least read in context .
 25 Then very briefly as to substance, as to which

1 I will be guided by your Lordship, so I can be extremely
 2 quick, which is really to say Hiscox accept that the
 3 Hiscox applicants are affected parties, and there's
 4 a very good reason why they accept that, and that's
 5 because Hiscox say that the issues in the Hiscox
 6 applicants' case are going to be determined in these
 7 proceedings. Therefore, shutting them out would be to
 8 shut them out of the proceedings which would determine
 9 their own rights. So they are affected parties.

10 The only issue of principle is whether or not it's
 11 been adequately established that the proposed joinder is
 12 needed in order to ensure that all the arguments of
 13 those with proposing interests are properly put, as to
 14 which I simply adopt and repeat the very clear points
 15 put by Mr Edey and admitted by the FCA.

16 We can't forget that the background to this, indeed
 17 the basis for this, appears in the framework agreement.
 18 In particular, I would highlight recital E, which is
 19 that the insurers acknowledge that there is a dispute
 20 between them and certain policyholders in respect of the
 21 coverage issue and the causation issue, and the correct
 22 interpretation in respect of the terms of the policies
 23 relevant to those issues.

24 The FCA say: well, at paragraph 55 we recognise
 25 those tensions. The very party that would be putting

1 the arguments against the insurers recognises that there
 2 are or may be other arguments. In those circumstances,
 3 in order to satisfy the court, as the court must be
 4 satisfied, that, as my learned friend Mr Edey
 5 emphasised, all proper arguments will be put to the
 6 court, the only way to achieve that is by allowing the
 7 applications, we would respectfully submit.

8 It's also, just very briefly, realistic that points
 9 will be missed, no matter how excellent the legal team
 10 is for the FCA; more realistically because one would
 11 feel that Mr Edelman and team would never miss a point.
 12 It may be more a case of them selecting points because
 13 they've got so much to deal with.

14 LORD JUSTICE FLAUX: I think we understand the point you and
 15 Mr Edey are making.

16 MR LYNCH: Thank you.

17 Finally, my Lord, there will be no disruption if the
 18 order is made in the terms that we have now clarified.

19 There are some points of detail addressed in the Hiscox
 20 skeleton. I wouldn't propose to deal with those, unless
 21 my learned friend Mr Gaisman addresses them, I would
 22 deal with them in reply.

23 Unless I can help with anything further.

24 LORD JUSTICE FLAUX: No, thank you very much.

25 Mr Edelman, I think you're next, aren't you?

1 MR EDELMAN: It's Ms Mulcahy.

2 LORD JUSTICE FLAUX: Sorry, Ms Mulcahy. I did know it was
 3 you.

4 Submissions by MS MULCAHY

5 MS MULCAHY: Apologies, my Lord, I was just switching on my
 6 video; can you hear me?

7 LORD JUSTICE FLAUX: Yes.

8 MS MULCAHY: I'm grateful.

9 My Lord, in relation to the Hiscox Action Group and
 10 the Hospitality Insurance Action Group interventions, as
 11 explained in our skeleton at paragraph 56, the FCA has
 12 given its consent for those applications to be permitted
 13 to intervene on the basis of the limited and
 14 non-duplicative role proposed by both interveners, and
 15 now Mr Edey's clients no longer pursue their application
 16 for them to potentially diverge from the general no
 17 costs rule, the FCA is able to fully consent to their
 18 application.

19 As the court is aware, it's necessary for
 20 interveners to establish that they are both affected by
 21 the determination of the issues and that joinder is
 22 needed to ensure that the arguments of all those with
 23 opposing interests in relation to those issues are
 24 properly put before the court by those represented.

25 Now, no one is disputing that the interveners are

1 directly affected by the determination of the issues in
 2 question, even though the court is not going to be
 3 determining individual claims as part of the test case
 4 litigation.

5 But can I just say this: in relation to the issue of
 6 whether joinder is necessary and appropriate, the FCA
 7 has consented to these applications for three reasons:
 8 the first is fairness, given the importance to the
 9 interveners of their own claims and the consequences for
 10 them if they don't establish coverage.

11 The second is because the FCA cannot at this point
 12 in time, when pleadings are still not closed and written
 13 submissions have still not been fully worked up, rule
 14 out the possibility that the FCA may decide to advance
 15 on behalf of all policyholders under the relevant
 16 policies different arguments from those that the
 17 interveners would wish to advance, or they may wish to
 18 put a different emphasis on something. That will not
 19 become clear until relatively close to trial and clearly
 20 an attempt at intervention at that late point would be
 21 disruptive.

22 But thirdly and most importantly, it's because the
 23 test case scheme permits interventions, and these
 24 parties have proposed to put their own arguments before
 25 the court in a time-limited and reasonable way which

1 doesn't threaten the process or seek to be duplicative
 2 and the FCA does not wish, in those circumstances, to
 3 stand in the way of some of the very kinds of people
 4 these proceedings are intended to help in the current
 5 circumstances.
 6 However, can I say one thing, because some reasons
 7 have been advanced by each intervener, both in evidence
 8 and skeleton arguments, in support of their application
 9 to the effect that, firstly, that the FCA has not
 10 advanced certain points on behalf of policyholders
 11 because of its "neutral role", or that it must adopt
 12 what is described as a lowest common denominator
 13 approach, and those are suggestions which, in the
 14 interests of the potentially tens of thousands of
 15 policyholders which have policies that are the same or
 16 materially the same as those being tested in this case
 17 and who are depending on the FCA to argue the case, they
 18 don't have the benefit of funding enabling them to apply
 19 to intervene, the FCA would wish firmly to rebut.
 20 If I may just say this: the FCA is confident that it
 21 can properly advance the interests of policyholders. It
 22 has done so to date; it will continue to do so. And
 23 whilst it has been suggested by the Hiscox Action Group
 24 that certain points have not been run by reference to
 25 the particulars of claim, that is merely because those

1 points are matters for submission rather than for the
 2 statement of case. So it would be incorrect to assume
 3 that the FCA is not intending to take these points.
 4 And finally in terms of the FCA's position, its role
 5 in these proceedings is not neutral, although
 6 I'm grateful to Mr Lynch for clarifying what he means by
 7 "neutral", which I think is "neutral as between
 8 different groups of policyholders".
 9 As explained last week by Mr Edelman, my learned
 10 friend Mr Edelman, the FCA has initiated this litigation
 11 in its role as regulator to achieve legal certainty in
 12 its response to certain selected wording to COVID-19
 13 losses, because that is in everybody's interests,
 14 policyholder and insurers, to achieve certainty and to
 15 achieve it quickly, and by bringing a test case, the FCA
 16 is in a position to get or help achieve the earliest
 17 possible determination of those issues, and it is
 18 recognised many policyholders simply wouldn't have the
 19 resources to bring proceedings of this nature and
 20 complexity.
 21 What was also made clear in the evidence before the
 22 last proceedings and in Mr Edelman's submissions is that
 23 the FCA's role in this test case is adversarial. Its
 24 role is to take up an opposing position to insurers, to
 25 advance the case on behalf of policyholders properly and

1 robustly and to test the arguments being advanced by
 2 insurers fully.
 3 And this it will do to the best of its ability, and
 4 in that regard it is not acting as an amicus trying to
 5 assist the court in these proceedings. The FCA is
 6 seeking to establish that cover is available for
 7 business interruption losses under the policies that are
 8 the subject of this claim, and that's clear from the
 9 declaratory relief it is seeking.
 10 LORD JUSTICE FLAUX: Well, I think it is contemplated,
 11 Ms Mulcahy, that -- it may not be part of a formal
 12 order, but it's contemplated that if the interventions
 13 are permitted, that the interveners will liaise with the
 14 FCA, so far as possible, that the arguments that the
 15 interveners wish to put forward will be dealt with by
 16 the FCA. That's certainly what we contemplate will
 17 happen; that there will be, as it were, an iterative
 18 process.
 19 I mean, I think what your skeleton argument is
 20 accepting though is that there may be certain arguments
 21 or as you put -- certain ways of putting things and
 22 certain emphasis that might be put on things that the
 23 particular interveners might wish to put in a more
 24 forceful way, and that's why they say intervention is
 25 appropriate in this case.

1 MS MULCAHY: My Lord, I can confirm that the FCA will liaise
 2 closely with the interveners in order to ensure that the
 3 submissions being made are not duplicative, that they
 4 are supplementary, and it is accepted that if they wish
 5 to put matters differently or to have a different
 6 emphasis -- my Lord says "more forcefully" -- it may be,
 7 in certain respects, that is the case, but they're in
 8 a position to do so.
 9 But the idea is that the FCA will advance arguments
 10 on behalf of all policyholders, including the clients of
 11 the --
 12 LORD JUSTICE FLAUX: Yes, I don't think anybody thought that
 13 it was being suggested the FCA was going to, as it were,
 14 go soft. So I don't think you need be concerned about
 15 that.
 16 MS MULCAHY: Well, I'm grateful.
 17 In terms of practicalities, the FCA has seen
 18 a revised draft order which deals with both of those
 19 interventions. My learned friend Mr Lynch went through
 20 that with your Lordship.
 21 I think it additionally has points about the service
 22 of documents on the interveners. The FCA, for its part,
 23 is content with the order that is proposed by the
 24 interveners.
 25 So far as timetabling is concerned, the FCA hasn't

1 suggested that this -- the time for the interveners come
 2 out of the insurers' time. I would simply say this: the
 3 FCA has a lot to get through in three days, with no less
 4 than 21 wordings, and clearly has a responsibility to
 5 all policyholders, including those that are not
 6 represented by the interveners, and accordingly whilst
 7 fully appreciating the burden that this litigation will
 8 place on the court as well as the parties, it has
 9 invited the court to at least consider sitting for
 10 perhaps a slightly longer period on certain days in
 11 order to --

12 LORD JUSTICE FLAUX: Well, as I indicated earlier, that's
 13 something that Mr Justice Butcher and I have discussed.
 14 We think that's a case management issue for us at trial.

15 MS MULCAHY: Yes.

16 LORD JUSTICE FLAUX: If it transpires it is necessary -- in
 17 order to deal with the interventions it's necessary to
 18 sit late, then we will do so. We're not encouraging it
 19 or agreeing to it, but we will have to see how we go.
 20 But we understand all the constraints that everybody is
 21 working under.

22 MS MULCAHY: Yes. I'm very grateful for that indication,
 23 and clearly it's a matter for the court, and
 24 I understand it will be left for trial.
 25 My Lord, those are my submissions.

1 LORD JUSTICE FLAUX: Thank you very much.
 2 Mr Howard, I think.

3 Submissions by MR HOWARD

4 MR HOWARD: Yes, my Lord. Firstly, I apologise for delaying
 5 things this morning when I wasn't available, and
 6 I'm grateful that we were able to delay things for
 7 a shorter period of time.

8 My Lord, you will have seen that the position of QBE
 9 is it's not objecting to the hospitality group's
 10 joinder. Our position is simply we want to ensure that
 11 the joinder does not affect or prejudice the way in
 12 which the test case is being conducted or the interests
 13 of QBE and the other insurers, and so what we wanted to
 14 ensure was that the interveners would be confined to
 15 submissions in respect of the representative terms, and
 16 as I understand it, that is now common ground; that they
 17 will be so confined.

18 Now, on that basis we don't have any objection if
 19 Mr Edey's solicitors gather in more clients. I'm not
 20 sure I understand, really, what the purpose is in adding
 21 them formally to the proceedings, in that it doesn't
 22 seem to make a great deal of difference either way. But
 23 if they want to, that's a matter for them.

24 So our concern is simply that we're confined to the
 25 representative terms, and we're also concerned, as

1 your Lordship is, I know, to ensure that there isn't any
 2 duplication, but we've heard both from Mr Edey and
 3 Mr Lynch that essentially they propose to make
 4 supplemental submissions.

5 So the only other outstanding issue that had arisen,
 6 other than case management issues, was the one of costs,
 7 and as I understand it, both Mr Edey and Mr Lynch are
 8 prepared to abide by the terms of the framework
 9 agreement, which is there's no costs at any stage, so
 10 whether at the first instance or if the matter goes to
 11 appeal, that everybody bears their own costs, we would
 12 say it's important that everybody sticks to the same
 13 ground rules.

14 LORD JUSTICE FLAUX: Yes.

15 MR HOWARD: So subject to that, one is just left with what
 16 your Lordship says is the case management points, and
 17 I think we're content with the approach that my Lord,
 18 Lord Justice Flaux, was indicating, which is obviously
 19 matters are fluid, but if more time is required
 20 essentially for the presentation of the FCA case
 21 together with that of the interveners, it is likely that
 22 a corresponding amount of extra time will be required
 23 for the insurers. But I'm happy for my part to leave it
 24 there; that one assesses it as we go along.
 25 Prima facie, the time for the interveners would be part

1 of the FCA's time in that they're obviously making
 2 common cause.

3 So, my Lord, I think that's all I need to trouble
 4 you with at this stage, unless there's anything I could
 5 assist you with.

6 LORD JUSTICE FLAUX: No, thank you very much. I don't know
 7 if Mr Justice Butcher has anything?

8 No, thank you, Mr Howard.
 9 Mr Gaisman, I think.

10 Submissions by MR GAISMAN

11 MR GAISMAN: Can your Lordship hear me?

12 LORD JUSTICE FLAUX: Yes.

13 MR GAISMAN: Good. I only want to add, I think,
 14 three points on whether they are conditions or case
 15 management. They should be flagged at this stage.

16 The first, putting it perhaps in slightly different
 17 words what Mr Howard has just said, it should be clear
 18 that the interveners should only make submissions not
 19 just in respect of the representative terms only, but
 20 also in relation to the issues which are already before
 21 the court in the test case. And I think that is
 22 accepted, but if it isn't, we should know.

23 The second point is this: paragraph 31 of my learned
 24 friend Mr Lynch's skeleton refers to the Hiscox Action
 25 Group relying on "points comparing wordings available

1 and used elsewhere in the market". The utility of that
 2 exercise has already been the subject of observation
 3 this morning, but it does raise a red flag: this case is
 4 about the relevant wordings and what they mean.
 5 If Hiscox is referring to making points about the
 6 wordings, comparing the wordings which are already
 7 within the four corners of the test case, that's fine.
 8 But we cannot, with respect, have the interveners
 9 introducing other wordings, and, indeed, it is not clear
 10 by what means they would do so.
 11 LORD JUSTICE FLAUX: No. Well, speaking for myself,
 12 Mr Gaisman, that particular passage in the skeleton
 13 argument did cause me some concern. Mr Lynch hasn't
 14 addressed it in his submissions, but you will gather
 15 from what we said earlier that we're not interested in
 16 other wordings than the ones we're dealing with.
 17 MR GAISMAN: No.
 18 LORD JUSTICE FLAUX: So that should be understood all round.
 19 MR GAISMAN: But your Lordship is always asked to construe
 20 a contract by reference to what isn't in it.
 21 LORD JUSTICE FLAUX: Quite.
 22 MR GAISMAN: The third point is this, and this is,
 23 I appreciate, a matter of case management, but each of
 24 the interveners -- and I'm not sure your Lordship has
 25 yet heard from counsel for Mr Sheehan.

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1 LORD JUSTICE FLAUX: No.
 2 MR GAISMAN: But each of the interveners has asked for
 3 45 minutes in total by way of oral submission. That's
 4 90 minutes. It's just worth bearing in mind that that
 5 90 minutes for the interveners compares with only half
 6 a day for each of the insurers on the assumption, which
 7 is, in a sense, an artificial one, but we can make no
 8 other, of an equal division. The only reason I mention
 9 that is because that makes it all the more imperative
 10 that however late your Lordships are prevailed upon to
 11 sit, the interveners' time must come out of the FCA
 12 time.
 13 LORD JUSTICE FLAUX: I think that's accepted, and if it
 14 isn't, that is how we would proceed. I mean, we would
 15 not be intending to carve out of insurers' oral
 16 submission time any time for the interveners.
 17 MR GAISMAN: It's accepted by the interveners at footnote 1
 18 on page 2 of the Hiscox Action Group skeleton it is not
 19 accepted by the FCA in paragraph 56 of its skeleton.
 20 LORD JUSTICE FLAUX: No, I understand that, but I've already
 21 indicated how, other things being equal, we would
 22 propose to case-manage it.
 23 MR GAISMAN: I have no further submissions, my Lord.
 24 LORD JUSTICE FLAUX: No. Right.
 25 Do either Mr Edey or Mr Lynch want to say anything

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1 in reply?
 2 MR EDEY: My Lord, there's nothing that I need to add.
 3 LORD JUSTICE FLAUX: Mr Lynch?
 4 MR LYNCH: My Lord, thank you, only to clarify that my
 5 learned friend Mr Gaisman makes a very fair point as to
 6 paragraph 31, and of course your Lordship's comments
 7 have been heard, and what of course was intended was
 8 only to refer to any policies that are already within
 9 the proceedings and any inaccuracy in the skeleton I am
 10 afraid is my own poor drafting.
 11 LORD JUSTICE FLAUX: That's a helpful clarification, thank
 12 you.
 13 MR LYNCH: Thank you.
 14 LORD JUSTICE FLAUX: I think it would be sensible if, before
 15 we go any further, we were to hear from counsel for
 16 Mr Sheehan, don't you, Mr Justice Butcher?
 17 MR JUSTICE BUTCHER: Yes.
 18 LORD JUSTICE FLAUX: Mr Hendron, you are there, I think,
 19 somewhere.
 20 Submissions by MR HENDRON
 21 MR HENDRON: I am. Good morning, my Lord.
 22 My Lords, I appear for Mr Sheehan. 51, Practice
 23 Direction 2.5(a), we ask the court for three things.
 24 First is permission to apply witness statements limited
 25 to 25 pages. Secondly, permission to file skeleton

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1 arguments. Happy to limit that to 50 pages. And,
 2 lastly, my Lords, permission for oral submissions
 3 limited to 30 minutes.
 4 Mr Sheehan is a sole trader and a publican. There
 5 are tens of thousands of people in his position across
 6 England and Wales.
 7 LORD JUSTICE FLAUX: Has your client liaised with the FCA at
 8 all to see whether the arguments you want to raise on
 9 his behalf are already being dealt with by the FCA?
 10 MR HENDRON: My client has had various communications with
 11 the FCA. Insofar as the arguments that I wish to raise
 12 on his behalf, I don't believe they are, but I say that
 13 with a massive caveat.
 14 In any event, my client, from his perspective as
 15 a publican and sole trader, may like to add a different
 16 emphasis as to those arguments pursued by the FCA, and
 17 as he repeats the submissions that the FCA make via
 18 Ms Mulcahy as to fairness, and the different perspective
 19 that Mr Sheehan, through his evidence and submissions on
 20 his behalf, may bring and can bring to the determination
 21 of the issues involved.
 22 It seems, my Lord, that in these circumstances where
 23 all the other parties are either the insurers or the
 24 FCA, and granted the FCA share a mutual -- in principle
 25 a mutual interest with that of my client, that there

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1 must be or there ought to be, if fairness has its way,
 2 a place for people such as Mr Sheehan, my client, to
 3 make representations from his unique perspective, as
 4 a publican who was affected and has been affected
 5 directly by the COVID-19 outbreak. And, my Lord, in my
 6 submission, his evidence and submissions on his behalf
 7 can only add to create an important context to which
 8 submissions can be built to the court.
 9 I don't really have much further to add other than
 10 the Practice Direction envisages that applications from
 11 people such as my client can be made. He has
 12 a qualifying claim. He was in business at the relevant
 13 time, in accordance with the Practice Direction, and he
 14 is a relevant market. So he meets the criteria as to
 15 whether it is desirable and as to whether he can add
 16 further to what is already being said or what is likely
 17 to be said. I don't need to repeat my submissions on
 18 that.
 19 So for those reasons, my Lord, I would ask for what
 20 is a very short, relatively short, time out of the FCA's
 21 time to make submissions at the trial.
 22 LORD JUSTICE FLAUX: Right. Well, Ms Mulcahy, do you want
 23 to deal with this?
 24 Submissions by MS MULCAHY
 25 MS MULCAHY: Yes, my Lord. Mr Sheehan did make submissions

1 to the FCA as part of the consultation process with
 2 policyholders. However, it only became aware of this
 3 application this morning. It doesn't appear to have
 4 been served with it, but we have had a look at the
 5 application and, indeed, at the policy which Mr Sheehan
 6 is insured under, which is a RSA pubs policy wording,
 7 it's a matter for the --
 8 LORD JUSTICE FLAUX: Is that one of the ones -- is that one
 9 of the Eaton Gate wordings?
 10 MS MULCAHY: No, it isn't. It's not a test case
 11 representative wording and if the intervention is
 12 permitted, it will expand the existing scope of the
 13 litigation.
 14 But there is a further issue; that the clause in
 15 question, which is clause 4 in that policy, requires
 16 damage to property and that, again, is not within the
 17 scope of the test case.
 18 What the FCA has sought to do, having had to
 19 restrict what it could achieve to the time -- to being
 20 able to do it in a quick time period, it has not sought
 21 to test wordings that involve damage. It has sought to
 22 test non-damage wordings. And that is clear, if you
 23 need a reference to it, from the framework agreement --
 24 LORD JUSTICE FLAUX: No, I think we've got that point.
 25 MS MULCAHY: So if extended to include damage, that would be

1 a major further stream and one that would involve
 2 different issues of law and principle.
 3 Mr Sheehan has made a point in his witness statement
 4 by reference to the clause in question, which is a loss
 5 of attraction clause. It relates to where there is
 6 a fall in the number of customers attracted to the
 7 vicinity of the premises, whether the property used by
 8 you for the purposes of the business should be damaged
 9 or not. And he tries to contend that that's not
 10 property damage, but it's clear from the clause itself
 11 that it covers damage to property in the vicinity of the
 12 premises.
 13 So we read those words as requiring damage to
 14 property in the vicinity, but not necessarily damage to
 15 the insured property. But it's clear that this is
 16 a policy requiring property damage, and for that reason,
 17 as I said, it's not within scope and it seems that
 18 Mr Sheehan is not affected by the issues being
 19 determined in the test case for the purpose of
 20 paragraph 2.5(a).
 21 Now, ultimately it's a matter for the court, but
 22 I hope that that will assist in terms of identifying
 23 what the intervention covers.
 24 LORD JUSTICE FLAUX: Yes.
 25 MS MULCAHY: I believe Mr Turner for RSA would wish to --

1 LORD JUSTICE FLAUX: Well, I was going to say, Mr Turner is
 2 most obviously affected. It would be appropriate,
 3 I think, if we hear from him.
 4 Submissions by MR TURNER
 5 MR TURNER: My Lord, RSA has enormous sympathy for
 6 Mr Sheehan, as it does for all of its policyholders who
 7 have been impacted by COVID-19.
 8 We unfortunately oppose Mr Sheehan's application,
 9 essentially for the reasons given by Ms Mulcahy.
 10 Mr Sheehan will not be affected by the determination of
 11 the issues in the test case, that being the gateway
 12 criterion for intervention, because those issues do not
 13 include whether an outbreak of COVID-19 amounts to
 14 damage to property in the vicinity of his premises.
 15 That's all I have to say.
 16 LORD JUSTICE FLAUX: Do you want to say anything in reply,
 17 Mr Hendron?
 18 Submissions in reply by MR HENDRON
 19 MR HENDRON: Well, I hear what my Lord said insofar as the
 20 court making clear it doesn't want to widen the policy
 21 wordings in consideration. I don't want to knock on
 22 that door too much, but I would ask if that is
 23 a determinative consideration of my client's
 24 application, that the court reconsiders its position as
 25 to widening the policy (inaudible) just to include

1 damage to the property.
 2 Putting that aside, and I see my Lord shaking
 3 his head and I will move on, my client is affected
 4 insofar as he has a policy which, under clause 3(a) --
 5 clause 4, rather. Sorry, 3(a) and 4(b), 4(b) is
 6 a clause that relates to the fall in the business
 7 premises revenue. So I would say, in my submission,
 8 my Lord, that my client is affected by issues to be
 9 determined.
 10 If I'm wrong on that, then I would ask in my
 11 first submission to be joined to the proceedings because
 12 of the unique contribution that he could give in his
 13 evidence and the context he can put, as a publican, into
 14 the proceedings.
 15 Those are my submissions.
 16 LORD JUSTICE FLAUX: Thank you very much, Mr Hendron.
 17 I'll ask Mr Justice Butcher to give the ruling of
 18 the court in relation to the intervention applications .
 19 (11.46 am)
 20 Ruling (pending approval)
 21 (11.51 am)
 22 LORD JUSTICE FLAUX: Thank you very much. Right.
 23 MR EDELMAN: My Lords, it's Mr Edelman back. Just looking
 24 at the time, I anticipate that the transcribers might
 25 appreciate a break at this point, and it does seem

1 a natural point.
 2 LORD JUSTICE FLAUX: Yes, presumably this works as with
 3 other Skype; that when we press our red buttons, there's
 4 a thing that says "rejoin the meeting" and we then
 5 re-press that.
 6 MR EDELMAN: My Lord, can I suggest that the easier way
 7 would be simply to turn off video and microphone. It
 8 saves everybody having to log back in again.
 9 LORD JUSTICE FLAUX: Or just leave the room, Mr Edelman.
 10 Well, it's now just after 11.50. So if I say
 11 12 o'clock.
 12 MR EDELMAN: My Lord, yes, that sounds suitable.
 13 LORD JUSTICE FLAUX: Thank you very much.
 14 (11.52 am)
 15 (A short break)
 16 (12.00 pm)
 17 LORD JUSTICE FLAUX: Right, Mr Edelman, by my reckoning it's
 18 12 o'clock. Have we got everyone here?
 19 MR EDELMAN: Impossible for me to say, my Lord.
 20 LORD JUSTICE FLAUX: No, I'm not asking you; I'm asking
 21 generally whether --
 22 MR EDELMAN: Well, that might cause everyone to turn on
 23 their microphones and that might cause chaos.
 24 LORD JUSTICE FLAUX: Are we now on to number --
 25 MR EDELMAN: 6.

1 LORD JUSTICE FLAUX: -- 6. So this affects Mr Kealey,
 2 doesn't it?
 3 So, Mr Kealey.
 4 MR EDELMAN: If Mr Kealey is here, then...
 5 LORD JUSTICE FLAUX: If Mr Kealey is here. Are you here,
 6 Mr Kealey?
 7 MR KEALEY: I'm here. I hope you can see me somewhere.
 8 LORD JUSTICE FLAUX: Yes, I can.
 9 MR EDELMAN: My Lord, I've had a request, and obviously as
 10 he is there with his jacket on, not from Mr Kealey, but
 11 from one of the members of the Bar, a request for them
 12 to remove their jackets if possible when they're
 13 speaking. I have the advantages of having an air
 14 conditioning unit in my study, but I suspect others may
 15 not do so and may be suffering in the heat.
 16 LORD JUSTICE FLAUX: Well, it's funny you should mention
 17 that, because I was going to say, actually, at the
 18 outset of the hearing, if anybody wants to take his
 19 jacket off -- and I suppose her jacket off as well,
 20 Ms Mulcahy -- then by all means feel free to do so.
 21 Mr Kealey I'm sure won't want to.
 22 MR JUSTICE BUTCHER: I'm sure he won't.
 23 MR KEALEY: I'm very conservative, my Lord. I'll keep my
 24 jacket on.
 25 LORD JUSTICE FLAUX: Mr Kealey, precisely the point I was

1 about to make.
 2 MR EDELMAN: Conservative in style, but not necessarily in
 3 colour.
 4 LORD JUSTICE FLAUX: No. Very well, Mr Edelman. When you
 5 two have finished, perhaps we could continue.
 6 Submissions by MR EDELMAN
 7 MR EDELMAN: My Lord, we now move on to our application to
 8 adduce expert evidence, and as I hope you have seen from
 9 our skeletons, we don't intend to pursue an application
 10 in circumstances where Ecclesiastical say they want to
 11 get expert evidence to deal with this and can't do so.
 12 We're a little surprised that they've been unable to do
 13 so, but so be it. We don't doubt that they've made
 14 efforts.
 15 But the question is: what do we do now? Is the
 16 court, as we would say is appropriate, prepared to
 17 assume the facts pending Ecclesiastical obtaining any
 18 evidence and indicating to us whether they are able to
 19 agree or disagree, and is that assumption, if they can't
 20 find an expert, to continue to trial, which we say it
 21 should do? It should be an assumed fact at trial. Or
 22 is Mr Kealey prepared to stand by his offer of an agreed
 23 fact, if that's available from him? Is that
 24 an alternative, or should I -- should the FCA be
 25 debarred from this at all?

1 Can I just paint the background to this. I think
 2 my Lords have seen from the skeletons the issue that
 3 arises on the Ecclesiastical wording, but if you want to
 4 see the main wording, that's at bundle 1, page 393 in
 5 our particulars of claim. That's probably the easiest
 6 place to see it.
 7 (Pause)
 8 LORD JUSTICE FLAUX: Yes.
 9 MR EDELMAN: You will see that it provides cover where:
 10 "... access to or use of the premises is prevented
 11 or hindered by any action of government, police or local
 12 authority due to an emergency which could endanger human
 13 life or neighbouring property."
 14 And there is an exclusion at (iii):
 15 "Closure or restriction in use of the premises due
 16 to the order or advice of the competent local authority
 17 as a result of the occurrence of an infectious
 18 disease ..."
 19 Et cetera.
 20 And the main issue at trial on the scope of the
 21 language is going to be as to the meaning of the words
 22 "competent local authority". I'm not suggesting there
 23 aren't other issues, to prevent Mr Kealey from saying
 24 anything about that, but there's going to be a question
 25 as to whether "competent local authority", construed in

1 the light of the earlier reference to "government,
 2 police or local authority", encompasses action by the
 3 government.
 4 We anticipated from declinature letters that
 5 Ecclesiastical would say that relevant to the
 6 construction of the words "competent local authority" is
 7 a specified diseases clause, which Mr Kealey has
 8 referred to in his skeleton and which relates to certain
 9 specified diseases and it provides cover if those
 10 diseases cause restrictions in the use of the premises
 11 on the order or advice of the competent local authority.
 12 Now, this is a selective list of diseases in that
 13 clause, and if my Lords can turn on to page 396 of the
 14 bundle you were looking at -- you had 393 open, so it's
 15 just two or three pages on, three pages on.
 16 LORD JUSTICE FLAUX: Hang on. 396?
 17 MR EDELMAN: Yes, my Lord. You will see there is a table
 18 there, "Example reasons for declining cover", and if you
 19 go down to the fourth paragraph in that --
 20 LORD JUSTICE FLAUX: Yes.
 21 MR EDELMAN: -- you will see this is a fairly standard
 22 letter of declinature :
 23 "We do provide businesses with cover for established
 24 infectious diseases whose impact is assessable, known as
 25 specified disease cover. These diseases are set out in

1 the policy and only those listed are covered. COVID-19
 2 is not included on the list of diseases covered by this
 3 insurance. This is because, in common with most of the
 4 market, our insurance policies are not designed and
 5 priced to cover pandemics."
 6 So we had anticipated that it would not be
 7 contentious that the diseases listed in the specified
 8 diseases exclusion would not reasonably be anticipated
 9 to be capable in the modern age of causing a pandemic.
 10 Of course, Mr Kealey is very keen to pick out some of
 11 those which might cause a stir. Something like smallpox
 12 in the past would have been capable of creating
 13 a pandemic, but that --
 14 MR JUSTICE BUTCHER: When you say "pandemic", Mr Edelman,
 15 it's not a question of a pandemic, is it? "Pandemic"
 16 means more than one country. We're not really concerned
 17 with that, are we?
 18 LORD JUSTICE FLAUX: What we're concerned with is whether or
 19 not any of these -- I say "what we're concerned with";
 20 an issue is whether any of the diseases in the list is
 21 capable of being widespread in the sense that it's
 22 capable of covering more than, as it were, a confined
 23 area of one local authority.
 24 MR EDELMAN: Exactly.
 25 LORD JUSTICE FLAUX: Speaking for myself, I would have

1 thought there are a huge number of diseases on that list
 2 which might very well, even in the modern age. I mean,
 3 the plague is an example. Mercifully we haven't had
 4 a plague in this country for a long while, but if we did
 5 have one...
 6 MR EDELMAN: Well, our expert says --
 7 LORD JUSTICE FLAUX: The other thing, Mr Edelman, is we
 8 don't know how long this specified disease wording has
 9 been in use in one form or another, but the reality is
 10 that within our respective lifetimes there have been
 11 serious outbreaks of several of these diseases which
 12 have been widespread in this country. Measles, mumps
 13 and rubella; certainly there have been serious and
 14 widespread outbreaks of those diseases within the last
 15 20 or 30 years.
 16 MR EDELMAN: I think my Lord needs to be careful about
 17 judicial memory because --
 18 LORD JUSTICE FLAUX: Well, that may be right, Mr Edelman.
 19 MR EDELMAN: -- there may well have been localised outbreaks
 20 amongst particular communities or --
 21 LORD JUSTICE FLAUX: Anyway, that's not the real point, is
 22 it?
 23 MR EDELMAN: My Lord, the real point is whether -- because
 24 our experts, the expert from whom we've obtained
 25 evidence, has expressed an opinion as to the extreme

1 unlikelihood of those diseases , in the modern age, being
2 other than localised .

3 Of course they will have outbreaks. My Lord is
4 quite right . But my Lord may only have a vague
5 recollection of matters which is not accurate, and the
6 expert is giving the expert opinion as to what is
7 accurate.

8 Now, we're not asking at this stage or insisting
9 that that evidence go in as expert evidence in
10 circumstances where Ecclesiastical have yet to obtain
11 an expert. But something needs to be done to have
12 an assumption, and it can be an assumption one way or
13 the other, and my Lord may or may not reach a decision
14 which is affected by the assumption.

15 But in order to enable us, the FCA, to put forward
16 policyholders ' case at the hearing in the best way that
17 we feel is appropriate, we would invite the court not to
18 shut out this evidence, even as an assumed fact, simply
19 on the basis of either judicial recollection or any
20 other basis .

21 LORD JUSTICE FLAUX: Yes, very well.

22 MR EDELMAN: That's what we -- can I just make some further
23 observations about the criticisms that Mr Kealey makes.
24 I should also observe that the declinature letter
25 describes these diseases as being diseases whose impact

1 is assessable , and assessable means, in our submission,
2 that you can assess the extent of the impact that they
3 will have, and that, we say, is a localised impact.

4 But Mr Kealey says this is all too late. Well, he
5 will hopefully know the time pressures that all the
6 parties have been under. And the insurers entered into
7 the framework agreement knowing full well that things
8 would have to be done under time pressure , and that that
9 would necessarily mean that things were done at the last
10 minute.

11 And I can tell the court that it was like
12 a battlefield , as far as the FCA was concerned
13 yesterday , receiving applications and representations
14 right , left and centre. We haven't complained about
15 that. It's a tight timetable. We appreciate it. But
16 a complaint that something comes in in time but not
17 earlier is, we submit, not a valid complaint.

18 He says that what we're trying to do is not relevant
19 factual matrix. What we've sought to put in is
20 something that we've considered in light of what
21 Ecclesiastical said to its own policyholders as a reason
22 for declining cover, that the impact of the listed
23 diseases was something that was assessable and they did
24 not insure un-assessable diseases . We had thought that
25 in the spirit of the framework agreement, some agreement

1 could have -- some agreed fact could have been offered .

2 As my Lords have seen, we've made strenuous efforts
3 with other parties , despite the fact we don't accept the
4 relevance of the alleged facts , to agree on things like
5 events in Sweden, because that is the spirit of the
6 framework agreement.

7 So it is unfortunate that Ecclesiastical is not even
8 prepared to agree to this as an assumed fact, but,
9 my Lord, that's where we are. We submit that it is
10 relevant to the construction of the clause because it is
11 evidence about the impact of these diseases and it would
12 be unsatisfactory for the court to reach conclusions
13 without some evidential basis for it .

14 As I've said, we're content to accept assumed facts,
15 in the circumstances, but if my Lords are against me on
16 that, then we would invite you to apply the approach
17 that Mr Kealey seems to be prepared to accept in
18 paragraph 39, but of course he may either say that's not
19 available or he may resile from it , but he will , no
20 doubt, say what his position is .

21 My Lords, those are my submissions.

22 LORD JUSTICE FLAUX: Mr Kealey.

23 Submissions by MR KEALEY

24 MR KEALEY: My Lord, there's a fundamental problem with this
25 application . I just want to put paid to one thing

1 before I go to the fundamental problem. The way in
2 which Mr Edelman made his submissions is almost as
3 though it's our fault that this has come out late, and
4 that we can't possibly agree it. Far from that.

5 Can I just remind your Lordships, if I may, what
6 this evidence is supposed to be. If you go to, I think
7 it's bundle 6 at F1, you'll see the application .

8 LORD JUSTICE FLAUX: Yes.

9 MR KEALEY: I'm sorry to take you there. It's referred to
10 in our skeleton , but it's worth seeing it , as it were,
11 facially , so you can see how it simply doesn't work.

12 LORD JUSTICE FLAUX: Just a moment, Mr Kealey. It's F1.

13 MR KEALEY: It's F-1, I think it's bundle 6, F-1.

14 LORD JUSTICE FLAUX: Yes. Got it.

15 MR KEALEY: The order that is sought, in the middle of the
16 page, is that:

17 "The claimant shall have permission to rely on the
18 expert report of Dr Samir Bhatt, dated 19 June, in
19 relation to whether the expressly listed diseases in the
20 third defendant's policy definition of specified
21 disease, could lead to a widespread outbreak in the UK
22 or are likely to be localised in nature."

23 LORD JUSTICE FLAUX: Mm.

24 MR KEALEY: Then the reason is given, because the expert
25 evidence is supposed to be reasonably required to

1 resolve the pleadings:
 2 "Whether the listed diseases could require
 3 a national response may be relevant to the breadth of
 4 the meaning of 'competent local authority' in the
 5 disease clause and whether it could include the national
 6 government and potentially also therefore the meaning of
 7 the same team in the exclusion of the prevention of
 8 access clause."

9 Mr Paul Lewis has signed a witness statement to
 10 exactly the same effect, which goes no further.

11 Could I just remind your Lordship before we go any
 12 further to what Mr Edelman's skeleton says in relation
 13 to the RSA's application, which your Lordships
 14 dismissed.

15 LORD JUSTICE FLAUX: Yes.

16 MR KEALEY: It's in his supplemental skeleton argument at
 17 paragraph 8. Could I please adopt it mutatis mutandis.

18 LORD JUSTICE FLAUX: Yes, you say what's sauce for the goose
 19 is sauce for the gander.

20 MR KEALEY: Yes, and I wouldn't necessarily describe
 21 Mr Edelman as necessarily a goose or a gander, but
 22 certainly the direction of your Lordship's comment is
 23 certainly accepted.

24 LORD JUSTICE FLAUX: Yes.

25 MR KEALEY: Although it's sought to be justified as factual

1 matrix, it patently fails to pass the test for
 2 admissible factual matrix. There is no suggestion that
 3 RSA is, for it to read my client's, Ecclesiastical's,
 4 policyholders, or any brokers they may have used in
 5 relation to the selected test case wordings were aware
 6 that these specified diseases were or were not such as
 7 would lead to a widespread outbreak in the UK or are
 8 likely to be localised in nature.

9 In fact, given your judicial recollection, my Lord,
 10 it may actually be that the policyholders being in the
 11 main clerics and nursery school owners and people who
 12 operated nursery schools may actually think that they
 13 are epidemic in nature, rather than what Dr Bhatt, who
 14 is a rather specialist - specialist from Imperial College,
 15 after much cogitation, it would appear, and consultation
 16 with probably innumerable, although not actually
 17 numbered in his report, colleagues have concluded.

18 So go on with Mr Edelman's skeleton. Indeed, the
 19 second statement doesn't even say that RSA was aware of
 20 it when the policies were entered into. Well, what you
 21 have is a complete absence from or on behalf of the FSA
 22 or any policyholder or, indeed, in relation to any
 23 underwriter at Ecclesiastical that it was aware of
 24 anything in relation to this, let alone the evidence
 25 sought to be adduced through Dr Bhatt.

1 So the idea of going back to the application notice
 2 or the application form, whatever it is to be described
 3 as, the idea that this is admissible evidence as it
 4 stands is, I would respectfully suggest, simply wrong.

5 At page 12 of the [draft] transcript this morning,
 6 Mr Edelman said that -- or, rather, it's [draft]
 7 page 12, so if you could go down for a little while. He
 8 says that there was no evidence, my Lord:

9 "There's no [evidence] advanced either that the
 10 policyholder or their brokers, if they used brokers,
 11 were aware or had any means of being aware of the
 12 particular wording..."

13 For which read: what this expert evidence is relied
 14 upon:

15 "... and there's no obvious reason why they should
 16 have been aware of it."

17 It's really on the basis of that that Mr Edelman
 18 advanced his arguments against the RSA application. It
 19 was on the basis of that that your Lordships dismissed
 20 the application, rejected it, and quite rightly, if
 21 I may respectfully say for the RSA, forgive me. But
 22 that's as it goes.

23 Can I just take your Lordships, if I may, to
 24 Dr Bhatt and what and who he is. You've probably seen
 25 that. I don't know where you would like to see it, but

1 you see his report attached in F1 where I was just
 2 before.

3 LORD JUSTICE FLAUX: So it's attached to Mr Lewis' witness
 4 statement, isn't it?

5 MR KEALEY: It's attached to Mr Lewis' witness statement.
 6 Mr Lewis' witness statement, I've already referred to,
 7 says absolutely nothing about what a policyholder or
 8 an underwriter knew or should have had available to him
 9 or to her to be known.

10 If you go to the witness statement itself, the
 11 expert report, forgive me, at F12, this is from
 12 a gentleman of quite considerable specialism and
 13 expertise, and I don't think many policyholders quite
 14 live up to his qualifications. I'm not sure that there
 15 are many clerics who actually share his expertise.

16 But he is currently employed by Imperial as a senior
 17 lecturer/associate professor in geostatics, something
 18 which I have to confess that, until I looked it up,
 19 I wasn't sure what it meant, in the Department of
 20 Infectious Disease, Epidemiology and Faculty of Medicine
 21 in the School of Public Health:

22 "I have been involved in the study of infectious
 23 diseases since 2006 and have co-authored publications
 24 relating to a number of diseases below."

25 And there are nine of them.

1 Then in paragraph 3 he tells us what he was
2 instructed to provide an independent expert in relation
3 to:

4 "Whether outbreaks in the UK of the specified
5 diseases in the table set out at paragraph 15 below are
6 likely to be localised in nature."

7 He has been provided copies of various documents.

8 Then at paragraph 13, my Lords, at bundle F,
9 page 15, at paragraph 13, he says:

10 "In the preparation of this report, I have been
11 assisted by a number of my colleagues from
12 Imperial College."

13 So one has the impression of a veritable team of
14 expert specialists in infectious disease, epidemiology
15 and probably geostatics who have come up with the
16 conclusions set out in this report which, of course, are
17 the expression of Dr Bhatt's opinion and only his own.

18 Then paragraph 14 tells you what he has been asked
19 to consider, and he says in the fifth line of
20 paragraph 14:

21 "Whilst the characteristics of some of the diseases
22 listed below are such that outbreaks could give rise to
23 nationwide epidemics, and historic outbreaks of some of
24 the diseases have been widespread, it's my view that
25 given current healthcare standards and practices in the

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1 UK that it's extremely unlikely that any of the diseases
2 listed below could lead to a widespread outbreak in the
3 UK. This is because, aside from existing treatments and
4 vaccinations, none of the diseases listed below is
5 a novel virus where both the level of susceptibility is
6 very high and no preventive measures exist."

7 Then if your Lordships could turn -- well, then you
8 have the reference to something which is now, of course,
9 very well known in the United Kingdom; herd immunity.

10 Then at paragraph 15, he says -- he explains the
11 specific reasons why an outbreak of each disease would
12 be localised in nature, unlikely to be the type to give
13 rise to a nationwide epidemic affecting 21st century UK.
14 Then you have anthrax, cholera, measles, mumps, rubella,
15 scarlet fever, typhus fever, viral hepatitis, whooping
16 cough, et cetera.

17 So what we say, my Lord, is a fundamental point.
18 It's not a question of: oh, well, what can we do about
19 this? Why don't we have a couple of assumed facts?
20 It's not a question of that at all: it's a question of
21 the admissibility and relevant of this evidence, and our
22 respectful submission, put briefly, is that it's wholly
23 irrelevant and wholly inadmissible.

24 LORD JUSTICE FLAUX: Yes, thank you.

25 MR KEALEY: That doesn't even deal, my Lord, with the only

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1 prepared fact that we were prepared to give, which is no
2 more and no less than at paragraph 39 of our skeleton,
3 which is merely that someone who happens to be
4 an associate professor in geostatics in the Department
5 of Infectious Disease, Epidemiology, Faculty of
6 Medicine, School of Public Health at Imperial College
7 London, after assistance from a number of his colleagues
8 at Imperial, has concluded that he is able to set out
9 the opinions expressed in that report; in other words,
10 the report.

11 LORD JUSTICE FLAUX: How does that help us to decide the
12 issues with which we are concerned?

13 MR KEALEY: It doesn't help you at all. It's rather like
14 saying a nuclear physicist will be able to tell you what
15 he, a nuclear physicist, is able to tell you.

16 LORD JUSTICE FLAUX: Yes.

17 MR KEALEY: It tells you nothing more about that. Certainly
18 it doesn't help you or the FCA or justice to determine
19 what the proper interpretation of these wordings is.
20 And that's a fundamental issue, and that's why we say
21 that you shouldn't even contemplate going any further.

22 If you want me to go further, you have it all in
23 writing. It is far too late. Factual matrix evidence
24 is quintessentially something to be pleaded. It is
25 quintessentially something in this case which was not

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1 pleaded. So we are in absolutely no position to deal
2 with this.

3 As to the reference to what is described by my
4 learned friend as one standard declinature letter, well,
5 in this country, as I recall, the proper interpretation
6 of contracts is not to be determined by reference to
7 post-contractual conduct or words or expressions or
8 opinions. That's as I had always understood the law,
9 but it's been such a long time since I went to
10 university I can't really remember whether that still
11 subsists, but I think it probably does. Therefore, all
12 those references are equally irrelevant, inadmissible
13 and should not have been made.

14 So those are my submissions, my Lord.

15 LORD JUSTICE FLAUX: Yes, thank you very much, Mr Kealey.
16 Mr Edelman.

17 Submissions in reply by MR EDELMAN

18 MR EDELMAN: It's interesting to just remember what the
19 issue actually is in this case on the clause. The
20 clause the FCA relies on refers to a government or local
21 authority. The exclusion only refers to a local
22 authority, and one might, therefore, think that it only
23 refers to a local authority and not to a government.
24 But no, no, no, say Ecclesiastical, and this is what we
25 anticipated. It's suggested that we should have pleaded

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1 factual matrix for an anticipated construction argument.
 2 No, no, no, they say; look at this other clause where we
 3 use the same phrase, and although we use the word
 4 "local" in that clause, we actually meant "government"
 5 as well as "local" in that clause, even though we've
 6 distinguished between the two of them in the clause
 7 you're relying on.

8 Really, what we're doing is just seeking to defuse
 9 that argument on the basis that "local" makes perfect
 10 sense in the other clause in the context of the diseases
 11 referred to, in the sense that it is a sensible
 12 construction of the words to say that it is local.

13 But that needs the court to understand something
 14 about the diseases. Now, that's not factual matrix;
 15 we're construing the words. We're trying to understand
 16 what the implications of those words are.

17 LORD JUSTICE FLAUX: It's seeking to construe the words in
 18 the contract by reference to some other extraneous fact.
 19 If that's not part of the factual matrix, I don't know
 20 what is. Nice try, Mr Edelman, but I am afraid you
 21 won't get out of it that way.

22 MR EDELMAN: Well, my Lord, what it's doing is it's
 23 explaining that one sometimes has technical words used
 24 in a contract. One doesn't say that the evidence --

25 LORD JUSTICE FLAUX: It's not a dictionary definition at

1 all.

2 MR EDELMAN: No, but, my Lord, one sometimes has language
 3 used in a policy where one needs some technical
 4 assistance to understand what it means and what its
 5 implications are, and that is what this evidence is
 6 going to.

7 What are the implications of smallpox, for example?
 8 Is that a disease in the context of the use of these
 9 words? Does it make sense only to be referring to
 10 a local authority in the context of smallpox? A few
 11 centuries ago, certainly not, but nowadays it will be --
 12 it will make sense.

13 And that's the simple point that we try to make;
 14 that the court needs to understand and not have
 15 a misappreciation of the implications of the diseases to
 16 which this clause is referring.

17 If Mr Kealey is going to say that he accepts that
 18 what Dr Bhatt says as being actually correct but
 19 Ecclesiastical won't, which is perhaps surprising -- but
 20 the concern that the FCA has is that Mr Kealey, with his
 21 usual enthusiasm, will start saying how terrible all
 22 these diseases -- smallpox can be a real killer
 23 everywhere, and that needs to be restrained.

24 We submit that the appropriate way forward would be
 25 to assume the fact. My Lord --

1 LORD JUSTICE FLAUX: Mr Edelman, if Mr Kealey tries to make
 2 submissions like that, he's likely to be met by the
 3 court with exactly the point that he resisted the
 4 adducing of expert evidence on that issue. So I don't
 5 think -- I think your fear in that respect is probably
 6 misguided in this context. Even allowing for
 7 Mr Kealey's boundless enthusiasm, I'm sure that the
 8 members of the court are capable of restraining him in
 9 that sort of respect if he raises points which are not
 10 appropriate, given the history of the case management.

11 MR EDELMAN: But it also, with respect, my Lord, then
 12 involves the court imposing its own self-restraint, and
 13 the court must not make any assumptions one way or the
 14 other as to the capability of those listed diseases to
 15 have an impact beyond a particular locality.

16 Local authority can be a regional one. We say it's
 17 not a national one because the other clause draws
 18 a distinction between "government" and "local", but as
 19 long as the court also is not going to approach the
 20 construction of this clause with any conclusion in mind
 21 or inclination in mind as to the capability of these
 22 diseases to cause some impact beyond a locality, then it
 23 may be that the problem is resolved. But that was our
 24 concern.

25 LORD JUSTICE FLAUX: I'm not going to restrain our approach

1 to construction. I think the issue for us is whether
 2 this expert evidence is admissible for the reasons
 3 you've given.

4 Very well. Is there anything else you want to say?

5 MR EDELMAN: No, my Lord.

6 (12.35 pm)

7 Ruling (pending approval)

8 (12.39 pm)

9 Submissions by MR EDELMAN

10 MR EDELMAN: Thank you. May I then move on to the next
 11 item, which is item 7, assumed facts.

12 LORD JUSTICE FLAUX: Yes.

13 MR EDELMAN: It's raised in QBE's skeleton by Mr Howard, who
 14 I think is the appointed person to deal with that, and
 15 he refers to the scenarios that have been sent.

16 I'm not sure whether it's an appropriate subject for
 17 the hearing today, but all I can say is they have sought
 18 to simplify the scenarios, but they do still seem to us
 19 to be unduly complex. I can elaborate on that if the
 20 court -- if it would assist the court, but our concern
 21 is that some of the -- if my Lords have had
 22 an opportunity to read the pleadings, some of the issues
 23 that are raised are issues of principle, and that's what
 24 this case was supposed to be about.

25 For example, do you prevent access to premises only

1 when you're required to close them or do you prevent
 2 access to premises when you prevent people from visiting
 3 them?
 4 MR JUSTICE BUTCHER: What are we meant to be doing about
 5 this now, because --
 6 MR EDELMAN: Well, nothing.
 7 MR JUSTICE BUTCHER: -- if the example is unduly
 8 complicated, then it won't help us.
 9 MR EDELMAN: Yes, but I'm concerned -- there is a concern
 10 that insurers are trying -- there is a principle
 11 involved, and that is that the insurers are trying to
 12 turn what the FCA regards as issues of principle -- for
 13 example, how do you apply under a trends clause? How do
 14 you apply the but-for test? Are these clauses different
 15 from Orient Express? Is Orient Express correctly
 16 decided, or I should say was the decision of the
 17 tribunal, arbitration tribunal, in Orient Express
 18 correct? It was, of course, endorsed by
 19 Mr Justice Hamblen, so his decision may need to be
 20 revisited. But those are issues of principle which will
 21 need to be considered and decided by the court.
 22 What we don't want to turn this into is a trial of
 23 many sample cases so that -- one does, of course, in
 24 litigation have sample cases selected and the facts of
 25 those sample cases investigated by the court in the hope

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1 that the answer to those sample cases will provide
 2 an answer to others. That's not the purpose of this
 3 litigation.
 4 The purpose of this litigation is to try and extract
 5 from the defences and reasons for declination that
 6 insurers have been giving some defences of general
 7 application which raise issues of principle which can be
 8 argued and decided by the court. It's not, as
 9 I emphasise again, a trial of sample cases.
 10 That is the only issue of principle, I think, that
 11 arises, and where the parties may be missing each other.
 12 LORD JUSTICE FLAUX: What are you actually inviting us to
 13 do?
 14 MR EDELMAN: We didn't raise it. I think it was Mr Howard
 15 raised it in his skeleton, and so --
 16 LORD JUSTICE FLAUX: Well, perhaps we'd better hear from
 17 Mr Howard.
 18 MR EDELMAN: Yes, perhaps we'd better hear what he wants to
 19 say about it.
 20 LORD JUSTICE FLAUX: Right. Mr Howard, are you still there?
 21 Submissions by MR HOWARD
 22 MR HOWARD: I am, my Lord.
 23 My Lord, we recognise there's nothing that
 24 your Lordship is actually required to do today, but
 25 bearing in mind this is the case management conference,

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1 it probably is appropriate just to ventilate the point
 2 so that your Lordships can have any input into how this
 3 is going forward.

4 Can I say this: I don't actually think there is any
 5 disagreement between the insurers and the FCA on this,
 6 in that this is a test case whose purpose is essentially
 7 to determine issues of principle as to -- we're calling
 8 it construction; it's slightly more than questions of
 9 construction because it's also approach to causation.
 10 But whether one calls that a construction point or
 11 a legal principle doesn't really matter.

12 Now, the only point that we are making, and I think
 13 the FCA make, is that when the court is considering
 14 these questions, one is obviously not going to be
 15 considering it purely as arid questions isolated from
 16 real-world issues, and so the assumed facts are -- the
 17 court is obviously not determining those. They're
 18 simply meant to be factual scenarios against which the
 19 court can consider the issues of construction and the
 20 approach to causation.

21 Now, the problem is if we don't agree the
 22 assumptions, people then in their skeleton arguments may
 23 refer to different hypotheses and different factual
 24 scenarios and the matter potentially gets out of hand.
 25 So the idea is that one has got, as it were, an agreed

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1 playing field against which one is going to try these
 2 things.

3 Now, I think it might be helpful if
 4 your Lordships -- I don't know whether you have had
 5 a chance to look at what we're talking about, if I just
 6 showed it to you very briefly. The latest version of
 7 the assumed facts has been added into the bundle at I,
 8 page 511 in bundle 9.

9 At 511 is a composite document which contains the
 10 different factual assumptions which are set out in seven
 11 different categories. It may be simpler, rather than
 12 looking at the composite, if one goes on to 519. You
 13 have category 1, and we can just take that as
 14 an example. What one sees is one is looking at, on
 15 page 5, 20, a restaurant business operating in Central
 16 London, operating from one premises and so on. Then
 17 it's looking at different potential scenarios where
 18 a business like that has been affected by COVID-19
 19 outbreak, and what your Lordships can see, and I'm sure
 20 you are aware of, is there are permutations about how
 21 a business is affected.

22 So one has, firstly, got the period in early March
 23 prior to the government lockdown, as it's being called,
 24 later in March. So one is looking at factually what
 25 potentially happened and one is then trying to

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1 understand how, if at all, any of the clauses respond to
2 that. One is then looking at questions of downturn in
3 business that was suffered at that stage, how that fits
4 into the trends clause and so on.

5 Now is not the time to argue the point, but you can
6 see, if you take category 1, it isn't actually
7 particularly complicated: it's just laying out some
8 factual scenarios and variants on the factual scenarios,
9 and we believe that the court ultimately will be
10 assisted when considering the various arguments,
11 particularly the application of the but-for test,
12 causation and the trend clause, to bear in mind these
13 different permutations, and will probably want to
14 express some sort of view on them.

15 That's not making this into a trial of sample cases,
16 but it is trying to deal with the questions not in the
17 abstract, but apply them to potentially real-world
18 situations.

19 The situations that have been set out in these
20 different -- there are altogether eight -- categories
21 are ones which are based upon information input from
22 loss adjusters in relation to real claims that are
23 coming forward. So it's not, as it were, some flight of
24 fancy. This does actually represent what real insureds
25 experience and the types of situations in respect of

1 which they are seeking an indemnity.

2 Now, my Lord, as I said --

3 MR JUSTICE BUTCHER: So, Mr Howard, it's like what happens
4 in lots of cases, where counsel says assume -- I mean,
5 just take the example, for example. This is going to
6 put those examples, which counsel might otherwise invent
7 on the hoof, on paper in advance; is that really right?

8 MR HOWARD: Essentially, and it also ensures that we only --
9 we don't invent more examples, but the examples that
10 people want to use by way of reference points, if I can
11 put it like that, in their argument are the ones that
12 are defined because, as I say, the danger is -- and
13 I think everybody recognises we needed to do this.
14 I think the only issue that my learned friend Mr Edelman
15 raised is he says these are too complicated. But, as
16 I understand his skeleton from last night, they're now
17 going to look at them and look at them, I'm sure,
18 constructively.

19 So, as I say, I don't think there's anything for the
20 court to do today, unless the court has a view, looking
21 at these, as to whether they are or are not helpful.

22 We believe they are helpful. Indeed, we say it is
23 essential that one doesn't just look at this purely in
24 the abstract and that one has in mind actually what has
25 happened in the real world and how the policy questions

1 we're asking you to decide relate to real-world issues.
2 LORD JUSTICE FLAUX: Well, in a sense, since you're not
3 inviting us to decide anything today, there's probably
4 a limited amount we can say.

5 Speaking for myself, if a series of factual
6 scenarios can be agreed between the parties, that would
7 be helpful to the court at the trial in due course. So
8 we would encourage, in the spirit of the framework
9 agreement, that the parties endeavour to agree this.
10 I'm sure both sides have heard their respective
11 arguments addressed by you and Mr Edelman and can go
12 away and endeavour to resolve any differences between
13 you.

14 MR HOWARD: Yes, for my part --

15 LORD JUSTICE FLAUX: I mean, it's quite difficult really,
16 Mr Howard, because I don't think -- it would be
17 difficult to see what, as it were, our jurisdiction
18 would be to say -- we can't force you to agree things
19 between yourselves, but I suppose that if you were
20 unable to agree the assumed facts, you might have to
21 come back to court, I think probably on paper, for
22 Mr Justice Butcher and I to say whether we think your
23 assumed facts are helpful and they would form the basis
24 upon which we would consider issues of construction at
25 the trial.

1 MR HOWARD: I think a point that is probably worth bearing
2 in mind; these assumed facts, it doesn't mean that every
3 single one is necessarily going to be referred to, and
4 obviously the position of the different insurers depends
5 upon what type of business they were writing as to the
6 extent to which they, in relation to their policy terms,
7 will want to look at them.

8 So, for instance, number 7 as to (a) and (b), they
9 relate to the position of Ecclesiastical, who wrote
10 insurance cover covering different types of schools,
11 church schools and private schools. So it's simply
12 looking at the different variants.

13 Now, it may well be that when people come to their
14 written arguments that they won't need to go into a lot
15 of detail about this, but this is -- as I say, it's
16 intended as an aid to the court in reaching its
17 decisions.

18 But I think for my part, unless there's anything
19 Mr Edelman says, we're content with that direction and
20 we will seek to agree these insofar as we can.

21 MR EDELMAN: My Lord, can I just say it is very
22 unsatisfactory for Mr Howard to say: well, insurers will
23 take a look at these and see whether they need to deploy
24 them, because if examples like this are on the table,
25 the FCA will use up -- and are there to be addressed,

1 will have to use up a huge amount of its resource
 2 addressing all these examples, not knowing whether
 3 insurers, when they come to write their arguments,
 4 whether these are to be exchanged or sequential, the
 5 same problem will arise, without knowing whether the
 6 insurers, in the fullness of time when they come to put
 7 pen to paper, will say: oh, we didn't really need that.
 8 Before leaving this subject, I know the court can't
 9 do much more, but I just want to show you, for example,
 10 the skeleton argument of today of Argenta.
 11 LORD JUSTICE FLAUX: Yes.
 12 MR EDELMAN: I wonder if my Lord could just look at
 13 paragraphs 7-9. This is not an unusual type of policy.
 14 It's got a 25-mile radius clause, disease within
 15 a 25-mile radius. The point that Argenta make -- and
 16 it's made by a number of insurers -- is your loss wasn't
 17 caused by an outbreak within 25-miles; it was caused by
 18 the national outbreak.
 19 LORD JUSTICE FLAUX: Yes.
 20 MR EDELMAN: Whilst there may be odd cases where you can
 21 prove that the outbreak locally caused it, on a general
 22 level, the loss is attributable to the national
 23 pandemic.
 24 Now, we will have our causation arguments to address
 25 that, but we do struggle to see what examples at all are

1 necessary to deal with that fundamental causation point.
 2 We have an answer to it. We will -- insurers will see
 3 it and -- but it's a matter of principle as to how you
 4 apply the causation test.
 5 But we can't -- and this is, as I say, not a -- I've
 6 not picked Argenta as being exceptional, because a
 7 number of insurers --
 8 LORD JUSTICE FLAUX: It's a point that's taken by many of
 9 them, isn't it?
 10 MR EDELMAN: Yes, and you don't need probably any examples,
 11 but let alone examples of the complexity you were just
 12 shown, to answer that point.
 13 LORD JUSTICE FLAUX: Well, the difficulty is, you very
 14 skillfully picked on an issue of construction in
 15 relation to which you say that none of this would be of
 16 any assistance to the court.
 17 No doubt if we spent enough time on this question,
 18 Mr Howard could point us to other scenarios which might
 19 be of assistance in relation to some of the issues of
 20 construction we have to determine, given that nobody is
 21 actually inviting us to do anything or to rule on
 22 anything today, it doesn't seem to me it's actually
 23 a particularly helpful use of our time given, as ever,
 24 we have a limit.
 25 All I would say is at least in principle, unless

1 Mr Justice Butcher disagrees with me, and I don't think
 2 he does -- he will speak out if he does -- in principle
 3 it would seem sensible that we have some sort of -- that
 4 we're not deciding issues in a vacuum, so we need to
 5 have some sort of assumed factual scenarios against
 6 which some of these issues we decide.
 7 So it does seem to me to be sensible if the parties
 8 could endeavour to agree those matters, and if they
 9 can't agree them then the court will have to look at
 10 them on paper and decide whether or not we think they
 11 would be helpful. But I don't think we can go any
 12 further than that today.
 13 MR EDELMAN: We've never said that we won't agree these.
 14 LORD JUSTICE FLAUX: No, no. I understand your point, but
 15 it does seem to me that at least an effort should be
 16 made to put something before the court for the trial,
 17 a series of assumed scenarios that we can look at in the
 18 context of some of the issues of construction that we
 19 have to decide.
 20 MR EDELMAN: It may be that that's best finalised in light
 21 of the list of issues.
 22 LORD JUSTICE FLAUX: That may be right, Mr Edelman.
 23 MR EDELMAN: And identify which issues actually would
 24 benefit from examples rather than examples in the
 25 abstract, because there are some real threshold issues

1 for example as to the application of Orient Express,
 2 whether it is rightly decided, how it applies where
 3 you've got an insuring provision with multiple triggers
 4 in it. One has those issues, which are issues which
 5 probably don't need examples, but I'm not ruling out the
 6 fact that there may be others that would benefit from
 7 examples.
 8 LORD JUSTICE FLAUX: Yes, okay. Right, well I don't think
 9 we can take that any further for now. It's almost
 10 1 o'clock, so it might be sensible if we broke there.
 11 MR EDELMAN: Yes, I can probably, if my Lord -- well,
 12 I could deal with something -- maybe it would be better
 13 deal with it after lunch.
 14 LORD JUSTICE FLAUX: Well, the next matter is your
 15 application for permission to amend.
 16 MR EDELMAN: Yes, that's obviously a major one.
 17 LORD JUSTICE FLAUX: And the disease prevalence issue, which
 18 is obviously something that is going to take longer than
 19 two minutes.
 20 MR EDELMAN: Yes, I was just seeing if there was something
 21 that could be dealt with in two minutes.
 22 LORD JUSTICE FLAUX: Then I think once we've dealt with
 23 that, we're really then -- agreed facts I think we don't
 24 need to worry about, because I think that's been sorted.
 25 We're then on to, really, the procedural issues for

1 trial .

2 MR EDELMAN: Well, there are some timing of response issues

3 on the agreed --

4 LORD JUSTICE FLAUX: Yes. I mean, we've discussed all these

5 points and we've formed preliminary views on them, we'll

6 obviously hear counsel's arguments, but they shouldn't

7 take an immense length of time.

8 So we'll adjourn until 2 o'clock and we'll pick up

9 on disease prevalence at 2 o'clock, Mr Edelman.

10 MR EDELMAN: Right. I'm grateful, my Lord.

11 (12.59 pm)

12 (The Luncheon Adjournment)

13 (1.59 pm)

14 LORD JUSTICE FLAUX: Right, I think we're all here,

15 Mr Edelman.

16 Submissions by MR EDELMAN

17 MR EDELMAN: Yes, I think we are, and so I will move on to

18 the next item on the agenda, which is item 8, and

19 I intend to deal with that by reference to its

20 subparagraphs and not collectively, if I may --

21 LORD JUSTICE FLAUX: Yes.

22 MR EDELMAN: -- because the first item needs separate

23 treatment because it may affect what is said about the

24 rest, is our application to amend, which I understand

25 the opposition to which is being led by Mr Gaisman.

1 He says, as I understand it, the ground for opposing

2 our application to amend is said to be that it is

3 demurrable as a matter of law. Our submission, in

4 a nutshell, is that we are entitled to put before the

5 court in July a methodology for insureds to discharge

6 their burden of proof, which it has been treated as

7 sufficient for doing so, and in that regard, insureds

8 should be entitled to rely on the same data and

9 information that the government is relying on for the

10 purposes of running the affairs of the country.

11 Now, my Lords cannot decide whether it is or is not

12 legally permissible for the FCA to advance that case.

13 What I am inviting the court to do is to allow the FCA

14 the opportunity at the trial to advance such a case, and

15 it would only be if you could exclude that as being

16 utterly hopeless and unarguable that, in my submission,

17 it would be appropriate to refuse an application to

18 amend, and particularly given the importance of these

19 insurance issues to so many businesses, if it is

20 possible for this amendment to be allowed, the court

21 ought to do so, so that all possible avenues of solving

22 what is a real logjam for policyholders can be overcome.

23 LORD JUSTICE FLAUX: Mr Edelman, can I just try and

24 understand your rebuttal presumption point? Is it this:

25 that you say that what you would argue at the trial is

1 that, other things being equal, the methodology which

2 you would advocate, the court should decide that that is

3 effectively an appropriate methodology save in cases

4 where insurers can show that in the particular case it

5 isn't an appropriate methodology, for whatever reason?

6 MR EDELMAN: Yes.

7 LORD JUSTICE FLAUX: Is that --

8 MR EDELMAN: Yes, and my Lord saw that I sent you, although

9 I referred to it on the last occasion, so insurers

10 should not be taken by surprise by it --

11 LORD JUSTICE FLAUX: Yes.

12 MR EDELMAN: -- I sent you that decision in *Equitas v R&Q*;

13 I recognise a very different situation but with some

14 important analogy. And both my Lords will be familiar,

15 I'm sure, with that case; the difficulties that the

16 decisions of the courts here not to allow reinsurance

17 recoveries for the Exxon Valdez disaster and the

18 decision of the courts to divide up the Kuwait Airport

19 losses so as to treat British Airways as a separate

20 loss, the implications that had for losses which were

21 already circling around the LMX spiral. And the

22 defendant in the *Equitas* case insisted on adequate proof

23 being only by an undoing of all the settlement and proof

24 down to the last penny of --

25 LORD JUSTICE FLAUX: Liability.

1 MR EDELMAN: -- liability. What *Equitas* did was to get

2 an actuarial report which did a probability analysis on

3 how that should all work out.

4 If my Lords have the cases at hand -- I don't know

5 if you do; it was sent in soft copy to you -- there's

6 a helpful passage in the judgment at paragraph 70.

7 LORD JUSTICE FLAUX: Just a moment, Mr Edelman. I know we

8 received it, but the problem is there are so many

9 emails.

10 MR EDELMAN: I know, yes.

11 LORD JUSTICE FLAUX: It's finding the right one. Hang on.

12 (Pause)

13 Yes, I've got it.

14 MR EDELMAN: Right, I'm very grateful.

15 LORD JUSTICE FLAUX: Yes.

16 MR EDELMAN: If you go to 613, it's paragraph 70. One of

17 the advantages the court will have is I don't need to

18 paint too much of a background to the case.

19 LORD JUSTICE FLAUX: I'm just getting there.

20 MR EDELMAN: Page 613 of the original.

21 LORD JUSTICE FLAUX: Yes, I've got it.

22 MR EDELMAN: What's said there by Mr Justice Gross is:

23 "There is a danger of over-complicating the analysis

24 or the terminology by straying into 'legal',

25 'evidential', 'shifting' and 'provisional' burdens of

1 proof."
 2 Then he gives references :
 3 "That said, a consideration of and the distinction
 4 between, the nature of the burdens involved may be
 5 helpful in shedding light on this issue."
 6 He's adopting the phraseology of Mr Justice Evans,
 7 and he cites the case:
 8 "... it can be suggested that the concern here lies
 9 with the ' evidential and therefore a shifting burden of
 10 proof'. If this be right, then Equitas is entitled to
 11 discharge the legal burden resting upon it (of
 12 satisfying Lord Mustill's first rule) by the use of the
 13 best evidence it has available ; should such evidence
 14 prima facie suffice to discharge that legal burden,
 15 Equitas does not need to undertake a progress of
 16 regression ; it would be for R&Q to mount a sufficient
 17 response which necessitates Equitas doing so."
 18 So the question posed, firstly , is it the best
 19 evidence that a policyholder would have available? And
 20 insurers make a point of saying: there is no other
 21 evidence and we would have to go off and find another
 22 expert to find it .
 23 So, in a sense, their defences tell you that the
 24 government statistics and the analyses through Public
 25 Health England, which is what the Cambridge analysis is ,

1 collaboration with Public Health England, the evidence
 2 they are relying on is the best evidence that any
 3 policyholder would have available , and one of the
 4 reasons that the FCA was so concerned about insurers '
 5 attitude to all this is that it is the best evidence
 6 available even if the implications of it aren't to
 7 insurers ' liking .
 8 Then the next question is: it may be the best
 9 evidence available , but the court may not regard it as
 10 sufficient prima facie to discharge the legal burden.
 11 So the question the court has to ask itself : is it , on
 12 the face of it , sufficient to discharge a legal burden?
 13 Of course, in the Equitas case they were dealing
 14 with an individual actuary's report . He prepared
 15 a report for the purposes of the case in the form of
 16 an expert report . Here, we would say, that actually
 17 this is data relied on by the government. It 's
 18 a methodology and model relied on by the government and
 19 that prima facie should suffice to discharge the legal
 20 burden, and as the judgment goes on to say, that 's not
 21 the end of the matter, because by recognising that it 's
 22 not the perfect evidence, one necessarily acknowledges
 23 that the other party should have the opportunity to say:
 24 well, that may be the best evidence, it may be
 25 sufficient prima facie to discharge the legal burden,

1 but it 's wrong and doesn't -- or doesn't apply in
 2 an individual case for reasons A, B, C.
 3 I make it clear , I'm not asking you to decide all
 4 this now; all I am doing is simply to explain the nature
 5 of the case and why it is not, as Mr Gaisman would say,
 6 demurrable as a matter of law and why we should be
 7 permitted to advance it .
 8 MR JUSTICE BUTCHER: Mr Edelman, I understand, I think,
 9 roughly what you're saying as to the case you want to
 10 advance. What I don't understand at the moment is how
 11 that relates to wider questions of how this matter might
 12 be proved.
 13 So just suppose that you were allowed to make this
 14 amendment and just suppose that at the hearing it was
 15 found that, for whatever reason, R&Q was not a very good
 16 analogy and that this proof wasn't sufficient . Let's
 17 just assume that. Where does the FCA then go? Does it
 18 say: okay, we do want to try and prove it by some other
 19 means, or what?
 20 MR EDELMAN: I think there would then have to be discussion
 21 and consultation with the insurance industry as to how
 22 to move forward, because I don't -- my understanding is
 23 that the FCA would not regard it as an acceptable
 24 position for policyholders , as they may well be, to be
 25 required -- we all know when you put in an insurance

1 claim, you're required to submit certain elements of
 2 proof, and the concern is that insurers will continue to
 3 say to policyholders : thank you for your accounts, thank
 4 you for this piece of information , thank you for that
 5 piece of information . In order to consider your claim,
 6 we also need your evidence of incidents , which most of
 7 the policyholders -- and you've heard of the range of
 8 policyholders we're concerned with today, you have had
 9 a sample, at least, of the type of policyholder -- they
 10 would just not know where to start .
 11 And so there has to be a solution to this logjam,
 12 and it was one of the aims of the FCA to try and
 13 overcome this problem somehow, because I think we'd
 14 debated it at the last hearing . It was in the very
 15 first draft of the questions for determination and there
 16 are various routes which the FCA might wish to consider .
 17 Certainly if you were against me on this today, the
 18 application to amend, the FCA would want to go away and
 19 think about where it was going to go next, because the
 20 prospect of another trial -- it 's not just the cost, but
 21 it 's also the delay -- is not something that the FCA
 22 would enter into lightly and would need some time to
 23 consider it , but also to discuss with insurers whether
 24 that was what they really wanted to do and to be seen to
 25 be doing.

1 And there may be other regulatory alternatives that
 2 the FCA may want to consider. I'm not privy to those.
 3 I couldn't comment on those. I just raise it as
 4 a possibility .
 5 But what we want to do is to at least have the
 6 opportunity to see if we can persuade the court to find
 7 a solution . Courts have done it in different scenarios
 8 where exceptional circumstances create difficulties that
 9 wouldn't arise in other cases. Sometimes exceptional
 10 cases require exceptional remedies, and we would submit
 11 that this is just such a case.
 12 One asks oneself also, where would a trial go?
 13 Let's say that insurers find an expert who comes up with
 14 different projections . How is the court going to choose
 15 between the two experts? It's very difficult because
 16 these are, as I've said, estimates. The government has
 17 relied for its whole policy on estimates. The question
 18 is: is an estimate a sufficiently reliable estimate to
 19 discharge prima facie the burden of proof? And, as
 20 I've said, our argument is if it's --
 21 MR JUSTICE BUTCHER: There's no particular difficulty, is
 22 there, in the court deciding between two different
 23 experts' estimates? I mean, that is not an unusual
 24 situation .
 25 LORD JUSTICE FLAUX: Yes, and indeed if, for example -- and

1 I know it's said by the insurers that they can't
 2 actually find an appropriate expert, but assume for the
 3 sake of argument that there did have to be a subsequent
 4 trial, which would not be -- well, it won't be in
 5 August, but it might well be in the first week or so of
 6 September, if we had to have one, and it might only be
 7 a few days, which would give the insurers the time to
 8 find the experts they say they want. And then the court
 9 is faced with rival expert evidence, for example, as to
 10 the accuracy of the Public Health England figures, the
 11 accuracy of the Cambridge analysis and so on and so
 12 forth. Just as in any other case where there's rival
 13 expert evidence about, in this case, statistics, the
 14 court will have to make its mind up.
 15 I mean, the difficulty -- I mean, we haven't heard
 16 Mr Gaisman on this yet, but I can see the force of your
 17 point, that you should at least be allowed to argue
 18 this. But it seems to me in one sense that you will be
 19 faced with exactly the same arguments at trial, whether
 20 Mr Gaisman is right that it's to do -- you know, your
 21 point is demurral as a matter of law may be debatable,
 22 but the insurers will still say, will they not: this is
 23 not a satisfactory way of proceeding because there are
 24 all sorts of ifs and buts about this approach, and we
 25 haven't had a chance to produce our own expert?

1 MR EDELMAN: Well, that will then be a matter for them to
 2 say what was sufficient to discharge the burden of proof
 3 should not be treated as such in particular cases,
 4 because it may be that even if they do --
 5 LORD JUSTICE FLAUX: They would be saying, I think --
 6 I think what's being said is it's inaccurate across the
 7 board, as it were.
 8 MR EDELMAN: Well, they are making no admissions, by and
 9 large, as to accuracy, or no admissions as to accuracy
 10 or relevance. They've raised one or two points which
 11 actually we believe to be based on their
 12 misunderstanding of the data, but by and large it's
 13 a series of non-admissions.
 14 I hadn't taken you to the pleading. I can, if you
 15 want to be refreshed as to what RSA actually says. But
 16 it is, by and large, not admitting, and not admitting
 17 relevance .
 18 So our primary goal at the moment is to seek to
 19 argue at trial about methodology. If that is not to be
 20 permitted, then we would ask the court not to make any
 21 further orders today and the FCA can consider what to do
 22 about the issue. Not ruling out the possibility of
 23 a further trial, but those are --
 24 MR JUSTICE BUTCHER: The problem -- Mr Edelman, the
 25 difficulty about your inviting us not to make any

1 further orders is suppose that we allowed the amendment
 2 but if we made no further orders. That might actually
 3 potentially, supposing that your argument based on or
 4 analogising R&Q were not accepted, it might actually
 5 slow down the process of determining any matter as
 6 a matter of expertise, supposing that still arose.
 7 LORD JUSTICE FLAUX: Well, that's right.
 8 MR EDELMAN: My Lords, it may do, but...
 9 LORD JUSTICE FLAUX: One possibility, Mr Edelman, is that we
 10 allow your amendment so you're free to run that case at
 11 trial, but we also provisionally fix a further trial in
 12 the event that there has to be one.
 13 It may be that insurers, in the time between now and
 14 the trial, which is nearly a month, maybe they do find
 15 an expert and it may be that their expert forms a view
 16 that, by and large, the material on which you rely is
 17 the best evidence and you're never going to get any
 18 better. And it's just not worth the candle, as it were,
 19 trying to run a contrary case.
 20 But, of course, the problem that they face, and
 21 I fully appreciate it, is that, you know, in the limited
 22 time available and the current crisis, it has proved
 23 impossible to find anybody to help them.
 24 MR EDELMAN: Well, my Lord, I can but cite my instructions
 25 that the FCA do not favour a second trial .

1 LORD JUSTICE FLAUX: I understand that. I'm not advocating
 2 it. I'm just saying that, you know, we have to look at
 3 the practical reality of what we're faced with and if
 4 I have, or we have, eminent sensible commercial counsel
 5 telling us: we just can't find an expert, you know,
 6 I would take that at face value.
 7 MR EDELMAN: My Lord, I haven't questioned it. I have not
 8 questioned it.
 9 LORD JUSTICE FLAUX: No. Okay. Well, I think we've got
 10 your submission, Mr Edelman.
 11 Mr Gaisman, you are presumably next on, on this
 12 point, are you? You need to turn your microphone on.
 13 I'm not sure he can hear us.
 14 Mr Gaisman, your microphone is still ... there we
 15 are.
 16 MR GAISMAN: Can you hear me, my Lord?
 17 LORD JUSTICE FLAUX: Yes.
 18 Submissions by MR GAISMAN
 19 MR GAISMAN: It's rather liberating in a way. I am afraid
 20 I've been able to hear almost nothing for the last seven
 21 or eight minutes, so I apologise if I appear to be more
 22 than usually slow.
 23 LORD JUSTICE FLAUX: Oh dear.
 24 MR GAISMAN: Is your Lordship calling upon me to make
 25 submissions?

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1 LORD JUSTICE FLAUX: I am.
 2 MR GAISMAN: Yes.
 3 My Lords, this is only, in one rather limited sense,
 4 about whether or not permission to amend should be
 5 given. It's much more about what happens at the trial
 6 in July.
 7 The short answer -- and I will give the longer
 8 one -- is that there is no time for prevalence to be
 9 addressed in July, as the court decided at its ruling in
 10 the first CMC on the basis that expert evidence would be
 11 adduced if prevalence were to be debated.
 12 Now, the court's ruling last time was to the effect
 13 that there would be no expert evidence on prevalence at
 14 the July trial, and we have set out the key paragraphs
 15 in paragraph 47.4 of our skeleton.
 16 Now Mr Edelman says he wants to do something which
 17 he coyly calls "relying on the same data". The data is
 18 put forward in the context of expert evidence. The
 19 expert evidence that was considered in the debate
 20 between Mr Kealey -- sorry, the expert evidence that --
 21 the report that we were served on the day before our
 22 defence was due.
 23 So Mr Edelman claims a right to rely on what he
 24 calls the same data. That is expert evidence, because
 25 the data is underpinned by expert evidence, and as

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1 Mr Justice Butcher held, it's expert evidence that we
 2 have not had a chance to rebut. That is clear from his
 3 ruling at I think it's paragraph 3, but I may be wrong,
 4 at the last hearing.
 5 Now, we need to pick up a word used by my Lord,
 6 Lord Justice Flaux. We need to be clear what is and
 7 isn't meant by "methodology". It's a potentially
 8 slightly ambiguous word.
 9 The court last time said, and we have never
 10 disputed, that what is not precluded at the July trial
 11 is deciding questions about what methods of proof might
 12 be permitted, for example, on assumed facts.
 13 So, for example, it can be debated whether it is
 14 appropriate or legitimate for an assured to prove its
 15 case as to the existence of disease within
 16 a contractually stipulated radius by relying on certain
 17 elements which the FCA propose: element number 1, for
 18 example, the selection of local government zones as
 19 units of proof. Selection or factor number 2, the
 20 application of an evenly distributed average across that
 21 chosen local government zone. Application number 3, the
 22 applicability in principle of an undercounting ratio as
 23 a tool. All of that, of course, is methodology, and all
 24 of that -- and no doubt other questions too -- can be
 25 debated in July.

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1 Now, we are, as I say, quite happy to enter into
 2 that sort of debate, and we will say that the very fact
 3 that the FCA proposes recourse to such unorthodox
 4 methods of proof itself tells one something about
 5 whether phenomena such as this pandemic were ever
 6 objectively intended to fall within these policies. So
 7 we can have that sort of argument.
 8 What cannot happen, as the court ruled last time, is
 9 this. Now, this is what the FCA put in its original
 10 particulars of claim and we need to see how it is now
 11 put forward in a different way. The original
 12 particulars of claim are at 1(a), tab 5, and we're
 13 looking at paragraphs 28(c) and 28(d), pages 343-345.
 14 LORD JUSTICE FLAUX: Hang on a moment.
 15 MR GAISMAN: Well, you can look at the original or you can
 16 look at the proposed amendment, because you can see...
 17 LORD JUSTICE FLAUX: Volume 1?
 18 MR GAISMAN: Tab 5, page 343. I hope that's right, my Lord.
 19 My bundles arrived at 11.45 last night, so --
 20 LORD JUSTICE FLAUX: Electronic page 359.
 21 MR GAISMAN: Thank you very much. So we're on paragraph 28.
 22 Now, what in the original particulars of claim the
 23 FCA sought to do, in paragraph 28(c), was to say the
 24 undercounting ratio was, in fact, X, and in 28(d) it's
 25 therefore said on the balance of probabilities there was

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1 a case of COVID in every required radius by such and
 2 such a date. That was the case that was put forward in
 3 the original particulars of claim.
 4 MR TURNER: Could I just interrupt Mr Gaisman very briefly,
 5 because the paragraph numbers in the amendment are
 6 different to the original, which may be causing
 7 confusion, looking at faces on the screen. 28(c) as in
 8 the amendment was 28.3 on page A345, and 28(d) in the
 9 amendment was a successor to 28.4 in the original
 10 pleading.
 11 MR GAISMAN: Thank you. Thank you.
 12 With that correction, I think the submission I made,
 13 I hope, was accurate. So the reason why the court ruled
 14 that that could not happen is because these were
 15 non-agreed issues of fact and required expert evidence
 16 which insurers were in no position to adduce and the
 17 trial was in no position to accommodate.
 18 Now, in paragraph 12 of its supplementary skeleton
 19 of last night, the FCA says that it "opposes any
 20 suggestion of postponement of the prevalence issue".
 21 But, as is obvious, it has already lost that argument.
 22 What it has done now was to come back, and now I want to
 23 look at the amended particulars of claim, so with any
 24 luck, my paragraph numbers will become accurate.
 25 It still wants issues of fact determined. It just

1 wants slightly different ones, and we can see this from
 2 the amendments to paragraph 28(c) and paragraph 28(d),
 3 because now it seeks findings that the undercounting
 4 ratio not was X, but may have been X, and not that there
 5 was a case of COVID within the relevant policy area, but
 6 that there was a rebuttable assumption that there was.
 7 Now, what's going on with paragraph 12 of my learned
 8 friend's supplementary skeleton, my learned friend
 9 Mr Edelman seeks to persuade -- wants an opportunity to:
 10 "... seek to persuade the court that policyholders
 11 ought to be able to rely on a rebuttable presumption of
 12 disease prevalence based on the data and analyses that
 13 the UK Government itself relies on in order to run the
 14 country's affairs."
 15 Now, I'm sure I yield to nobody in my respect for
 16 the UK Government, but with respect, none of this makes
 17 the slightest sense. What the FCA continues to propose
 18 entails the determination at the July trial of
 19 non-agreed factual questions, just to a different
 20 standard, and that exercise was ruled out at the last
 21 CMC.
 22 And so we come, none too soon, to the question of
 23 the rebuttable presumption. Now, my Lord, I always get
 24 nervous when people talk about rebuttable presumptions,
 25 but what the FCA is doing here is pulling itself up by

1 its bootstraps. Where on earth does this rebuttable
 2 presumption come from? By the way, without wishing to
 3 look ahead, it doesn't come from Equitas v R&Q.
 4 The legal burden is on the FCA and on policyholders
 5 to prove the occurrence of an insured peril on the
 6 balance of probabilities. There is no basis as a matter
 7 of law for imposing some sort of reversal of the burden
 8 of proof merely because, on the present facts, that is
 9 in policyholders' interests.
 10 The FCA still has to establish on the evidence that
 11 it's more likely than not. Nothing in Equitas v R&Q
 12 says anything different. The claimants in that case
 13 still had to prove their loss on the balance of
 14 probabilities, and all that that case decides is that
 15 the evidence presented was sufficient, unless it was
 16 rebutted, to discharge that burden. It established the
 17 prima facie case that was necessary to shift the
 18 evidential burden.
 19 If we can go back to paragraph 70 and just look at
 20 one other paragraph, picking it up, perhaps, where my
 21 friend stopped reading, towards the end of paragraph 70,
 22 there's a sentence:
 23 "Of course, should the evidence relied upon by
 24 Equitas be incapable of satisfying the burden resting
 25 upon it ... or if such evidence in fact falls short of

1 doing so ... then Equitas claim/s must fail. The risk
 2 that Equitas runs ... is one of fact or evidence; it does
 3 not [run] foul of any rule of law."
 4 Then 71(iii), if we can go down to 71(iii):
 5 "Once it can be demonstrated that an Equitas
 6 liability does, as a matter of the balance of
 7 probabilities, fall within the cover of the policy
 8 reinsured ... liability would be established."
 9 Of course, in this case, in order for a policy cover
 10 to exist on the basis of disease within the required
 11 radius, we're dealing with a liability question.
 12 Then the learned judge, Mr Justice Gross, as he then
 13 was, goes on to consider the approach as to quantum,
 14 which is a different question.
 15 Now, my learned friend talks about the fact that he
 16 has got the best evidence. Well, whether it's the best
 17 evidence depends on whether it's right or wrong, and
 18 whether it's right or wrong depends upon it being
 19 tested, and whether or not it is tested depends upon
 20 insurers having an opportunity to test it,
 21 an opportunity which Mr Justice Butcher has already held
 22 they have not yet had, through no fault of their own.
 23 So coming back to the rebuttable presumption, the
 24 legal burden is on the insured. How that legal burden
 25 is discharged is a question of fact in each case, but

1 the notion of a rebuttable presumption amounts to
 2 a shift not in the evidential burden but in the legal
 3 burden, and there is simply no basis that the burden
 4 should be shifted. The burden always stays where it
 5 was. And it's for that reason that the plea in
 6 paragraph 28(d) is demurrable because it is simply
 7 unsustainable in law.

8 My learned friend says: well, if it turns out to be
 9 no good, well, then the FCA will propose something else.

10 LORD JUSTICE FLAUX: Presumably -- I mean, I wasn't
 11 participating in the first case management conference
 12 last week, but my Lord refused the application to adduce
 13 this by way of expert evidence on the basis that you
 14 hadn't had an opportunity or that you couldn't in the
 15 time available produce an expert and there probably
 16 wasn't time to deal with the issue at trial.

17 MR GAISMAN: Both.

18 LORD JUSTICE FLAUX: Yes. Well, quite. So what that
 19 presumably contemplated at that stage is that unless
 20 this could be agreed --

21 MR GAISMAN: Yes.

22 LORD JUSTICE FLAUX: -- there would have to be
 23 a second trial of some description --

24 MR GAISMAN: That is exactly my understanding.

25 LORD JUSTICE FLAUX: -- albeit not eight days; possibly

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1 two days or three days or whatever. But that must have
 2 been what was contemplated by the parties ten days ago.

3 MR GAISMAN: Well, my Lord, Mr Justice Butcher will correct
 4 me, but that is exactly what happened. If you look at
 5 paragraph 6 of the order, which is quoted at the end of
 6 our skeleton -- sorry, in the ruling, which is quoted at
 7 the end of our skeleton, you will have a sense of
 8 déjà vu, because Mr Edelman is doing exactly what he was
 9 doing last time.

10 Has your Lordship got it, paragraph 47.4 in our
 11 skeleton?

12 LORD JUSTICE FLAUX: Hang on a moment. Yes.

13 MR GAISMAN: Mr Edelman's argument is in effect that the
 14 insurers should not dispute the conclusions of the
 15 expert report -- or, sorry, of the Cambridge and the
 16 Imperial analysis, or should not dispute it to such
 17 an extent that it makes any difference. He may be
 18 right; he may not be. But I find it impossible to say
 19 that I should proceed on the basis that he is right, or
 20 more specifically to make orders which proceed on the
 21 basis that he is right.

22 So I'm going to say -- and then he says "no expert
 23 evidence". Then he says a number of things, and
 24 paragraph 9 picks up my points on methodology and
 25 paragraph 12 is where my Lord, Lord Justice Flaux,

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1 pointed out he contemplated making directions for
 2 a future resolution of this, and indeed that is
 3 something that RSA has addressed in its skeleton
 4 argument.

5 May I just finally -- I've dealt with demurrability.
 6 There is a slightly unsatisfactory suggestion, not quite
 7 as unsatisfactory as being told that the FCA will
 8 consider other regulatory possibilities, but no doubt
 9 that was just advocates' high spirits, that we're going
 10 to have several bites at the cherry on this one. Well,
 11 I don't think Mr Justice Butcher, with respect,
 12 contemplated that either. It can either be tried in
 13 July or, because it can't be tried in July, it should be
 14 tried within a short space of time after that.

15 Of course, the alternative is that the FCA is
 16 seeking to do what the claimants did in R&Q, in other
 17 words to prove its case as best it could. But it can't
 18 do that in July because that would require evidence,
 19 just as evidence was submitted and evaluated by
 20 Mr Justice Gross in R&Q, and the court has ruled that
 21 that's not going to happen.

22 LORD JUSTICE FLAUX: Even if my Lord hadn't ruled as he did
 23 ten days ago, if one thinks about it in practical terms,
 24 we get to a trial in a month's time. Mr Edelman stands
 25 up and says: this is my case. You stand up and say:

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1 okay, well, prove it; how are you going to prove it?
 2 The answer is you can only prove it by calling expert
 3 evidence, which is what my Lord decided wasn't going to
 4 happen.

5 MR GAISMAN: Exactly. Exactly. That's the point I was
 6 labouring to --

7 LORD JUSTICE FLAUX: So what you're really saying --
 8 Mr Edelman says: oh, well, I'll get round that by
 9 getting the court in effect to say in the event that
 10 I could prove this, it would give rise to some sort of
 11 rebuttable presumption. But your point is that you
 12 don't get to first base.

13 MR GAISMAN: No, because the evidence has never been tested.
 14 That's exactly right, my Lord. I won't take up much
 15 longer.

16 All I then have to deal with is the half suggestion
 17 with which my learned friend buttresses his position
 18 that my clients have been in some way, or insurers
 19 generally have been in some way, dragging their feet in
 20 relation to this. There is no basis for that suggestion
 21 and it is inconsistent with my Lord's ruling on the
 22 previous occasion.

23 We put in evidence at the last hearing, and there is
 24 evidence at this hearing that we were taken by surprise
 25 and that we have not had time to instruct an expert.

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1 Indeed, we haven't found an expert, for good reason, and
2 we keep being met -- and paragraph 42, if I can ask
3 your Lordships to look at it, the FCA skeleton,
4 paragraph 42, this is the sort of attitude we have to
5 deal with. I speak with some feeling because we have
6 been dealing with it for some time.

7 What this paragraph reveals is that on 19 June, the
8 FCA had a report from Dr Samir Bhatt on prevalence.
9 They then held onto it until 22 June, the day before our
10 defences were served. They then sent it to us on
11 22 June and said: please deal with this in your defences
12 or at the same time as your defences within 24 hours,
13 and if not, why not?

14 Now, I don't want to broaden this submission because
15 I'm only dealing with this example of FCA unrealism, but
16 that is really an absurd position to adopt.

17 The truth is that the FCA, as I said last time, has
18 taken a misstep in relation to this part of its case.
19 We will do everything we can to cooperate with the
20 resolution of every other aspect of the case, which is
21 what we expected to do and what we will do. But this,
22 both in its original iteration and in its current
23 iteration, is simply a non-starter, and the pleading,
24 therefore, should not be admitted, and if the FCA wants
25 to consider some other way of dealing with the matter,

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1 that is entirely a matter for it.

2 Thank you, my Lords.
3 LORD JUSTICE FLAUX: Thank you, Mr Gaisman.
4 Mr Edelman.

5 Submissions in reply by MR EDELMAN
6 MR EDELMAN: My Lord, Mr Justice Butcher's ruling at the
7 last hearing you will find in bundle 1B, 702A, which, if
8 you have the electronic version of bundle 1B, it's
9 page 24 of that electronic section of the bundle.

10 LORD JUSTICE FLAUX: A702?

11 MR EDELMAN: 702A.

12 LORD JUSTICE FLAUX: Yes. Yes.

13 MR EDELMAN: It's 24, but the passage I wanted was on
14 page 24, 702C --

15 LORD JUSTICE FLAUX: Yes.

16 MR EDELMAN: -- paragraph 9.

17 So after precluding any expert evidence, my Lord,
18 Mr Justice Butcher, continued:

19 "Let me make certain things clear, however.
20 Firstly, that decision of itself will not preclude
21 arguments as to whether a type of proof could be
22 sufficient to satisfy whatever onus of proof is on the
23 insured. Secondly, it would clearly not preclude
24 arguments on the assumptions (video link interrupted)
25 their defences (video link interrupted) visit this at

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1 the next CMC in the light not only of the defences, but
2 also, I hope, of discussions between the parties in the
3 meantime, with one of the possibilities being whether,
4 if there remain issues which depend on finding actual
5 prevalence, there should be directions for their
6 resolution."

7 Now, one of our concerns about insurers' pleadings
8 when they came back is they weren't even admitting the
9 relevance of, for example, hospital data for the
10 purposes of proving relevance -- prevalence. So there
11 was absolutely no engagement at all even with what
12 I would call hard data. It's not the undercounting
13 ratio; it's hospital data. No admissions, no admissions
14 as to relevance, no admissions as to what can be proved
15 from it. Absolutely, in cricketing terms, although
16 I'm not a cricketer or cricketing fan, an absolute
17 straight bat.

18 So we have sought to see if we can take advantage of
19 paragraph 9:

20 "The decision itself would not preclude arguments as
21 to whether a type of proof could be sufficient to
22 satisfy whatever onus (video link interrupted)."

23 What we are seeking to do (video link interrupted),
24 which --

25 LORD JUSTICE FLAUX: You keep breaking up, Mr Edelman.

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1 I don't know if your connection is ...
2 MR EDELMAN: Sorry, I was promised by BT very fast internet.
3 LORD JUSTICE FLAUX: I've got the same, but just
4 occasionally.

5 MR JUSTICE BUTCHER: Mr Gaisman, could you mute your mic?

6 MR GAISMAN: Quite right, thank you.

7 MR EDELMAN: That may be why I was breaking up.

8 MR JUSTICE BUTCHER: That might help.

9 MR EDELMAN: Yes, I think that was why I was breaking up,
10 because I think Mr Gaisman was interrupting on the --
11 did my Lord catch my submissions as to those paragraphs
12 or did you want me to repeat them? Can everyone hear
13 me? Did my Lord want me to repeat those submissions or
14 do you have them?

15 LORD JUSTICE FLAUX: I have them.

16 MR EDELMAN: I'm grateful.

17 LORD JUSTICE FLAUX: Does my Lord have them?

18 MR JUSTICE BUTCHER: Yes.

19 MR EDELMAN: So that contemplated that we could return to
20 this subject of methodology. What I was going to say
21 about the circumstances of this case is that ordinarily,
22 as in the Equitas v R&Q case, what has to be proved is
23 a purely private matter; in that case how to construct
24 the balances or how to reconstruct the balances that
25 would have gone around the LMX spiral.

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1 Here we are dealing with a public matter, and there
 2 are public data and statistics, and I have to say when
 3 the FCA entered into this litigation, it had hoped that
 4 the insurers would be prepared to proceed on the premise
 5 of the same data that the government had relied on, but
 6 they have chosen not to even though they have no
 7 evidence at all that there is anything to challenge
 8 about it.
 9 LORD JUSTICE FLAUX: Well, they don't know, do they? That's
 10 the point my Lord decided against you on the last
 11 occasion. It's all very well making submissions like
 12 that, but the reality is that unless and until the
 13 insurers have got their own expert, who may or may not
 14 agree, then they just don't know, and that's why what
 15 we've done is they've put in non-admissions, because
 16 they can't put forward a positive case because they
 17 haven't got any expert evidence to support it.
 18 MR EDELMAN: With respect, my Lord, their expert evidence
 19 isn't going to tell them how many people died at
 20 a particular hospital or how many people tested positive
 21 at a particular testing site --
 22 LORD JUSTICE FLAUX: Well, no, but --
 23 MR EDELMAN: -- but they haven't admitted that either, or
 24 its relevance.
 25 LORD JUSTICE FLAUX: Well, I am afraid I see this -- and

1 I wasn't at the last hearing, but I see this as
 2 an attempt to either revisit a ruling that has already
 3 gone against you or to find an ingenious way of getting
 4 around a ruling that has gone against you.
 5 MR EDELMAN: Well, my Lord, I've invited the court to allow
 6 me to argue at trial that the government statistics
 7 should be treated by the average small or medium-sized
 8 policyholder who simply cannot afford to do anything
 9 else -- should be treated as sufficient evidence so that
 10 if that policyholder goes to his insurer and says: here
 11 are the statistics, here's the information the
 12 government relies on, is the insurer entitled to say:
 13 no, that is not good enough, or is the insurer obliged,
 14 then, to say: that's wrong for the following reasons?
 15 Now, that's really where it's at, and that's the
 16 hard question that we want the court to consider
 17 an answer at the trial. Is a policyholder entitled to
 18 have his claim submitted to the insurer with the
 19 government statistics and analysis as sufficient
 20 evidence for the insurer then to be required to say why
 21 (video link disrupted).
 22 Now, that's not binding the insurers to have to
 23 accept it. They could say: we've now got our expert
 24 evidence and for you, it makes a difference.
 25 One of the insurers has accepted -- Argenta I think

1 it is -- that for most of their policyholders, the
 2 25-mile limit will be satisfied. But some other
 3 insurers have just played a straight bat and said: you
 4 have to prove it. And it's this logjam that you are
 5 trying to overcome so that an insured knows what is
 6 prima facie sufficient proof, and that's the change from
 7 our last position, and last time we were trying to
 8 prove, on the balance of probabilities by scientific
 9 evidence, that this was correct. We hadn't anticipated
 10 it would be controversial. It turned out to be.
 11 Now we are having to reconsider how to put our case,
 12 if that's correct, but this is the way in which we
 13 wished to put it and we wished to argue it on that
 14 basis. And unless my Lords are ruling that it is
 15 impermissible as a matter of law, then my submission is
 16 we ought to be allowed to argue it. It won't take up
 17 a huge amount of time because it is a matter of legal
 18 argument.
 19 The arguments Mr Gaisman has advanced may be
 20 correct. They may be wrong. It is certainly one of the
 21 issues which the framework agreement and the questions
 22 for determination which were associated with it
 23 contemplated would be determined at this trial.
 24 I entirely recognise and accept, of course, that, as
 25 it were, if the final proof, in other words one that

1 would bind insurers forever and in all cases, cannot be
 2 done in this trial, we seek an alternative route.
 3 LORD JUSTICE FLAUX: I think the problem is the rebuttal
 4 presumption point, I think.
 5 MR EDELMAN: Well, I'm merely -- that was putting in
 6 ordinary language, because many people will be reading
 7 what's being said on this --
 8 LORD JUSTICE FLAUX: I mean, if what you're really saying,
 9 which I think is what your reply seems to be saying,
 10 that you want to be able to argue at trial that this --
 11 the government data should be sufficient for
 12 policyholders to prove their cases as a matter of
 13 principle, and that doesn't depend upon calling any
 14 expert evidence about it, I can see the force of that
 15 argument. That can be addressed by the insurers in
 16 their response.
 17 If it turns out that there's still a factual dispute
 18 about prevalence that can only be resolved through some
 19 further hearing, well, then we would have to have
 20 a further hearing.
 21 MR EDELMAN: One of the concerns about a further hearing is,
 22 of course (video link interrupted) in any event and will
 23 give them that route which (video link interrupted)
 24 materially lower would make no difference. The concern
 25 about the second trial is how many people does it

1 actually impact? But that, in a nutshell, is what we
 2 want to achieve. We want to be able to argue that the
 3 government statistics, so that's why I took you to
 4 Equitas v R&Q, (video link interrupted) and one can
 5 describe that as rebuttal. It's the same (video link
 6 interrupted).

7 LORD JUSTICE FLAUX: Right, is there anything else you want
 8 to say, Mr Edelman?

9 MR EDELMAN: I mean, if my Lord wishes us to clarify the
 10 pleading to express the point better, then we will, but
 11 it's (video link interrupted).

12 LORD JUSTICE FLAUX: Okay. What I think we will do, because
 13 I think Mr Justice Butcher and I would like to discuss
 14 this, we will suggest that you have a transcriber break
 15 now for 10 minutes, or at least until 3 o'clock, and we
 16 will communicate with each other by mobile phone.

17 MR GAISMAN: May I be permitted to try and understand my
 18 learned friend's submission as encapsulated by your
 19 Lordship on the [draft] transcript at page 120, because
 20 if what your Lordship meant is there can be an argument
 21 about whether an undercounting ratio as a matter of
 22 principle is a permissible method of proving, by saying:
 23 look, there are so many reported cases, is it legitimate
 24 in principle to say: well, the reported cases understate
 25 the true nature of the problem and some sort of

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1 methodology which applies an undercounting ratio.
 2 If that's the sort of thing your Lordship has in
 3 mind, well, I think I've indicated in my submissions
 4 that's not a debate we have any difficulty with at all.
 5 What I have more difficulty -- and I'm only intervening,
 6 really, to understand what your Lordship understood
 7 Mr Edelman's case in reply to be, reading from
 8 your Lordship:
 9 "You want to be able to argue at trial that the
 10 government data should be sufficient for policyholders
 11 to prove their cases as a matter of principle."
 12 Now, I know your Lordship is not doing anything more
 13 than summarising your Lordship's understanding of
 14 Mr Edelman, but my difficulty is I don't really
 15 understand what is now being suggested on behalf of the
 16 FCA.

17 LORD JUSTICE FLAUX: Well, that was -- I think Mr Edelman,
 18 as I understood him, was accepting that he couldn't say:
 19 well, I have proved this, because he hasn't got
 20 permission to call expert evidence, which you would have
 21 to do. But I think it's, as it were, a sort of
 22 hypothetical, that in the event that this is what could
 23 be established, this would be sufficient in principle.

24 MR GAISMAN: Yes, that's fine. I said in my own submissions
 25 one of the ways this could be approached is on assumed

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1 facts. And if one assumes the facts, for example in
 2 paragraph 28 of my learned friend's particulars of
 3 claim, we could still have an argument about whether
 4 that was an acceptable method of proof.

5 LORD JUSTICE FLAUX: Well, that's the argument about
 6 methodology, isn't it?

7 MR GAISMAN: Exactly, that's what I call methodology. The
 8 trouble is, that builds into your statement of
 9 Mr Edelman's argument in reply is: the government data
 10 should be sufficient to prove their cases as a matter of
 11 principle.

12 Now, does that mean that some qualitative judgment
 13 is being expressed on the government data? Because that
 14 we're not in a position to engage with. Or is it being
 15 said, assuming that this turns out to be, to use the
 16 expression Mr Edelman likes, the best data there is and
 17 nobody in due course can say anything against it, is
 18 that still a legitimate way for a policyholder to prove
 19 a claim?

20 The assumption is fine, but built into the way
 21 your Lordship has expressed that, that is, on one
 22 reading of it, a qualitative judgment.

23 LORD JUSTICE FLAUX: I certainly had not intended the way
 24 I formulated it to be that. I had in mind your
 25 second way of putting it.

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1 MR GAISMAN: Yes, exactly. All right. Then I'm sorry to
 2 have taken up your Lordship's time.

3 LORD JUSTICE FLAUX: Well, in that case, what I suggest we
 4 do is let us break until -- well, everything else we've
 5 got to debate is really trial case management, and it
 6 shouldn't take more than about half an hour or so. Why
 7 don't we break until 3.10.

8 MR EDELMAN: My Lord, can I make it clear that my primary
 9 case is that the government data and analyses should be
 10 treated and given equivalent status to the actuarial
 11 report in Equitas v R&Q, which is sufficient to
 12 discharge the burden of proof without being necessarily
 13 conclusive. That's my rebuttable presumption point,
 14 which means that the other party -- it's open --
 15 recognising that it isn't the perfect evidence, it's not
 16 the actual best evidence that could be obtained, but
 17 it's the best that is available, it's open to the other
 18 party to prove to the contrary, because it recognises
 19 that there is more perfect evidence theoretically
 20 available.

21 LORD JUSTICE FLAUX: I think I follow what you say. I think
 22 you've gone back to where you started, really.

23 Very well, we will break now and we will see you at
 24 3.10.
 25 (2.58 pm)

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1 (A short break)
 2 (3.11 pm)
 3 LORD JUSTICE FLAUX: Is everybody here? Mr Gaisman, are you
 4 there? I just want to check whether Mr Gaisman is there
 5 or not.
 6 MR GAISMAN: Yes, I'm here, my Lord.
 7 LORD JUSTICE FLAUX: Jolly good. Okay.
 8 (3.11 pm)
 9 Ruling (pending approval)
 10 (3.15 pm)
 11 Directions
 12 MR EDELMAN: My Lord, before any order is made in relation
 13 to a second hearing, could I just ask for, as it were,
 14 a seven-day moratorium on that so that the FCA can
 15 internally decide whether that is something that they
 16 want to be involved in? It requires decisions to be
 17 made at the highest level in the FCA.
 18 LORD JUSTICE FLAUX: Well, I don't think we can cavil at
 19 that.
 20 MR EDELMAN: I'm grateful.
 21 LORD JUSTICE FLAUX: You can have your permission to amend,
 22 but very much on the basis I've indicated.
 23 MR EDELMAN: Yes, that's understood, my Lord.
 24 LORD JUSTICE FLAUX: Right, okay. Does anybody want to say
 25 anything about the practicalities of having to have

1 a further hearing, if we were to go down that road, and
 2 anything about the practicalities of producing an expert
 3 report before the end of July?
 4 MR TURNER: My Lord, if I may, briefly. My Lord, as you
 5 know, the efforts to try to find a suitable expert
 6 continue, and they are not limited simply to Mr Wilkes
 7 who instructs Mr Kealey, but that is something being
 8 pursued across the board by those insurers who have
 9 an interest in the issue of prevalence.
 10 The reason we had proposed directions leading to
 11 a trial possibly even early October, which is only
 12 (video link interrupted) your Lordship has indicated,
 13 was to recognise the reality of the challenge of working
 14 with multiple workstreams over the course of the next
 15 month leading up to the trial of the construction issues
 16 at the end of July.
 17 The reason, as you would doubtless have realised,
 18 why it is so difficult to find an expert is that there
 19 is an acute and pressing demand for the mathematical
 20 modellers at the moment. It is to be hoped that that
 21 demand will subside, perhaps over the next few weeks, as
 22 the current epidemic at least wanes, hopefully
 23 permanently, if only temporarily, and thus the chances
 24 of being able to find an expert who has time will
 25 increase over the next few weeks.

1 And it is therefore more probable that we will be in
 2 a position to have a trial at the beginning of October
 3 than at the beginning of September. But we recognise
 4 that it is an issue that does need to be resolved and it
 5 needs to be resolved very quickly.
 6 LORD JUSTICE FLAUX: Right. Well, I think that's really
 7 a submission about practicality, Mr Edelman. I'm not
 8 sure there's anything you can say in response to that
 9 that's going to make much difference, really.
 10 MR EDELMAN: No, my Lord, other than if you do allow
 11 seven days before any order is made, then perhaps the
 12 parties can liaise as to what would -- if there is to be
 13 a second trial, if the FCA decides to investigate that
 14 process, and as to whether there should be a September
 15 or October date.
 16 LORD JUSTICE FLAUX: Well, another possibility, because
 17 I'm acutely conscious that I'm being lent to the
 18 financial list for this trial, and that's as much as my
 19 superiors are prepared to lend me, if I can put it that
 20 way, which is why I had in mind September rather than
 21 any other time. So it may be that we would have to
 22 look, for example, at the very end of September, which
 23 is essentially the same sort of timescale.
 24 I mean, I fully understand your point, Mr Turner.
 25 What I think we will say -- I mean, obviously we will --

1 I think we will make some sort of order that it will
 2 be -- it will take account of the fact that there may be
 3 issues about timing, and if what's happening is that
 4 Mr Edelman is having a seven-day breathing space, then
 5 we would not make any order in relation to that aspect
 6 until the end of that breathing space, giving the
 7 parties an opportunity to put in any written submissions
 8 to us, short written submissions to us, that they wish
 9 to put in on this issue.
 10 MR EDELMAN: My Lord, I hesitate to interrupt, but I thought
 11 my Lord had raised the prospect of Mr Justice Butcher
 12 alone doing this second-stage hearing, in which case
 13 my Lord's difficulties would --
 14 LORD JUSTICE FLAUX: Well, he and I hadn't discussed that at
 15 all. I think that would probably not be appropriate.
 16 I mean, if we are effectively the trial court, then
 17 I think we are the trial court. The issues in this
 18 case, including that issue, are of sufficient
 19 significance that they have to be decided by the trial
 20 court as a two-man court.
 21 I mean, obviously if it transpires that the only
 22 time when it's practically possible to have this case is
 23 some time in the first half of October, I would be made
 24 available. I'll say no more than that.
 25 So we won't make an order about that, but if you

1 could, within seven days, give us any submissions you
 2 want to give us about practicalities and finding
 3 an expert, and then, as necessary, we can revisit that
 4 in July.
 5 Right, where do we go now?
 6 MR EDELMAN: Just to find a date for responding to agreed
 7 facts 2, 3 and 4.
 8 LORD JUSTICE FLAUX: Mm-hm.
 9 MR EDELMAN: We've asked for a deadline of 4.00 pm on
 10 29 June for responses to those. 2 and 4 have been
 11 outstanding for some time, and 3 is a rework. I haven't
 12 troubled you with the detail of it, but there are
 13 aspects where the defendants have not responded. Maybe
 14 they'll say if they're not going to, but at least we
 15 want to know what the final position is on that
 16 document.
 17 LORD JUSTICE FLAUX: I think Mr Gaisman says he will respond
 18 by 29 June and it's not necessary to have an order.
 19 MR GAISMAN: My Lord, so far as concerned agreed facts 4,
 20 the last draft from the FCA was sent at 10.52 yesterday.
 21 That was quite a busy day. They want a reply by Monday,
 22 and we have said no need for an order, but we will
 23 revert on Tuesday. So there really is no need for
 24 an order.
 25 So far as concerns agreed facts 3, Mr Edelman, were

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1 he not pressed for time, as we all are, would have told
 2 your Lordship that that is the very issue of prevalence
 3 that we have just been on.
 4 LORD JUSTICE FLAUX: Yes, I thought so. I thought it was 2,
 5 Mr Gaisman, agreed fact 2, isn't it?
 6 MR GAISMAN: No, no, he said 2, 3 and 4.
 7 LORD JUSTICE FLAUX: Oh, it's 2 and 4, according to the
 8 agenda.
 9 MR EDELMAN: We're picking up the one from the previous
 10 agenda, my Lord.
 11 MR GAISMAN: My learned friend, how shall I say, introduced
 12 agreed fact 3 as well, so I'm addressing all.
 13 LORD JUSTICE FLAUX: No, it's 2 and 4. I mean, your point
 14 is simply you will respond by Tuesday and it's quite
 15 probable that we'll have arrived at Tuesday before
 16 there's a sealed order.
 17 MR GAISMAN: My Lord, just to be quite plain, my submission
 18 about Tuesday is in relation to document number 4.
 19 LORD JUSTICE FLAUX: Okay.
 20 MR GAISMAN: There shouldn't be an order in relation to
 21 document number 3, which my learned friend mentioned
 22 orally, but is not in the agenda, because it is the
 23 prevalence issue that we've just discussed, and I don't
 24 think I'm responsible. I think it is Mr Orr for Zurich
 25 who is dealing with agreed fact 2.

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1 MR ORR: My Lord, I am dealing with agreed fact 2 and our
 2 position is the same in the sense that we have said we
 3 will respond by 4.00 pm on 29 June and no order is
 4 necessary.
 5 LORD JUSTICE FLAUX: Right. Well, you've got your answer,
 6 Mr Edelman.
 7 MR EDELMAN: My Lord, I hope they do.
 8 LORD JUSTICE FLAUX: Well, if they don't, then you can come
 9 and ask for an order.
 10 MR EDELMAN: So that we know that the document can be
 11 finalised, I note agreed fact document 3 is about
 12 prevalence, but it would be -- it would be helpful to
 13 know how far we can take the document. It may be that
 14 insurers will say, because we've said -- on that
 15 document we've said where defendants agree or don't
 16 agree, so we have recorded a lack of agreement.
 17 LORD JUSTICE FLAUX: What the agenda records is that they
 18 had received a further mark-up from your instructing
 19 solicitors just after lunch yesterday to which they
 20 anticipate responding by 29 June, which is Tuesday. So
 21 if that's the position, then I don't think you can do
 22 any better than that, really.
 23 MR EDELMAN: All right. My Lord, I'll accept that. I just
 24 wanted to make sure that --
 25 LORD JUSTICE FLAUX: If, for whatever reason, they don't

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1 respond and there is a degree of obduracy demonstrated,
 2 we will make an order.
 3 MR JUSTICE BUTCHER: By my calculation, I don't want to make
 4 unnecessary difficulties, isn't 29 June Monday?
 5 LORD JUSTICE FLAUX: Is it Monday?
 6 MR EDELMAN: It is the Monday, yes.
 7 LORD JUSTICE FLAUX: You're quite right. Well, whether it's
 8 Monday or Tuesday...
 9 MR EDELMAN: I think Mr Gaisman was saying the 30th for
 10 number 4 and Mr Orr the Monday for number 2.
 11 MR ORR: That was my understanding.
 12 MR EDELMAN: Yes, that was my understanding.
 13 LORD JUSTICE FLAUX: Okay. Well, number 2 by close of
 14 business on Monday. Number 4 by close of business on
 15 Tuesday. Any further responses in relation to, as it
 16 were, the recast on number 3 by close of business on
 17 Tuesday as well. That gives them another 24 hours.
 18 There has been quite a lot to do, Mr Edelman.
 19 MR EDELMAN: Yes, my Lord, particularly for us.
 20 LORD JUSTICE FLAUX: For everybody, I think.
 21 MR EDELMAN: Got all of their applications through.
 22 LORD JUSTICE FLAUX: Yes. Now we're moving along now to
 23 effectively case management to trial, are we not?
 24 MR EDELMAN: Yes, we are, my Lord.
 25 LORD JUSTICE FLAUX: Can I just say one thing at the outset

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1 of this exercise : that obviously I have not been in the
 2 Commercial Court since I went to the Court of Appeal,
 3 which is now four years, nearly, but when I was in the
 4 Commercial Court and particularly when I was judge in
 5 charge of the Commercial Court, I found that case
 6 management ran a lot smoother if the parties' legal
 7 advisors, their solicitors and counsel and their
 8 counsel's clerks, used my clerk, Tracey, as the point of
 9 contact for -- in effect for everything other than the
 10 actual listing of cases. I would urge you to adopt that
 11 approach in relation to this case; to use Tracey as the
 12 point of contact, or initial contact, obviously
 13 everything copied to Mr Justice Butcher's clerk. But
 14 you will find, those of you who have come across her in
 15 the past, she's incredibly efficient and things will run
 16 a good deal more smoothly.

17 I had a distinct sense yesterday afternoon of what
 18 can only be described as déjà vu from four years or more
 19 before when skeleton arguments came dribbling in at
 20 various times, so far as I was concerned between,
 21 I think, about 1 o'clock and 4.55. No criticism being
 22 levelled at anybody for that. I know people are under
 23 a lot of strain, but I suspect that that could have been
 24 dealt with more efficiently.

25 So could I just make that plea at the outset,

1 please?
 2 So timing, exchange and length of skeleton
 3 arguments. There are the two points here, aren't there,
 4 Mr Edelman? One is simultaneous or sequential.

5 Three points, I suppose: simultaneous or sequential,
 6 should there be reply skeletons, and length.

7 MR EDELMAN: Yes. Yes, my Lord, and you have what we say
 8 about it.

9 LORD JUSTICE FLAUX: We've got the written submissions.
 10 We've discussed it. Although we do feel that the length
 11 of the skeleton so far as the interveners are concerned
 12 should be limited to 50 pages as we indicated, in
 13 relation to everybody else, we don't think it's
 14 appropriate to put any sort of page limit.

15 We will trust to the good sense of all counsel
 16 involved on the basis that there is not prolixity or
 17 repetition or overlap between defendants. It doesn't
 18 seem to us that this is the sort of case where we're
 19 going to be helped by imposing page limits which may
 20 turn out to be artificial and people will have to come
 21 back and ask permission to put in a longer skeleton. So
 22 we won't impose any page limits.

23 We also, subject to anything you want to say, think
 24 that the skeletons should be, as is normal, sequential.
 25 So you go first with your skeleton to be served,

1 I think, by close of business on 10 July -- I hope
 2 I've got my dates right -- and then the defendants'
 3 skeletons by close of business on the 14th, which is the
 4 Tuesday of the reading week.

5 At the moment, subject to any submissions that
 6 anybody wants to make, we don't see the need for reply
 7 skeletons. Whatever is in the insurers' skeletons that
 8 you haven't anticipated, you can pick up in your oral
 9 submissions, and vice versa.

10 MR EDELMAN: My Lord, it does, though, make it necessary for
 11 the insurers to ensure that they comply with the letter
 12 and spirit of the framework agreement by ensuring that
 13 there is one lead set of submissions on any particular
 14 issue. I quite appreciate they may divide up the issues
 15 between them, but where there are issues of general
 16 principle as opposed to individual policy construction,
 17 that it will be important for us to be able to look to
 18 one set of submissions to deal, for example, with the
 19 Orient Express point, and we don't want to be faced
 20 receiving submissions on the 14th for a trial starting
 21 on the 20th with eight different ways of putting the
 22 Orient Express point.

23 LORD JUSTICE FLAUX: Well, Mr Edelman, I think I speak for
 24 both of us that if we are faced on the 20th with
 25 eight different ways of putting the Orient Express

1 point, somebody would be coming to the headmaster's
 2 study.

3 MR EDELMAN: I'm grateful for that indication. I have no
 4 problem -- that was our only concern, really, about page
 5 limit.

6 LORD JUSTICE FLAUX: That's what I meant when I said about
 7 overlap and duplication; that my understanding is that
 8 the insurers will -- there are common issues of
 9 principle which the insurers will divide up between
 10 themselves so that one insurer leads on the particular
 11 issue of principle and the others will only deal with
 12 that issue to the extent that, for example, their
 13 wordings give rise to some subtle difference that needs
 14 to be emphasised.

15 MR EDELMAN: Exactly, and I gave an example earlier as to
 16 what prevention of access requires. It occurs in
 17 a number of insurers' wordings, and I appreciate
 18 sometimes the context may differ. They may say it has
 19 a different nuance, but in principle, one insurer should
 20 be dealing with what that word means.

21 LORD JUSTICE FLAUX: Okay. No, I agree with that.

22 You wanted to -- Mr Gaisman, are you making the
 23 running on this?

24 MR GAISMAN: My Lord, of course, we can spend a long time
 25 all agreeing in different ways, and we do agree, that

1 unnecessary duplication is a bad thing.
 2 My learned friend keeps invoking -- he did it in his
 3 skeleton -- paragraph 9.2 of the framework agreement,
 4 but, actually, it's not his best point, because
 5 paragraph 9.2, although it says quite rightly that
 6 insurers agreed so far as reasonably practical and
 7 efficient to coordinate and to minimise duplication,
 8 each insurer -- and the FCA recognises that each party
 9 has separate independent legal representation and each
 10 of the insurers has written different policies in
 11 relevant terms and, accordingly, each insurer remains
 12 entitled to communicate and make submissions separately.
 13 Now, of course I understand what my learned friend
 14 is saying, but the idea that there are many, many issues
 15 on this case where leading insurers can be appointed to
 16 (video link interrupted) so obviously, his submissions
 17 on the Orient Express fall into a particular type of
 18 category, and one can see that that is -- there are
 19 certain what you might call philosophical issues,
 20 especially on the causation side of the case --
 21 LORD JUSTICE FLAUX: Yes.
 22 MR GAISMAN: -- where one quite understands the point my
 23 learned friend is making, and I hoped we might have
 24 worked it out for ourselves.
 25 But the other aspects of causation and, of course,

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1 a fortiori insured perils, very much depend on the
 2 particular wordings.
 3 Each insurer has put its case on causation with its
 4 own wordings in mind, and for good reason. I don't even
 5 begin to need to explain why, because obviously each
 6 insurer will say that the right question to look at in
 7 terms of causation is what would have happened but for
 8 the insured peril, and because each insurer defines its
 9 insured perils in different ways, then obviously
 10 there's -- what you might call the downstream
 11 submissions on causation have to be made separately.
 12 We haven't got the time or, I would say, with
 13 respect, the inclination to try and merge submissions
 14 which can't be merged.
 15 LORD JUSTICE FLAUX: I don't think anybody was suggesting
 16 you should have to. I certainly wasn't. What I had in
 17 mind was exactly the point about something like
 18 Orient Express, Mr Gaisman, where there's an issue of
 19 principle which is effectively common to all insurers.
 20 One insurer will be selected to run that point and the
 21 others will only put in anything of their own to the
 22 extent there is some subtle distinction on their own
 23 wording. That's all I had in mind.
 24 MR GAISMAN: I don't think I need to say any more, my Lord.
 25 LORD JUSTICE FLAUX: Does any of the insurers' counsel want

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1 to say anything else on skeletons? (Pause)
 2 Right, okay.
 3 Bundles, where are we on bundles?
 4 MR EDELMAN: My Lord, I think that we are -- I don't think
 5 there's any issues between us. Again, it's Mr Gaisman.
 6 We've made some proposals and I apprehend that that is
 7 agreed.
 8 LORD JUSTICE FLAUX: We have got Opus 2 Magnum. Is it
 9 proposed that the bundles will be on Opus 2?
 10 MR EDELMAN: Yes, so far as I'm aware.
 11 LORD JUSTICE FLAUX: Yes, okay.
 12 MR EDELMAN: We've said use reasonable endeavours to have
 13 the documents available by close of business on the 3rd,
 14 simply because we're in their hands.
 15 LORD JUSTICE FLAUX: Yes, I understand.
 16 Has there been any discussion about the extent to
 17 which the court might require hard-copy bundles not of
 18 everything but of certain things? I did a Magnum Opus 2
 19 appeal in a competition case a little while ago where we
 20 had things like the core bundle, the pleadings,
 21 obviously witness statements here is unlikely to apply,
 22 but the core bundle, the pleadings and the authorities
 23 in hard copy, and speaking for myself, I find the
 24 combination of the two in this sort of case is much
 25 easier to work with.

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1 Now, if that's not going to be too much of
 2 an imposition, I think we're -- people are going back
 3 into their -- solicitors are going back into their
 4 offices. I know that there is the ability to produce
 5 hard-copy bundles, and if that is possible, then I would
 6 certainly, for my part, and I don't know about my Lord,
 7 I would find that very helpful.
 8 MR EDELMAN: My Lord, we would certainly look into that by
 9 the time of the uploading to Magnum --
 10 LORD JUSTICE FLAUX: No, what I mean is that by the time we
 11 come to our reading, assuming we have 15-17 July dates,
 12 by the time of the -- by that time, we would have the
 13 hard-copy bundles.
 14 MR EDELMAN: We may have discussions and we can certainly
 15 discuss with insurers whether it would be possible to
 16 have some sort of compressed core bundle.
 17 LORD JUSTICE FLAUX: You know, things like the policy
 18 wording, there's nothing like having them in a bundle so
 19 you can underline it in pen or whatever, and however
 20 much one gets -- one familiarises oneself with using
 21 electronic bundles, that sort of exercise is very
 22 difficult to conduct on electronic bundles.
 23 MR EDELMAN: Well, (video link interrupted) I have managed
 24 (video link interrupted) that insurers may want. There
 25 may be definitions which are on definitions pages, but

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1 if we could try and collect a hard-copy core bundle with
 2 all the relevant pages. That would be the business
 3 interruption section, any definitions pages insofar as
 4 separately contained, and any other page that insurers
 5 think they would refer to, so this is not intended to be
 6 partisan.
 7 LORD JUSTICE FLAUX: No, that would be very helpful,
 8 I think.
 9 MR GAISMAN: My Lord, may I -- my learned friend Mr Edelman
 10 said that the position on bundles was agreed. May
 11 I just address your Lordship on that?
 12 LORD JUSTICE FLAUX: Of course.
 13 MR GAISMAN: The draft order that was originally proposed
 14 was a mixture of good news and bad news. Paragraph 12
 15 of the original draft order said:
 16 "The parties shall agree the trial bundle by 5.00 pm
 17 on 1 July."
 18 That's good news, and unfortunately --
 19 MR EDELMAN: I don't want to interrupt my learned friend
 20 Mr Gaisman, but if he looks at the agenda and our
 21 supplementary skeleton, he will see where we've got to.
 22 MR GAISMAN: Yes, I have looked at them and that's why
 23 I'm making the submissions.
 24 MR EDELMAN: All right.
 25 MR GAISMAN: What has happened in relation to that good news

1 is we have now taken a step backwards, and what is now
 2 said in paragraph 15 of its supplementary skeleton
 3 argument, which, as I say, I have looked at, is that it
 4 will "work to agree" a trial bundle by 1 July. Now,
 5 that's a step backwards.
 6 The step forwards is that whereas the original draft
 7 order gave the FCA 13 days until 13 July to supply
 8 electronic copies of the bundle, what is now said is
 9 that they will use reasonable endeavours because it's
 10 not entirely within the FCA's control to have the
 11 requested bundles available on Magnum by the 3rd.
 12 Now, all I'm pointing out is that, as matters stand
 13 in the FCA's current formulation, working to agree
 14 something by the 1st and reasonable endeavours by the
 15 3rd, and I'm particularly concerned by the first of
 16 those, does allow for slippage in a timetable where
 17 slippage is not really possible.
 18 Of course, documents can be uploaded to Magnum bit
 19 by bit, and we all had experience of the fact that
 20 different volumes of the trial bundle appear on Magnum
 21 at different stages, but I submit we should keep --
 22 first thoughts were better. We should keep the FCA's
 23 original proposal, which is that the trial bundle (video
 24 link interrupted) at this stage would agree the (video
 25 link interrupted).

1 In my submission, what should then happen is that
 2 there should be an order, with liberty to apply, that
 3 those bundles be available on Magnum by 3 July with
 4 liberty to apply, protecting the FCA and, indeed,
 5 anybody else, in case of mishap. But we do really need
 6 a timetable which is clear and which the parties can
 7 rely on and which everybody sticks to.
 8 MR EDELMAN: My Lord, our proposal was in the summary on the
 9 agenda. Parties to seek to agree -- seek agreement by
 10 1 July, claimant to use reasonable endeavours to have
 11 the documents available on Magnum by close of business
 12 on 3 July. To require (video link interrupted) to apply
 13 if not everything is loaded by 3 July is to impose on us
 14 yet further obligations.
 15 We will do our utmost to get the documents on by
 16 3 July. If by some misfortune we can't, then we'll do
 17 it as soon as possible after that. But why we should
 18 have to apply to the court for an extension of time
 19 mystifies me and why Mr Gaisman cannot accept the
 20 assurance that we will do our best also mystifies me.
 21 LORD JUSTICE FLAUX: Mr Turner has arrived on screen,
 22 presumably because he wants to say something.
 23 MR TURNER: I do, my Lord, and I'm prompted to do so by
 24 Mr Edelman's suggestion that there should be some
 25 filleting exercise in relation to policies in order to

1 condense them down to something that can be fitted in as
 2 few pages as possible.
 3 Your Lordship will have seen concern pressed in
 4 various defences as to the difficulties of taking terms
 5 in isolation from the rest of the wording. If all the
 6 policies are in the bundles in full, they would probably
 7 run to about five bundles, at a guess, as an initial
 8 guess.
 9 The exercise of trying to strip out the wordings to
 10 achieve the core bundle proposed by Mr Edelman is one
 11 that may be contentious, but it would also be
 12 an unwelcome distraction, I suspect, to all parties over
 13 the next few weeks, and it is inevitable that as the
 14 parties prepare for trial, there would be other terms to
 15 which they wish to refer, and of course there will be
 16 nothing to stop them from doing so, and of course those
 17 terms will be available in your Lordship's bundle.
 18 But your Lordship will then have the unhappy
 19 situation of having a bundle with some but not all of
 20 the terms of the particular policy and a different
 21 bundle with different bits of the same policy
 22 potentially marked up to which to refer while writing
 23 a judgment.
 24 LORD JUSTICE FLAUX: By the time we get to reading in on the
 25 last three days before the trial, you will have decided

1 which bits of your skeletons each of you wishes to refer
2 to. So I wouldn't have thought it was beyond the wit of
3 man to provide the court with the relevant sections of
4 the policies on which you want to rely.

5 MR TURNER: Well, my Lord, we will take the encouragement.

6 MR GAISMAN: My Lord, can I just mention the question of
7 reading in. It may well be that this is beyond
8 your Lordship's control, but the insurers in general
9 claim the view that three days is very tight, and if
10 your Lordship were able to negotiate for a fourth,
11 your Lordship could, of course, then start reading the
12 claimants' skeleton, which your Lordship would have had
13 since the 10th. To say this is a --

14 LORD JUSTICE FLAUX: Mr Gaisman, before you go any further,
15 I don't know; my clerk may or may not be on the line,
16 but if she is, she will be able to find out. Given that
17 I've asked to be given the three days, the chances are
18 I will not be given anything else to do for that week.

19 In fact, I think from recollection, I was due to be
20 on compensatory leave that week anyway, before the
21 pandemic started, and so I would have thought, other
22 things being equal, that I would have been able to carve
23 out four days.

24 MR GAISMAN: It's merely by way of giving your Lordship our
25 view of how long your Lordship will need.

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1 LORD JUSTICE FLAUX: Understood. Understood. Okay.

2 MR JUSTICE BUTCHER: Certainly for my part the
3 Commercial Court has said that I will have the week.

4 LORD JUSTICE FLAUX: Right.

5 Now, I mean, so far as bundles are concerned --
6 notwithstanding your points, Mr Edelman; we fully
7 understand that -- we think there has to be an element
8 of certainty here. We think that they should be agreed
9 by (video link interrupted) close of business on the
10 3rd, and that if there's a problem, you will have to
11 come to the court and explain what the problem is.

12 I'm always very wary of things that say "reasonable
13 endeavours", "best endeavours", "do our utmost",
14 et cetera, et cetera. I think it's much easier you have
15 an order to do something by a certain time and if you
16 can't, you come and explain why you can't.

17 Magnum who are involved in that will have heard that
18 as well and they will know that that's what they've got
19 to do. All right?

20 MR EDELMAN: Right. List of issues is item 12. We have
21 an agreement what the order was for list of issues; us
22 to propose it on the 4th and the respondent to provide
23 their responses by the 17th --

24 LORD JUSTICE FLAUX: By the 7th.

25 MR EDELMAN: By the 7th, sorry. Unless it's being said that

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1 the order should be varied, that should stand.

2 MR ORR: My Lords, I am dealing with this. In order to
3 assist, we made an offer to produce the first draft of
4 the list of issues to be provided to the FCA by 3 July
5 and with them to respond by 6 July.

6 My Lords, we did that for two reasons: first of all
7 in the spirit of cooperation, which has underlain
8 insurers' approach to these proceedings from the outset,
9 and, secondly, my Lords, because the court's order
10 required, expressly required, the parties to cooperate
11 with a view to agreeing the list of issues. That was
12 the first provision of my Lord Mr Justice Butcher's
13 order of 16 June.

14 The timing which my learned friend Mr Edelman has
15 referred to is a default timing. So we did this simply
16 as a constructive offer in a genuine attempt to assist.
17 If the FCA wants to reject our offer, then so be it, and
18 we will revert to the default timing and we look forward
19 to receiving the FCA's list as soon as practicable.

20 LORD JUSTICE FLAUX: Well, I think Mr Edelman wants to, as
21 it were, have the run at this, doesn't he?

22 MR EDELMAN: My Lord, yes, and it is the most sensible
23 because we will have been in the midst of drafting our
24 replies to the defences, and so we will be able to
25 provide the list of issues at about the same time as

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1 we're providing the reply, and then the insurers will
2 deal with it. But for insurers to start dealing with
3 list of issues before they've seen or considered our
4 reply seems to be rather nonsensical.

5 LORD JUSTICE FLAUX: Anyway, this is not exactly the most
6 important point we've had to consider today. We will,
7 I think, leave it with the claimants, Mr Orr.

8 MR ORR: Precisely so, my Lord, we are happy with that.

9 LORD JUSTICE FLAUX: Okay.

10 Well, we've dealt with pre-reading and my clerk is
11 already on to the case, so she tells me, so we'll try
12 and get a fourth day for pre-reading for the 14th as
13 well.

14 Trial timetable: I think on this one, Mr Edelman,
15 what's really said by the insurers is they're not in
16 a position to indicate how they're going to divide up
17 the time and in any event, provided they don't use more
18 than their four days between them, that's for them.

19 MR EDELMAN: My Lord, I'm not pressing for them to do so
20 now, but it would, perhaps, be of assistance to the
21 court nearer the time for the court to know and for us
22 to know who is speaking when.

23 That may also help, for example, if one
24 particular -- because there may be, for example,
25 a division of labour between myself and Ms Mulcahy and

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1 it would be nice for us to know who is due to be
 2 speaking when.
 3 We don't -- I'm not pressing for that now, but
 4 I thought the court would like to know.
 5 LORD JUSTICE FLAUX: I imagine that's something that will
 6 come in due course.
 7 MR EDELMAN: As long as it does. But it may also be
 8 important as between the insurers that the tail-end
 9 Charlie doesn't find him or herself squeezed on time --
 10 LORD JUSTICE FLAUX: No.
 11 MR EDELMAN: -- and then that being taken out of our time.
 12 But that's a matter for them.
 13 MR EDEY: My Lord, may I just interject on behalf of the
 14 interveners?
 15 LORD JUSTICE FLAUX: Yes.
 16 MR EDEY: From the interveners' point, it obviously would be
 17 helpful to know when the relevant insurers intend to be
 18 on their feet, metaphorically speaking. We may not wish
 19 to be there throughout the two weeks, and it would
 20 therefore assist to know when they are likely to be
 21 speaking.
 22 LORD JUSTICE FLAUX: Well, Mr Gaisman, do you want to say
 23 anything about this?
 24 MR GAISMAN: My Lord, it's not a secret. It just hasn't
 25 been decided yet, and obviously I don't know how many

1 cases your Lordship was involved in at the Bar with
 2 quite so many parties, all of whom have an equal
 3 interest and all of whom are represented by vigorous
 4 silks, but it all takes a bit of discussion, and one
 5 thing this case has been very short on -- I speak only
 6 for myself, of course, except I suspect I don't -- is
 7 thinking time, and what we need now is some thinking
 8 time, because having discussions and having agreements
 9 before you have had some thinking time is a waste of
 10 time.
 11 So when we've thought -- and of course I completely
 12 accept Mr Edey's point and of course the court will at
 13 some stage wish to know. Not actually of great interest
 14 to the FCA, can't see how it could be. But of course we
 15 will act responsibly and when we know, we will let the
 16 parties know, my Lord, and if we're taking too long over
 17 it, well, maybe it will be said we are. But
 18 your Lordship will have seen that the proposal is that
 19 we tell the FCA what our position is by next Wednesday.
 20 LORD JUSTICE FLAUX: Well, that's a distraction, with
 21 respect. I would have thought that -- I mean, what's
 22 really required is that, given that this is a case where
 23 it's not as if somebody is going to have to bone up on
 24 their cross-examination, because there isn't going to be
 25 any cross-examination, I would have thought that if you

1 were in a position to let the court and the FCA and the
 2 interveners know what the batting order of the insurers
 3 is likely to be at the same time as you serve your
 4 skeleton arguments on 14 July, that would be sufficient.
 5 MR GAISMAN: Your Lordship took the words out of my mouth.
 6 LORD JUSTICE FLAUX: Of course I did.
 7 MR GAISMAN: The process of drafting the skeletons yields
 8 the answer to the question.
 9 LORD JUSTICE FLAUX: That was the point I had in mind.
 10 Okay. Well, if nobody -- unless somebody else wants
 11 to say something about that.
 12 MR EDELMAN: Item 14, my Lord, mode of trial, and we
 13 understood from the court that it had not fully
 14 committed yet to continuing with remote-only (video link
 15 interrupted).
 16 LORD JUSTICE FLAUX: Yes. Well, let's -- I think that the
 17 answer is that we feel, pleasant though it would be to
 18 see you all in the flesh and to return to normality in
 19 a court building, the practical reality is that even if
 20 the government social distancing is now 1 metre or
 21 1 metre plus, whatever that means, rather than 2 metres,
 22 with 30 counsel involved, which is what we're told, it's
 23 just not feasible. There isn't a court big enough to
 24 conduct a trial, even a hybrid trial, with the number of
 25 people who would need to be in court.

1 There are issues about some counsel being in court
 2 and some counsel being on a screen. I don't, myself,
 3 approve of that, and I would not want to be thought to
 4 be encouraging it. So I think where we go is really
 5 a fully remote hearing.
 6 There is another reason for that, which is the
 7 reason why my Lord, after he and I discussed it, made
 8 the amendment which he made to paragraph 8 of the order
 9 which he made, which I think puzzled your instructing
 10 solicitors. It is because if the video hearing -- if it
 11 is a fully remote video hearing, section 85(a) of the
 12 Courts Act 2003, which was inserted on 25 March of this
 13 year, allows the court to make an order, if appropriate,
 14 for broadcasting via live link or whatever so that
 15 members of the public can participate in the hearing.
 16 There is an issue, so we are advised, in relation to
 17 whether that is possible for hybrid hearings. At the
 18 moment, the advice we're getting is that it's not
 19 possible and it's not lawful. I wouldn't want to have
 20 to go down that road, and it seems to both of us, having
 21 discussed it, that this is the sort of case -- it's
 22 a test case; it potentially involves the financial
 23 interests and livelihood of a large number of
 24 policyholders, and it is exactly the sort of case where
 25 members of the public who are those policyholders should

1 have the right to participate in the trial in the sense
 2 of observing it and if the only way in which they can do
 3 that is via live link or live streaming or whatever,
 4 then we feel strongly they should have that opportunity
 5 and we should not be -- find ourselves as judges in
 6 a problem because we're conducting a hybrid hearing
 7 where that might not be possible .
 8 So for those reasons, I think we feel it should be
 9 a fully remote hearing .
 10 I don't know whether there's anything you want to
 11 add to that, Mr Justice Butcher?
 12 MR JUSTICE BUTCHER: No, thank you.
 13 LORD JUSTICE FLAUX: Right. Okay.
 14 MR EDELMAN: Yes, I make it clear that we only raised the
 15 option of hybrid because we were told it was --
 16 LORD JUSTICE FLAUX: I understand. I'm not complaining,
 17 I'm just telling you that you may have got one thing
 18 from the listing officer , but we, as the judges, are
 19 telling you what we think the position is . All right .
 20 MR EDELMAN: No, my Lords, that's fair and I appreciate it .
 21 I think the only matter is the publication of
 22 documents other than statement of case. Subject to the
 23 court's approval, the parties have reached an agreement
 24 on this , and you can find that agreement on volume 9 at
 25 page 121.

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1 MR SALZEDO: It's not 121, it's 121.
 2 MR EDELMAN: I apologise. I've actually got it on the
 3 screen in front of me.
 4 LORD JUSTICE FLAUX: 121. It's page 39 of the electronic
 5 bundle.
 6 MR EDELMAN: Sorry, 38 it starts.
 7 LORD JUSTICE FLAUX: Right.
 8 MR EDELMAN: Oh, no, sorry, I'm on the wrong electronic
 9 page.
 10 LORD JUSTICE FLAUX: No, you are on the right page, aren't
 11 you? It's the top email, I think.
 12 MR EDELMAN: 25.
 13 LORD JUSTICE FLAUX: It's the email from Allen & Overy,
 14 isn't it?
 15 MR EDELMAN: Yes, my Lord. It starts electronic page 25.
 16 I had the wrong one up on my screen. It says:
 17 "The insurers are content with your proposal in
 18 respect of transcripts . Seek judge's permission for
 19 Opus 2 to upload the synchronised audio and transcripts
 20 on its platform."
 21 You'll see, if you move down the email chain and
 22 it's the next page at the bottom, it's amendments to
 23 transcript , and then the subject carries on, transcripts
 24 for second CMC and trial.
 25 LORD JUSTICE FLAUX: Yes.

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1 MR EDELMAN: And that is the stipulation.
 2 In our summary in the agenda, we refer to finalised
 3 transcript at 10.00 am on the second day after the
 4 relevant hearing day. That should be the second working
 5 hearing day.
 6 LORD JUSTICE FLAUX: Yes.
 7 MR EDELMAN: My Lord, subject to that -- my Lords have had
 8 an opportunity to review that email exchange -- I would
 9 invite my Lords to approve that, and if so, then that's
 10 what the parties will do.
 11 LORD JUSTICE FLAUX: Well, I think that's going to be all
 12 right .
 13 Is there anything you want to say about that,
 14 Mr Justice Butcher?
 15 MR JUSTICE BUTCHER: No, that seems fine.
 16 MR SALZEDO: My Lord, I'm sure this isn't at all
 17 controversial , but the extension to "working day"
 18 instead of "day" should be for all of the references to
 19 "day" in that paragraph, not just the publication day.
 20 LORD JUSTICE FLAUX: Yes, very nice to see you, however
 21 briefly , Mr Salzedo. That was a very important
 22 contribution .
 23 MR SALZEDO: My Lord.
 24 LORD JUSTICE FLAUX: Okay, can I just say this: that
 25 Mr Justice Butcher and I just discussed briefly again

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1 the issue in relation to -- or the prevalence issue .
 2 I think, Mr Edelman, we've given you a seven-day
 3 breathing space. Could you please inform the court at
 4 the end of the seven days what your clients' decision is
 5 as to whether or not there needs to be a further trial ,
 6 at which point we can investigate the possibility of
 7 dealing with any directions for that trial to be made on
 8 paper.
 9 MR EDELMAN: Absolutely, my Lord. We'll also hopefully --
 10 if we do decide to proceed with a second trial , we can
 11 then decide -- discuss with the insurers what timing to
 12 go for .
 13 LORD JUSTICE FLAUX: Yes.
 14 MR EDELMAN: Obviously the last thing we would want would be
 15 to go for an early date and then for them to say that
 16 they need an adjournment because they're on the verge of
 17 finding an expert but he hasn't been able to work on it,
 18 and so on.
 19 LORD JUSTICE FLAUX: Yes, that would be helpful.
 20 Is there anything else from anybody?
 21 MR EDELMAN: That's the end of the agenda.
 22 LORD JUSTICE FLAUX: Good.
 23 MR EDELMAN: I'm grateful for my Lords' attention.
 24 LORD JUSTICE FLAUX: Thank you very much indeed for what's
 25 been by and large an extremely constructive hearing . We

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1 look forward to seeing you all on 20 July.
 2 Have a good weekend, everybody.
 3 (4.04 pm)
 4 (The hearing concluded)
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