

OPUS2

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

Day SC1

November 16, 2020

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1 Monday, 16 November 2020
 2 (11.00 am)
 3 LORD REED: Welcome to the Supreme Court of the
 4 United Kingdom where today we are beginning a four-day
 5 hearing of appeals in proceedings brought by the
 6 Financial Conduct Authority against a number of
 7 insurance companies.
 8 The proceedings are test cases concerned with
 9 business interruption cover in insurance policies. The
 10 purpose of the proceedings is to determine what
 11 liability, if any, the policies imposed on the insurers
 12 towards businesses that have been affected by the
 13 COVID-19 pandemic.
 14 I am hearing the appeal with four other members of
 15 the court, whom I will introduce now. The
 16 Deputy President, Lord Hodge.
 17 LORD HODGE: Good morning.
 18 LORD REED: Lord Briggs.
 19 LORD BRIGGS: Good morning.
 20 LORD REED: Lord Hamblen.
 21 LORD HAMBLÉN: Good morning.
 22 LORD REED: And Lord Leggatt.
 23 LORD LEGGATT: Good morning.
 24 LORD REED: We are going to be hearing today and tomorrow
 25 morning the submissions made on behalf of the insurance

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1 companies who are appealing against aspects of the
 2 decision of the court below which went against them.
 3 The insurance companies are Arch Insurance, Argenta,
 4 Hiscox, MS Amlin Underwriting, QBE UK,
 5 Royal & Sun Alliance, and later in the proceedings we'll
 6 be hearing from Zurich.
 7 The first submissions are going to be made by
 8 counsel on behalf of QBE. That's Michael Crane QC.
 9 So I will turn now to Mr Crane and invite him to
 10 open his submissions.
 11 Submissions by MR CRANE
 12 MR CRANE: Good morning, my Lord. I, as you say, appear for
 13 the fifth appellant, QBE, and before I address the court
 14 may I say on behalf of all parties that we are very
 15 grateful to the court for bringing this appeal on with
 16 such speed and we appreciate the burden that must have
 17 involved, in particular in relation to the late receipt
 18 of a mass of documentation. So we are grateful for
 19 that.
 20 My Lord, the order of speeches on behalf of insurers
 21 will roughly follow the plan of the judgment, that is to
 22 say we will address the so-called disease clauses first
 23 before turning to those clauses that involve measures
 24 restricting or preventing access or causing an inability
 25 to use the premises.

2

1 I have been allocated from the total time given to
 2 insurers an hour and 35 minutes to be split between my
 3 appeal and responding to Mr Edelman's appeal and
 4 I intend, if I may, to open my appeal in no longer than
 5 an hour and ten minutes, but I will see how it goes and
 6 bank what's left for my reply.
 7 I should also say that, in order to avoid
 8 duplication and because time is tight, there are two
 9 issues in which my clients, QBE, will adopt the
 10 submissions of other insurers.
 11 The first concerns the role of "but for" causation,
 12 so-called "but for" causation, at law and under the
 13 trends clauses in each of the policies and in particular
 14 the implications for those issues of the decision in
 15 Orient-Express Hotels v Generali. Now, on this clutch
 16 of issues, I will adopt the submissions made on behalf
 17 of Amlin by Mr Kealey.
 18 The second issue is that described in the written
 19 cases as pre-trigger losses. Now, this issue
 20 potentially affects all insurers, but it has a more
 21 profound impact on those writing restrictions on
 22 prevention of cover policies and it figures very largely
 23 in Mr Edelman's appeal, so I will say no more about that
 24 other than to say that QBE will adopt Mr Lockey's
 25 submissions made on behalf of Arch.

3

1 My Lord, my appeal is concerned only with so-called
 2 disease clauses. QBE is an appellant in relation to
 3 a group of four policies referred to collectively in the
 4 judgment as QBE1. These policies have identical
 5 so-called disease clauses, save in one respect, to which
 6 I will refer later.
 7 I'm also responding to the FCA's appeal, the
 8 Financial Conduct Authority's appeal, against the
 9 Divisional Court's construction in QBE's favour of two
 10 policy wordings referred to in the judgment as "QBE2 and
 11 QBE3" respectively.
 12 Now, before coming to the QBE1 wording, may I invite
 13 the court's attention to four paragraphs of the judgment
 14 of the court below, and the court will find the judgment
 15 in file C. For those with paper documents, it's behind
 16 tab 3, and the first paragraph to which I would like to
 17 refer is at paragraph 81, that's at page 57 of the
 18 electronic file {C/3/57}. Paragraph 81 starts at the
 19 foot of the page and it says this:
 20 "It will be necessary to consider the terms of each
 21 of these policies separately as it is of course
 22 impossible to determine questions of policy coverage in
 23 the abstract. What these policies share, however are
 24 provisions which in broad terms provide coverage in
 25 respect of business interruption in consequence of or

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1 following or arising from the occurrence of a notifiable
2 disease within a specified radius of the insured
3 premises."

4 Then there follows a sentence which is not that easy
5 to unpack:

6 "In relation to each there arises the question of
7 whether there is cover in respect of a pandemic where it
8 cannot be said that the key matters which led to
9 business interruption, and in particular the
10 governmental measures, would not have happened even
11 without the occurrence of COVID-19 within the specified
12 radius as a result of its occurrence or feared
13 occurrence elsewhere."

14 What we take that to mean is that it can't be said
15 that the loss-causing measures would not have happened
16 had there been no occurrence of COVID-19 within the
17 specified policy area, as those measures were taken as a
18 result of the occurrence, or feared occurrence, of the
19 disease elsewhere.

20 Now, the next paragraph, is paragraph 100 and this
21 is a paragraph with which my clients agree, where the
22 court says, at page 66 {C/3/66}:

23 "While much of the argument was understandably put
24 in terms of the nature of the causal requirements, we
25 consider that what underlies the dispute in relation to

5

1 the causative requirements is a difference as to the
2 nature of the peril insured and this depends upon
3 a proper construction of the relevant terms of ..."

4 Then it refers to the extension clause in another
5 policy, the disease clause:

6 "Once that question of construction is answered, it
7 seems to us that the issues of causation will also
8 largely have been answered and in particular it will
9 have been established which matters can be said to be
10 separate non-insured causes which could be seen as
11 distinct from the insured peril."

12 My Lord, we respectfully agree with that. Once the
13 insured peril is correctly identified, and that is
14 purely a matter of policy construction, causation
15 largely answers itself and once you have identified the
16 insured peril, you know what it is that has to be
17 removed or reversed out for the purpose of the
18 hypothesis demanded by the policy disease trends
19 clauses.

20 The next paragraph is paragraph 110 at page 69
21 {C/3/69}, where the court says:

22 "If we are correct in our view as to the nature of
23 the cover provided [in the relevant disease clause, not
24 mine] then the issues as to causation largely answer
25 themselves. If properly construed there is cover for

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1 the effects of a disease which may occur both within and
2 outside the specified radius and which may trigger the
3 response of the authorities and the public to the
4 outbreak as a whole, then it would be inconsistent with
5 the nature of the cover to regard the occurrence of the
6 disease outside the radius, or the response of the
7 authorities to that occurrence of the disease, as being
8 alternative uncovered causes of the
9 business interruption which could be relied on as
10 supporting an argument that would have been the same
11 business interruption in the absence of the
12 insured peril."

13 In relation to the trends clauses, this is clearly
14 set out at paragraph 532 at page 179 of the same file
15 {C/3/179}.

16 As I say, this is in relation to trends:

17 "Similarly, in relation to the disease clauses we,
18 have concluded that there is cover in principle — where
19 we have concluded that there is cover in principle, we
20 have done so because we consider that on the correct
21 construction of these wordings, they insure the effects
22 of COVID-19 both within the particular radius and
23 outside it, the whole of the disease, both inside and
24 outside the relevant area, has to be stripped out in the
25 counterfactual."

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1 My Lords, there we are. The court concluded that
2 the insured peril was the disease at large and the
3 measures taken in respect to it.

4 The last paragraph, before I turn to my wording, is
5 paragraph 540 at page 180 of the file {C/3/180}. At
6 paragraph 539, the court has addressed the types of
7 proof which in principle will be available for
8 demonstrating the existence of a case of COVID-19 within
9 a relevant policy area at a given date. Then at 540,
10 they say this:

11 "The hearing proceeded accordingly and no expert
12 evidence was heard on the question of prevalence. The
13 court is therefore not in a position to make any
14 findings of fact about the actual prevalence of the
15 disease at particular dates or in particular locations."

16 My Lords, against that background, can I now turn to
17 my policy wording which is also — this is QBE1 in
18 file C, at page 715 and for those following in paper
19 documents, that's tab 12 {C/12/715}. If I can start at
20 page 716, the contents page {C/12/716}, your Lordships
21 will see that this policy is a composite policy which
22 covers a miscellany of different risks and the sections
23 to which I will turn are firstly the core section,
24 section 4, which is the property section and after that,
25 the section of central relevance, business interruption,

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1 which is section 7.
 2 Before coming to that, I should say that QBE insures
 3 policyholders that fall into six out of the seven
 4 categories helpfully identified by the court at
 5 paragraph 53 of its judgment. Perhaps we needn't come
 6 to this, but for your Lordship's note at file C,
 7 page 1951 and following, there's a very helpful schedule
 8 which tells you what category of clients is insured by
 9 any given policy under consideration.
 10 But all I'd like to say at this stage is that while
 11 QBE does cover many cases where policyholders are
 12 resident in London and major English cities, it also
 13 covers policyholders situated in other parts of the UK,
 14 some of them remote parts. For example, QBE has
 15 a number of policyholders in the Highlands of Scotland
 16 benefiting from disease clauses. It has nine in the
 17 Orkney Islands, it has one in the Isles of Scilly and it
 18 covers insureds in Northern Ireland in Armagh and Omagh
 19 and in some of the more remote parts of Wales as well as
 20 the major metropolises. I'll come back to the
 21 significance of that briefly and in due course.
 22 Now, if we go to page 724 of bundle C {C/12/724},
 23 the court will see the property section and this gives
 24 cover for physical damage to insured property and it's
 25 to be assessed — the loss is to be assessed — in

1 accordance with the basis of claim provisions and you'll
 2 see that the cover works in relation to accidental
 3 damage to property insured.
 4 Now, "accidental" and "damage" are both defined
 5 terms. I'll give you the references to save going to
 6 them. The former, "accidental", is at page 804 and it
 7 means, not surprisingly, a single and unexpected event.
 8 The latter, "damage", means physical damage to tangible
 9 property and you'll find that definition at page 807
 10 {C/12/807}.
 11 You'll also see here reference to territorial limits
 12 and the territorial limits for the property section and
 13 indeed for the business interruption section, before we
 14 come to the relevant sub-limits, are the United Kingdom
 15 generally, and that you'll see at clause 23.110 at
 16 page 817 {C/12/817}. Unless the court feels it wants to
 17 look at those definitions, I won't spend time going to
 18 them.
 19 Accidental damage to the property insured is covered
 20 provided that:
 21 Damage occurs during the period of insurance within
 22 the territorial limits and from a cause not excluded in
 23 the property-related exclusions.
 24 Now, against that background, can I come to
 25 section 7, which is the section we're centrally

1 concerned with, at page 741 {C/12/741} which is the
 2 business interruption section, and the court will see at
 3 7.1.1 that the core cover for business interruption is
 4 business interruption resulting directly from damage as
 5 defined to property. Damage has been defined as
 6 physical damage to tangible property. Cover is provided
 7 to the resulting business interruption provided that, at
 8 the time the damage occurs, there's in force either
 9 cover under the property section of this policy or,
 10 and I am paraphrasing, a roughly equivalent property
 11 cover under a different policy. Then, at (b):
 12 "At the time the damage occurs you have claimed
 13 under the policy referred to in (a) above and the
 14 relevant insurer has either paid such claim or admitted
 15 liability or would have paid it but for the operation of
 16 some deductible or excess."
 17 Now, there then follows at 7.1.2 {C/12/741} basis of
 18 settlement provisions which your Lordships will see are
 19 applicable to the entire business interruption section,
 20 and we needn't, at least for my purposes, flog through
 21 these clauses. They are typical of this insurance.
 22 They quantify business interruption loss by reference to
 23 a number of defined parameters, the relevant ones of
 24 which are trend adjusted and the insured has a choice
 25 either to claim loss of insurable gross profit, which,

1 in 7.1.2(a) means reduction:
 2 "... in respect of reduction in turnover: the sum
 3 produced by applying the rate of gross profit to the
 4 amount by which the turnover during the indemnity period
 5 will, in consequence of the damage, fall short of the
 6 standard turnover ..." which is a trend adjusted defined
 7 term.
 8 Again at 7.1.4 {C/12/742}, your Lordships will see
 9 another option which is to claim reduction in gross
 10 revenue and again it works by reference to a fairly
 11 similar formula, with standard gross revenue being
 12 a defined trend adjusted term.
 13 Then, although I don't want to spend time on it
 14 because I am adopting the submissions of others, for
 15 your Lordships' note, at page 817 {C/12/817} — perhaps
 16 we ought to go there, actually. Sorry, it's 819
 17 {C/12/819}, my mistake. I apologise, you'll see the
 18 trend clause under the rubric "Trend adjusted", it's at
 19 23.117:
 20 "'Trend adjusted' means adjustments will be made to
 21 figures as may be necessary to provide for the trend of
 22 the business and for variations in or circumstances
 23 affecting the business either before or after the damage
 24 or which would have affected the business had the damage
 25 not occurred, so that the figures thus adjusted will

1 represent as nearly as may be reasonably practicable the
 2 results which but for the damage would have been
 3 obtained during the relative period after the damage.”
 4 Although that trends clause works by reference to
 5 damage as defined, which your Lordships know is physical
 6 damage, the court found — and it’s common ground before
 7 this court — that it applies across the board to
 8 business interruption caused by perils which are not
 9 physical damage. The necessary tweak, if I can put it
 10 like that, to the wording being to substitute the
 11 insured peril for the word “damage” when it appears.
 12 Can I now come to page 743 {C/12/743} of file C,
 13 where we see the extensions applicable to the
 14 business interruption section, one of which, 7.3.9, and
 15 I’ll come to that presently, is the disease clause which
 16 is central to my appeal. But the stem wording at 7.3
 17 says:
 18 “We will indemnify you for ...”
 19 I’ll come back to that. It may be relevant to an
 20 issue in due course.
 21 There are three clauses that I’d like to point out,
 22 if I may, en route to the disease clause. Each of these
 23 clauses has a specific geographical sub-limit which
 24 circumscribes the insured peril and limits the risk.
 25 The first is a denial of access clause at 7.3.4

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1 {C/12/44} which covers:
 2 “loss resulting from interruption of or interference
 3 with the business as covered by this section [and here
 4 are the words] caused by damage by any cause not
 5 excluded by this policy to property within ...
 6 250 metres of the perimeter of the premises which
 7 physically prevents or hinders the use of the premises
 8 or access thereto ...”
 9 What we say about that and similar clauses is that
 10 the specific limits on the territorial scope of the risk
 11 is intrinsic to the definition of the insured peril.
 12 It’s only damage within that very narrow confine which
 13 is relevant when you come to ask whether that damage has
 14 caused the relevant interference with the business or
 15 led to the relevant restriction.
 16 The second immediately follows it, it is 7.3.5, it
 17 is “Denial of access non-damage”, and this covers:
 18 “Loss resulting from interference with the business
 19 caused by action by the police authority following
 20 danger or disturbance within 250 metres of the premises
 21 which shall prevent or hinder use of the premises or
 22 access thereto.”
 23 Now, a very similar form of wording, namely “danger
 24 or disturbance within the vicinity of the premises”, was
 25 the subject of a decision in the court below and may I,

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1 by analogy, show your Lordships where that is to be
 2 found. Paragraph 436, it’s a number of places, but
 3 paragraph 436 {C/3/155} of the judgment at 155 of this
 4 file and this is one of Amlin’s clauses. An AOCA is
 5 “action of competent authority” and you’ll see from the
 6 second line of that paragraph that what was in issue
 7 were the words:
 8 “... following a danger or disturbance in the
 9 vicinity of the premises.”
 10 I needn’t read out that paragraph, but the court
 11 found that that connoted incidence within a very narrow
 12 compass, in other words local to the premises, such as
 13 a bomb scare or a gas leak. And similar findings, for
 14 your Lordships’ notes, are to be found in relation to
 15 the same language, albeit in relation to different
 16 policies, at paragraph 466 {C/3/162} and 499 {C/3/169}.
 17 Just returning, if I may, to my clause, the
 18 inference from the wording used and, indeed, from the
 19 court below’s conclusion on similar wording, is that
 20 following danger or disturbance within 250 metres
 21 connotes incidents proximate or local to the premises
 22 and it must be such incidence that caused the relevant
 23 loss.
 24 The final such clause which operates by reference to
 25 its own specific geographical limits is 7.3.7 {HL/13/8}

15

1 under the rubric “Loss of attraction”, that’s 7.4.4.
 2 The court will see that that covers:
 3 “Loss ... in consequence of diminution of attraction
 4 to the premises following damage by any cause not
 5 excluded by this policy to property occurring at any
 6 other site within a one mile radius of any of the
 7 premises ...”
 8 We say that in all three of those clauses the
 9 special geographical limits circumscribe the risk and
 10 are an intrinsic definition of the insured peril.
 11 My Lord, against that background, can I now focus on
 12 7.3.9, which is the disease clause under consideration
 13 in QBE’s appeal. I read back from the stem wording at
 14 7.3 that says:
 15 “We will indemnify you for interruption of or
 16 interference with the business arising from ...”
 17 There are then five perils of which (a) is the
 18 relevant one:
 19 “any human infectious or human contagious disease
 20 (excluding ... AIDS or an AIDS related condition), an
 21 outbreak of which the local authority has stipulated
 22 shall be notified to them manifested by any person
 23 whilst in the premises or within a 25 mile radius of it.
 24 “b) actual or suspected murder, suicide or sexual
 25 assault at the premises;

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1 "c) injury or illness sustained by any person
 2 arising from or traceable to foreign or injurious matter
 3 in food or drink provided in the premises;
 4 "d) vermin or pests in the premises;
 5 "e) the closing of the whole or part of the premises
 6 by order of a competent public authority consequent upon
 7 defect in the drains or other sanitary arrangements at
 8 the premises."
 9 And then:
 10 "The insurance by this clause shall only apply for
 11 the period beginning with the occurrence of the loss and
 12 ending not later than three months thereafter during
 13 which the results of the business shall be affected in
 14 consequence of the damage."
 15 My Lords, I make the following points in relation to
 16 that clause.
 17 First, the stem wording, which you've seen at
 18 clause 7.3 {HL/13/7}, tells you this is not in terms
 19 an indemnity for loss resulting from
 20 business interruption, it is cover for
 21 business interruption arising from the perils described.
 22 That means that the perils described by the words that
 23 follow must be the proximate cause of the
 24 business interruption.
 25 Now, the court may well be asking: why does it

1 matter whether business interruption is characterised as
 2 part of the peril or the loss which in turn is then
 3 quantified by the settlement provisions to which I've
 4 referred? To my clause I'm going to submit it doesn't
 5 matter at all for reasons I will explain, but the reason
 6 flows from the wording of section 55 of the
 7 Marine Insurance Act which, as the court will know, says
 8 that:
 9 "Unless the policy otherwise provides, the insurer
 10 is liable for any loss proximately caused by a peril
 11 insured against but, subject as aforesaid, he is not
 12 liable for any loss which is not proximately caused by
 13 a peril insured against."
 14 We needn't go to it, but the MIA is at {E/6/94} and
 15 what appears to have been suggested is that if
 16 business interruption is a component of a peril, then
 17 proximate cause only has to be established between the
 18 business interruption and the loss, as distinct from
 19 business interruption and the damage causing components
 20 of the peril.
 21 That's, as I understand it, the potential relevance
 22 of the wording, but actually it doesn't matter for my
 23 clause, because my clause covers interruption or
 24 interference with the business arising from the peril
 25 which follows and it's not, I think, disputed that the

1 expression "arising from" connotes the relationship of
 2 proximate cause between that which immediately precedes
 3 it and that which follows.
 4 I don't think the FCA disputes that this is the
 5 usual significance of the expression. For your
 6 Lordships' notes, at paragraph 362 of their respondents
 7 case, which can be found, we needn't go to it, at
 8 {B/10/443} and in any event, it's supported by
 9 authority, the most well known of which is *Coxe v*
 10 *Employers' Liability Assurance*, a judgment of
 11 Mr Justice Scrutton, which the court will find at file
 12 {F/19/314} for those that need it.
 13 I will assume at the moment that it is common ground
 14 that the words "arising from" connote the nexus of
 15 proximate cause between the interruption of or
 16 interference with the business, in other words, the
 17 words that precede it, and the perils which immediately
 18 follow it. So that expression is a pointer to the
 19 proximate cause as regards each of those perils.
 20 I should also say, for completeness, that in two of the
 21 four policies comprising QBE1, the words "caused by"
 22 replace "arising from". In my submission, they're
 23 synonymous. Those policies are at {C/22.1/1566} and
 24 {C/22.2/1643} respectively. We needn't go to them.
 25 There then follows the description of the

1 insured peril and there are two clauses that refer back
 2 to the noun "disease" and these two clauses perform very
 3 different roles. The first is purely descriptive. It
 4 tells the reader what type of disease qualifies for
 5 cover, namely, when an outbreak of which the
 6 local authority has stipulated shall be notified to
 7 them. In effect, it's an internal definition of
 8 notifiable disease.
 9 The second qualifying clause, however, performs
 10 a very different role. These are the words:
 11 "Manifested by any person whilst in the premises or
 12 within a 25-mile radius of it".
 13 This clause tells you what has happened to the
 14 disease, how it must have behaved in order to disclose
 15 the insured contingency. It must have been manifested
 16 by any person whilst in the premises or within a 25-mile
 17 radius of it. "Manifested by any person whilst in the
 18 premises," does not supplement the description of the
 19 disease. It doesn't add a qualifying characteristic to
 20 a disease. It tells you how the disease has acted. It
 21 describes a contingency in the nature of an event, and
 22 it is that event from which the business interruption
 23 must, as a matter of express wording, it is that
 24 contingency from which the business interruption must
 25 arise.

1 Now, the past participle of the word "to manifest"
2 has been used by the draftsman, but the same meaning
3 could just as easily have been expressed by use of the
4 present participle, ie a notifiable disease manifesting
5 itself in any person, and although it doesn't concern
6 me, your Lordships will see an example of that at
7 paragraph 285 of the judgment {C/3/116}. It's one of
8 RSA's policies, page 116, which covers loss as a result
9 of paragraph 285:

10 "Closure or restrictions placed on the premises as
11 a result of a notifiable human disease manifesting
12 itself at the premises."

13 It doesn't matter which tense you use, but what that
14 is describing is something in the nature of
15 a contingency and it's the contingency from which, as
16 a matter of express wording, the business interruption
17 must arise.

18 Now, in some disease clauses, for example QBE2 and
19 QBE3, to which we can come later, an occurrence of
20 disease at the premises is covered separately from
21 an occurrence within a radius of 25 miles of the
22 premises. They are treated as separate perils. In
23 fact, perhaps we had better look at an example of this
24 so I can make the point. It's at page 97 of the C file
25 {C/3/97} and you'll see in paragraph 208, that's QBE2,

21

1 which covers:

2 "Loss resulting from interruption of or interference
3 with the business in consequence of any of the following
4 events ..."

5 And (a) is:

6 "Any occurrence of a notifiable disease at the
7 premises or attributable to food or drink supplied from
8 the premises ..."

9 And (c) is:

10 "any occurrence of a notifiable disease within
11 a radius of 25 miles of the premises ..."

12 And there are other examples.

13 Now, as I understand it, although this is not
14 an observation made by the FCA in relation to QBE2 but
15 similar clauses, the FCA seems to accept as regards
16 other disease clauses that in the case of stand-alone
17 cover for a notifiable disease occurring in the premises
18 or attributable to food or drink supplied from the
19 premises, an event at the premises has to be the cause
20 of the loss. In other words, that must be the causative
21 insured peril. For your Lordships' note, that's
22 paragraph 194 of the respondent FCA's case at
23 {B/10/394}.

24 Now, we submit that that is obviously correct, but
25 we also submit that if it's right, there is no reason

22

1 why cover for an occurrence or manifestation of disease
2 within 25 miles of the premises should not also
3 circumscribe the insured peril from which the BI must
4 arise. It's a different geographical limit, but it has
5 the same role in circumscribing the territorial scope of
6 cover. All that has happened in QBE1 is that the two
7 separate perils have been elided for the purpose of
8 constituting peril A.

9 My Lords, the next point is this. For a disease to
10 become manifest, it has to have been demonstrated either
11 by diagnosis or the showing of symptoms. An occurrence
12 of a disease which is unobservable or asymptomatic
13 cannot qualify. This is common ground and the court's
14 finding on that is paragraph 225 of the judgment
15 {C/3/102}. We needn't look at it, it's common ground.

16 Now, that's an important distinction because the
17 manifestation of the disease by a person is an event in
18 the sense in which that word is commonly used in
19 an insurance context. That is to say, it is something
20 observable which happens at a particular time, in
21 a particular place, in a particular way, and is not too
22 remote from the cause of loss.

23 It's to be distinguished in an insurance context
24 from the remoter causes from that and other events may
25 have originated and in making that distinction, we refer

23

1 in our written case — and I needn't traverse it here —
2 to the familiar authorities cited at paragraph 74 to 77
3 of QBE's appellants case, and that's at {B/8/277}.

4 So once the proximate cause, the relevant
5 contingency, has been identified, you do not search for
6 its remoter origins. The remoter originating cause
7 of an insured contingency is irrelevant. The
8 authorities in question are the well-known cases of
9 Axa v Field, Becker Gray v London Assurance and
10 Everett v London Assurance, and your Lordships will find
11 them at those paragraphs.

12 Accordingly, we say, the event from which the
13 business interruption must arise is the manifestation of
14 the notifiable disease by someone whilst in the premises
15 or within 25 miles of it. The area limited by the
16 radius operates as a geographical sub-limit specific to
17 this risk. It imposes an explicit limit on the scope of
18 the insured peril. In this respect, the radius
19 provision operates similarly to any other territorial
20 limits imposed by a policy and your Lordships have heard
21 that the prima facie limit for business interruption,
22 territorial limit, is the UK.

23 Now, my Lord, that we respectfully submit, is the
24 reading — the natural reading — of 7.3.9 simply taken
25 on its own, but in its contractual setting, that

24

1 interpretation is emphasised, because — and I needn't
2 labour this — the court will see that perils (b), (c),
3 (d) and (e) are also perils, I should say, which refer
4 to events at the premises or attributable to something
5 happening at the premises, namely the provision of food
6 or drink.

7 My Lords, can I now deal with the wider matrix.
8 I've dealt with the clause in its contractual setting,
9 at least I hope I have, and I want to make four points
10 here because the wider matrix is something on which
11 great emphasis is placed by Mr Edelman's clients.

12 The first point is this, I apologise if they seem
13 obvious, but I submit they need to be emphasised in the
14 current context.

15 Firstly, it's only information reasonably available
16 to the parties at the time of contracting that is to be
17 attributed to their proxy, the notional reasonable man.
18 We say, for example, that it's reasonable to impute to
19 the broker and underwriters negotiating composite cover
20 of this sort the broad knowledge of public health powers
21 of which the average, well-informed citizen will be
22 generally aware. This would include, in serious cases,
23 a power to confine or quarantine infectious individuals,
24 or close perhaps specific premises, possibly even
25 a locality.

1 It's not, however, reasonable to impute to parties
2 negotiating composite cover of this sort the detailed
3 potential implications public health law outlined at
4 length in the FCA's respondent's case and most of us,
5 I would venture to submit, would have been unaware of
6 those powers before we came to look at this case. So
7 that's point 1.

8 Point 2, we submit, is important. In the vast
9 majority of instances of notifiable disease, the radius
10 clause would operate without undue difficulty to protect
11 an insured business. Before COVID-19 was listed as
12 a notifiable disease, 31 diseases were notifiable under
13 the relevant Health Protection (Notification)
14 Regulations 2010, and I wonder if the court would like
15 to look at those. It's in file E, page 88 is the
16 relevant list of diseases, tab 5 for those who need it
17 {E/5/88}.

18 What the court will see here — and there's quite a
19 long list — you will see cholera, food poisoning,
20 legionnaires' disease, measles, mumps, rubella, SARS —
21 and I'll come to that individually — tetanus and
22 typhus. You will see quite a few diseases which, if
23 they manifest themselves, are likely to affect
24 a locality, maybe a wide locality, but that would likely
25 be their impact. For example, an outbreak of measles

1 may lead to closure of a school or college or —

2 MR EDELMAN: I'm sorry to interrupt, Mr Crane, but there was
3 a ruling by the court below, and of course Mr Crane
4 wasn't involved in the court below, about the incidence
5 of these diseases because there was a point being raised
6 on an Ecclesiastical policy and the court found against
7 the FCA's application to adduce evidence on the
8 potential spread of these diseases, so that was ruled
9 out.

10 MR CRANE: Sorry, I'm not quite sure where the direction of
11 that interruption goes, but it's taken a valuable minute
12 off my time, but perhaps I can go on.

13 I don't think anything in the court below —

14 LORD REED: Do carry on for the moment, Mr Crane, and then
15 we can hear Mr Edelman in reply if there is an objection
16 to this line of argument.

17 MR CRANE: Very well, my Lord. Can I just say, for example,
18 obviously Legionnaires disease might lead to the closure
19 of one or more group of premises, but I will leave it
20 there.

21 The converse of this point is that the fact that
22 there are difficulties in applying this clause to the
23 wholly unforeseeable circumstances of this case does not
24 mean that the cover is illusory, a word that you will
25 come across frequently in the respondents' submissions.

1 A year ago, it was utterly inconceivable that the UK
2 and devolved governments will close down almost the
3 entire national economy and confine healthy citizens to
4 their homes to prevent further transmission of
5 a disease.

6 It was inconceivable that such measures would be
7 taken indiscriminately in the sense of nationally
8 throughout the UK, irrespective of the prevalence of
9 disease in any given locality.

10 Now, point 3 is that it's not suggested by QBE that
11 an epidemic as such was unforeseeable, as distinct from
12 the extraordinary measures taken in response in this
13 case to the pandemic. As the FCA has pointed out, SARS
14 was one of the notifiable diseases and a disease such as
15 SARS might well have had unpredictable patterns of
16 transmission and become widespread.

17 A number of points flow from that. First, it's
18 a fallacy to assume from the fact that a particular risk
19 may have been foreseen as a possibility at the time of
20 contract that the parties agreed to cover it, or, more
21 relevantly, to cover it without relevant limits. The
22 fact that a contingency may have been foreseeable does
23 not mean that the underwriter agreed to cover that
24 contingency without limits or that the policyholder was
25 willing to pay for such cover.

1 The question whether a given contingency is covered
2 is answered not by asking whether it was reasonably
3 foreseeable to the parties, but by a reading of the
4 insurance clause.

5 Now, the proper inference, the next point, is that
6 the proper inference here is that in the face of the
7 risk of a disease occurring with unpredictable patterns
8 of spread, there was no agreement to insure the effects
9 of such a disease at large. On the contrary, we submit,
10 in the face of such a risk, the parties stipulated for
11 a radius clause. That is to say, for an agreement to
12 cover the impact on an insured business of any such
13 disease manifesting itself within a territorially
14 limited area.

15 Point four that I would like to make on the wider
16 matrix is this: where circumstances have occurred which
17 were inconceivable when contracting, as I say, it's not
18 the epidemic as such, it's the measures in response, it
19 is tempting to interpret a contract with hindsight so as
20 to make it fit what may seem to be the merits as they
21 now appear.

22 Now, I hope the court will forgive me if I refer in
23 this context to a well-known dictum of
24 Sir Thomas Bingham when he was Master of the Rolls in
25 the case of *Philips Electronique v BSKyB*, which the

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1 court will find in file G at page 1556, tab 77 for those
2 that need it {G/77/1556}. Now, this, I should make it
3 clear, was a case about the implication of implied terms
4 and the court, I'm sure, will be familiar with it. One
5 has to treat the observation to which I'm going to refer
6 in that context. It is found at page 1556 and it's just
7 after the first paragraph break where the Master of the
8 Rolls said this:

9 "The question of whether a term should be implied
10 and if so what, almost inevitably arises after a crisis
11 has been reached in the performance of the contract. So
12 the court comes to the task of implication with the
13 benefit of hindsight and it's tempting for the court
14 then to fashion a term which will reflect the merits of
15 the situation as they then appear. Tempting but wrong."

16 Now, your Lordships will see on the previous page,
17 155, central paragraph, the context for this, which is
18 that the process of implying a term is rather more
19 ambitious than construing a contract, and I want the
20 court to have that context.

21 It remains relevant because here we're facing the
22 same temptation, we're construing a clause with
23 hindsight in the aftermath or indeed during a crisis of
24 unprecedented proportions and there is always
25 a temptation to read it in a way which makes it

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1 accommodate the unprecedented facts as they occur. But
2 I have to respectfully submit that that is a wrong
3 approach.

4 My Lords, on radius clauses, before I leave them,
5 the court will have had the core of my submissions when
6 I was going through my clause, but can I just make five
7 points in relation to radius clauses before I leave
8 them.

9 The first is this, there's no reason why a radius
10 clause should be treated any differently from any
11 other geographical limit on the risk. The scope of
12 insurance cover, we submit, is habitually circumscribed
13 by vertical and horizontal limits and where geographical
14 limits are placed on a risk, the inevitable inference is
15 that instances of the risk occurring outside the
16 geographical area are not covered.

17 That's point 1.

18 For example, one can illustrate this under the
19 property material damage section of this policy where
20 the territorial limits are the United Kingdom. That
21 section of the policy would not respond to property
22 damage caused outside the United Kingdom. That would
23 seem obvious, but we say it's just as obvious when you
24 have a sub-limit in the shape of a radius clause.

25 The second point is this, geographical limits are

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1 simply one method by which insurers limit the potential
2 for accumulation of loss across their book of business.
3 It's a crude tool, but it is, nevertheless, there for
4 that reason.

5 The third is this. There is no logic, we submit, in
6 the proposition that because the area within the
7 specified circumference is extensive, it is to be
8 inferred that the parties intended to cover the impact
9 of cases outside that area. The fact that the
10 territorial limits on a risk are generously drawn, in
11 fact the relevant area is nearly 2,000 square miles
12 within a radius of 25 miles from a fixed point, the fact
13 that those limits are generously drawn does not mean
14 they can be disregarded. Thus, a one-mile, a five-mile
15 or a ten-mile radius would reduce the underwriters'
16 exposure, but its effect in circumscribing the risk
17 would, in principle, be the same.

18 The next point is important from QBE's point of
19 view. It's a fallacy to view their case as contending
20 for an exclusion of cover if notifiable disease is
21 manifested outside the specified area.

22 Such instances are merely not covered and in each
23 case the question is whether the manifestation of
24 disease within the specified area is a proximate cause
25 of the business interference. I need no help in

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1 "but for" causation, in my submission, I should say
 2 that.
 3 Take a case, the fifth point, where
 4 a notifiable disease manifests itself both inside
 5 a specified area and outside it. In such a case,
 6 a judgment has to be made as to whether the appearance
 7 or manifestation of a disease within the perimeter was
 8 the efficient or dominant cause of loss. This is
 9 a question of fact in each case. If, for example, there
 10 is a cluster of cases within the radius but relatively
 11 few outside, the inference might well be drawn that
 12 measures taken in response were in response to disease
 13 within the insured area.
 14 Lord Leggatt.
 15 LORD LEGGATT: You said the efficient or dominant cause of
 16 loss, Mr Crane. I just wanted to pick you up on that.
 17 MR CRANE: Yes.
 18 LORD LEGGATT: It is well established nowadays, isn't it,
 19 that there can be multiple causes of loss; we're not
 20 limited to finding the dominant cause?
 21 MR CRANE: That's correct, my Lord. Well, I'm going to deal
 22 with that in a second, but I'm going to come back to it
 23 in relation to the court's view on causation.
 24 In a case where there is disease manifested both
 25 inside and outside the relevant area, one has to ask —

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1 has to make a judgment as to whether the causes, or the
 2 manifestation of the disease, within the relevant
 3 perimeter were the effective cause of loss in the sense
 4 that the business interruption arose from those cases.
 5 Now —
 6 LORD LEGGATT: Well, was there an effective cause of loss,
 7 then?
 8 MR CRANE: Yes, indeed, an effective cause of loss.
 9 LORD LEGGATT: Even if the occurrence outside the zone was
 10 another effective cause of loss?
 11 MR CRANE: Yes, yes, I accept that, but we'll see on the
 12 facts of this case that the relevant measures — there's
 13 no evidence that the relevant measures, the government
 14 measures, which caused the business interruption, either
 15 from 16 March or 23 March or the 26th were measures in
 16 response to the manifestation of disease at any given
 17 locality.
 18 One has to ask in cases where there is disease both
 19 within and without the relevant insured perimeter what
 20 are the respective contributions of those cases to the
 21 business interruption of the insured premises in
 22 question.
 23 So I accept, indeed it is part of my submission,
 24 that when cases occur both inside and outside the
 25 relevant perimeter, it will be necessary to assess the

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1 respective efficiency as a cause of loss of the covered
 2 and non-covered causes.
 3 Now, can I now turn to the Divisional Court's
 4 construction. The Divisional Court opted for
 5 a construction that removed any causative relevance from
 6 a manifestation of disease within the specified area.
 7 That's my core complaint, respectfully made.
 8 It concluded that the insured peril was the
 9 notifiable disease at large and that cover under the
 10 QBE1 disease clause was triggered if and when there was
 11 a single manifestation of disease within the defined
 12 area. This interpretation is most starkly illustrated
 13 by the Divisional Court's declaration in relation to QBE
 14 which the court will find at page 20 of file C, behind
 15 tab 1 for those that need it {C/1/20}.
 16 24.3 is the relevant declaration and it says this:
 17 "If COVID-19 was manifested at or within a 25-mile
 18 radius of the insured business, as to which see
 19 declaration 7 [which, by the way, just tells us the
 20 meaning of 'manifested'] there would be cover under the
 21 disease clause in QBE1 from the date COVID-19 was
 22 manifested in the 25-mile radius, the losses caused by
 23 interruption of or interference with the insured
 24 businesses caused by COVID."
 25 Then it refers to various measures pleaded by the

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1 Financial Conduct Authority. Then, under (i), and this
 2 is important:
 3 "It is not necessary for the interruption of or
 4 interference with the insured business to have been
 5 caused by the manifestation of COVID-19 within the
 6 25-mile radius as distinct from its manifestation
 7 outside the radius ..."
 8 And (ii):
 9 "The correct counterfactual is as set out in
 10 declaration 11."
 11 Thus, for the court's note, that deals with the
 12 trends clause and, of course, once you've identified the
 13 insured peril as a disease generally and measures taken
 14 generally with regard to it, you extract that in
 15 constructing the hypothesis required by the trends
 16 clause.
 17 This means, and I will just take — this is pure
 18 hypothesis, this means, for example, that in remote
 19 areas of the United Kingdom, such as, for example, the
 20 Highlands, the Orkneys, remoter parts of Northern
 21 Ireland or the Isles of Scilly, is an example that's
 22 been taken before, it's immaterial in such areas whether
 23 the lockdown and the consequent interference with local
 24 businesses preceded the first recorded case of COVID-19
 25 or not. On the court's construction, it simply doesn't

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1 matter whether the first local manifestation precedes or
 2 follows the measures that caused the damage.
 3 Where the first local case follows, the fiction —
 4 and this is advanced by the FCA in their respondent's
 5 case — is that somehow that local case operates as
 6 a concurrent cause of the continuing loss to which we
 7 say that cannot be correct. It's a fiction. The cause
 8 of loss is government measures which, on this
 9 hypothesis, have already had and continue to have their
 10 impact.
 11 In short, what on a natural reading, in my
 12 submission, is the insured event becomes, on the court's
 13 interpretation, a mere proviso to cover. The radius
 14 provision becomes a tick-box covering sets when someone
 15 with symptoms strays into the specified area presumably
 16 with the insured being oblivious to that fact and for
 17 the fact that its loss has now become recoverable and
 18 the indemnity period, which dates from the date of loss,
 19 has now incepted.
 20 Now, my Lords, against that reasoning, can I come to
 21 the one paragraph in the judgment in which the court
 22 deals with this clause or with this interpretation.
 23 That's paragraph 226 {C/3/102} at page 102. For the
 24 court's note you'll see in 224 that there is
 25 a conclusion on the meaning of "manifested" with which

1 we respectfully agree and at 226 we have the court's
 2 reasoning:
 3 "Focusing on the language and structure of Clause
 4 7.3.9, we consider that within the insured peril the
 5 required causal link ("arising from") is between the
 6 interruption or interference with the business on the
 7 one hand and the notifiable disease on the other,
 8 provided has been "manifested" by a person within the
 9 25-mile radius. We do not consider that the clause most
 10 naturally reads or should be construed as saying that
 11 the interference has to result from the particular cases
 12 in which the disease has manifested within the 25-mile
 13 radius. Instead, the cover is for the effects of
 14 a notifiable disease if it has been manifested within
 15 the 25-mile radius. This appears to us to be apparent
 16 from the juxtaposition of the phrase relating to
 17 business interruption without relating to notifiable
 18 disease and the fact that the phrase "manifested by any
 19 person whilst in the premises or within a 25-mile radius
 20 of it" is most naturally read as an adjectival clause
 21 limiting the class of notifiable disease which, if they
 22 interfere with the business, will lead to coverage.
 23 Now, my Lords, in my respectful submission, there
 24 are three errors in this paragraph.
 25 The first is that the required causal link "arising

1 from" is not within the insured peril. It's between the
 2 business interruption and the insured peril that
 3 follows.
 4 Your Lordship has had, I hope, a brief but helpful
 5 explanation earlier as to why that might matter because
 6 causal relationships within the insured peril don't have
 7 to observe the discipline of proximate cause required by
 8 section 55 of the Marine Insurance Act as regards the
 9 relationship of the peril to the loss.
 10 In my case, while we say that's an error, it's not
 11 an error that matters for reasons I've already
 12 explained, namely that it's common ground that the words
 13 "arising from" usually connote proximate cause, the
 14 nexus of proximate cause, and that is the only nexus
 15 apparent between the business interruption and the
 16 various perils that follow. So it doesn't make any
 17 difference.
 18 However, the other two errors, in my respectful
 19 submission, do. The second is the court says that the
 20 reading that you have just heard is the most natural
 21 reading. In other words, the reading which I have
 22 offered to the court is not the most natural reading.
 23 Now, I would respectfully submit that one can test
 24 that by asking this rhetorical question: if any of us
 25 had read this clause a year ago and had been asked what

1 it had meant and what it covered, in my respectful
 2 submission, the result would have been obvious. It's
 3 quite clear that this clause intended to cover the
 4 effects of a notifiable disease manifesting itself
 5 within the premises or the specified area.
 6 The third error, in my submission, is the court's
 7 treatment of the relative clause "manifested by any
 8 person within the premises or within a 25-mile radius of
 9 it". This clause is not a supplement to the description
 10 of the disease. That's already been described. It's
 11 a clause which tells you albeit succinctly what the
 12 disease has done, what has happened to it. In other
 13 words, it describes a contingency and it's that
 14 contingency which, when one refers back, has to be the
 15 cause of the business interruption or loss.
 16 It's easy to say it's adjectival because ultimately
 17 it conditions a noun, but actually it's doing a job
 18 completely different from the clause.
 19 My Lords, that's my case on construction. Can
 20 I just invite the court to see where the court goes on
 21 causation and we find that at page 69 of file C,
 22 paragraph 111 {C/3/69}. I think we've been there
 23 already.
 24 UNIDENTIFIED SPEAKER: No, we haven't.
 25 MR CRANE: Yes, paragraph 111, we can pick it up, I think,

1 halfway down that paragraph. The first part of the
 2 paragraph is dealing with the meaning of the word
 3 "following", but the court says this, halfway down 111:
 4 "Even if the word 'following' imports the
 5 requirement of proximate cause, we would consider that,
 6 given the nature of the cover as we consider it to be,
 7 this is to be regarded as satisfied in a case in which
 8 there is a national response to the widespread outbreak
 9 of a disease. In such a case, we consider that the
 10 right way to analyse the matter is that the proximate
 11 cause of the business interruption is the
 12 notifiable disease of which the individual outbreaks
 13 form indivisible parts."
 14 So that is once you have identified the disease at
 15 large as the peril, it follows that anything caused by
 16 the peril at large, provided it proximately affects the
 17 business interruption, is recoverable and, by parity of
 18 reasoning, it is removed for the purpose of performing
 19 the hypothesis or constructing the hypothesis required
 20 by the trends clause, and we should pick up in 112 the
 21 alternative view of causation which the court regards as
 22 less satisfactory and this really is relevant to
 23 Lord Leggatt's question:
 24 "Each of the individual occurrences was a separate
 25 but effective cause and on this analysis they were all

1 equally effective because the authorities acted on
 2 a national level."
 3 Now, I needn't say any more about the court's
 4 preferred view of causation because it's completely
 5 contingent on who's right as to construction, but if I'm
 6 right on construction, there is no problem as to
 7 causation and we can see that in the way the court dealt
 8 with QBE2 and 3 at paragraph 235, page 104 {C/3/104} and
 9 the background is the court found for QBE on this
 10 wording. They said:
 11 "Given our construction of 3.2.4, the issues as to
 12 causation largely answer themselves."
 13 Now, I needn't read that paragraph because the court
 14 goes on to say how causation works on that hypothesis.
 15 Yes, Lord Hamblen.
 16 LORD HAMBLEN: Why is that, Mr Crane? If paragraph 112 is
 17 right, if each local occurrence is an effective cause of
 18 the national measures taken, why isn't the local
 19 occurrence a proximate cause?
 20 MR CRANE: Because, my Lord, in relation to 3.2.4 the court
 21 has found that the peril is the event constituted by the
 22 occurrence of disease within the relevant radius. Ergo,
 23 on that hypothesis that that construction is right, it
 24 follows that those occurrences have to be proven to be
 25 the cause of the relevant business interruption and

1 elsewhere it's become, in my submission, plain that no
 2 cluster or single case of a local occurrence was the
 3 cause of the measures which affected businesses
 4 throughout the United Kingdom.
 5 LORD HAMBLEN: But if it was a cause, as paragraph 112, why
 6 isn't that good enough?
 7 MR CRANE: Well, my Lord, for this reason: paragraph 112
 8 proceeds and the court regards it as less satisfactory
 9 on the basis that each case of illness is a separate
 10 occurrence and given that that is the case -- and we're
 11 not talking about interdependent clauses here, we're
 12 talking about independent separate clauses -- what has
 13 to be demonstrated on that hypothesis is that the
 14 independent cases of illness manifested or occurring
 15 within a given radius led to or caused the
 16 business interruption in question.
 17 On that basis, one is into cases such as
 18 The Miss Jay Jay and Wayne Tank and Pump, which concern
 19 interdependent clauses, which these are not, but which
 20 are authority for the proposition which again has been
 21 accepted by the Financial Conduct Authority that where
 22 you have non-covered causes and covered causes, we, the
 23 insured, can recover if the covered and non-covered
 24 clauses are roughly of equal efficiency. That's
 25 accepted as the result of those authorities by the FCA.

1 I'll give you the paragraph in their case. It's
 2 paragraph 347 and it's at tab 10 of bundle B, at 439
 3 {B/10/439}:
 4 "The insured will only recover if the insured and
 5 non-insured perils are of roughly equal efficiency as
 6 a cause of loss."
 7 That's what's accepted by the FCA, in my submission
 8 correctly.
 9 Now, on the hypothesis of this -- on the assumption
 10 of this alternative view of causation where each
 11 individual case is an independent cause, one has to ask
 12 whether the combined effect of those causes within the
 13 relevant area is a roughly equal efficiency as a cause
 14 of loss as the effect of cases outside the area
 15 nationally, which prompted the relevant measures.
 16 The question becomes: were the individual cases
 17 within any insured area the efficient or proximate cause
 18 of the loss?
 19 My Lord, that's an hour and ten minutes, including
 20 one minute that Mr Edelman borrowed from me. Unless
 21 your Lordships have any questions with which I can help
 22 at this stage, I would give way to the next insurer.
 23 LORD REED: Well, thank you very much, Mr Crane.
 24 I believe we turn next to Mr Simon Salzedo QC on
 25 behalf of Argenta.

1 Submissions by MR SALZEDO
 2 MR SALZEDO: Thank you very much, my Lord. If it's
 3 convenient to your Lordships, I will first introduce the
 4 Argenta1 wording, then make further submissions on each
 5 of my six grounds of appeal in order. As your Lordships
 6 know, time is very short for the oral argument, so it
 7 is not a mere formality when I say that I also adopt my
 8 written case, I adopt the submissions of Mr Crane in
 9 relation to disease clauses generally, and that includes
 10 his adoption of the submissions of other insurers on
 11 certain aspects.
 12 My Lords, the Argenta wording is at {C/5/259} and if
 13 we turn to page 261 {C/5/261} you can see the contents
 14 page and like Mr Crane's composite QBE1, this also
 15 could be called a composite insurance. The main
 16 sections are buildings insurance, the fourth line of the
 17 contents, and contents insurance. There are then
 18 numerous added extras to those property classes,
 19 including business interruption insurance section
 20 starting at page 55, and in our bundle that's {C/5/314}.
 21 As you can see at the top of the page, 314, the
 22 business interruption section is operative only if the
 23 contents section is operative. So it never stands
 24 alone.
 25 On the next page, 315 {C/5/315} the main

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1 business interruption insurance section:
 2 "If the business at the premises is interrupted as a
 3 result of the premises being made uninhabitable by any
 4 Damage insurable under the buildings insurance section
 5 or the contents insurance section, Argenta will
 6 indemnify the insured for the amount of loss as stated
 7 in the basis of settlement up to the limits of
 8 liability ."
 9 Notice, my Lords, that the phrase
 10 "business interruption" does not feature in the main BI
 11 insuring clause at all other than in the heading. The
 12 closest thing in the text is the word "interrupted",
 13 which is not a defined term.
 14 What, then, is the structure of the main BI clause?
 15 I submit the structure is this: the subject matter of
 16 the insurance is the Business of the Premises. That is
 17 the thing that may get damaged by a peril. It's the
 18 equivalent of the property or the contents insured under
 19 the main section.
 20 The policyholder's insurable interest in that
 21 subject matter is their entitlement to profits from the
 22 Business at the Premises. The type of damage to that
 23 subject matter, which this insurance covers, is being
 24 interrupted. It's the Business being interrupted which
 25 is the equivalent of property being lost or damaged.

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1 The peril which is insured against is the premises being
 2 made uninhabitable by Damage insurable under the
 3 buildings or contents section. That's the fortuity that
 4 might cause damage to the business in the form of
 5 interruption.
 6 As you would expect, the clause specifies a causal
 7 link between peril and damage with the words "as
 8 a result of". The measure of indemnity for interruption
 9 damage is defined in the basis of settlement clause. If
 10 we look now at the basis of settlement clause at page
 11 {C/5/318} again we find that "interruption" and
 12 "interrupted" are not mentioned in this clause at all
 13 other than in the heading.
 14 The principal measure of indemnified loss in (a) of
 15 this clause is the amount by which gross income is
 16 reduced due to the Damage and that confirms that the
 17 sense of the peril is Damage. The words "due to"
 18 express the causal link directly from peril to loss. We
 19 don't need to look, I think, at the other two.
 20 Similarly, my Lords, if you go to page {C/5/314},
 21 turning back a couple of pages, and see the definition
 22 of "indemnity period", again "interruption" is not
 23 mentioned and the indemnity period makes sense only on
 24 the basis that Damage is the insured peril.
 25 On the same page, you find the definition of

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1 "standard gross income", which is the Argenta trends
 2 clause, and it also makes no reference to interruption
 3 and it also treats Damage as the peril which causes the
 4 reduction in gross income.
 5 My Lords, the extensions to the BI cover are at
 6 page {C/5/316}. The heading at 316 is:
 7 "Business interruption insurance section extensions".
 8 So this is expressly stated to be a set of extensions to
 9 the main cover which I have just shown you.
 10 You can see the extended insuring clause in the top
 11 left box on 316, and:
 12 "The company will also indemnify the insured as
 13 provided in the insurance of this section for such
 14 interruption as a result of ..."
 15 Then the list of extended perils.
 16 The word "also" further confirms that this must be
 17 read with the main BI section as an extension of it and
 18 so do the words "as provided in the insurance of this
 19 section". The term "such interruption" is a reference
 20 back to the main BI insuring clause and it means
 21 interruption of the business at the premises.
 22 Again, though, the word "interruption" is not here
 23 a defined or technical term.
 24 The phrase "indemnify for such interruption"
 25 confirms that, as we've seen in the main BI clause, such

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1 interruption is the type of damage for which the
 2 insurance provides indemnity.
 3 The words "as a result of", at the end of the
 4 insuring clause, are causal words. So one would expect
 5 that what follows that phrase will be the insured perils
 6 under the extension. As expected, what follows is
 7 a list of perils, whose role in the extension section is
 8 identical to the role in the main BI section of Damage.
 9 It's common ground among Argenta, the FCA and the
 10 Divisional Court judgment that for the purposes of the
 11 extensions in the definitions that I've shown you of
 12 "basis of settlement" and "standard gross income", where
 13 the word "Damage" appears, it means the relevant peril
 14 insured, including under the extensions where they are
 15 not damage. I add, my Lords, that the same must be true
 16 of the indemnity period definition.
 17 It follows, from simply reading the policy with its
 18 proper structure, that the only way to make sense of the
 19 wording is the analysis that I have been setting out as
 20 I've read it, namely that in the main BI section the
 21 peril insured is Damage, which makes the premises
 22 uninhabitable, and then the extensions, the peril is the
 23 content of each of the boxes on the left-hand side on
 24 {C/5/316} and {C/5/317}.

1 more detail, you can see that each is closely focused on
 2 the Premises, each in its own different way. So in box
 3 one, we have:
 4 "Damage to property in the vicinity which prevents
 5 or hinders use or access to the premises."
 6 Box two is:
 7 "Damage to utilities supplying the insured.
 8 Since the damage has to interrupt the business at
 9 the premises, in practice that means damage to a utility
 10 that supplies the insured's Premises."
 11 Box 3 is similar in relation to other suppliers.
 12 Box 4, going on to page {C/5/317} covers five
 13 sub-paragraph perils:
 14 "(a) restriction on the use of the premises by order
 15 of public authority consequent upon certain matters, all
 16 of which have to occur at the premises.
 17 "(b) any occurrence of [note that phrase]
 18 a notifiable disease at the premises or attributable to
 19 food and drink supplied from the premises.
 20 "(c) a discovery of an organism at the premises."
 21 I'll come back to (d), which is the important one,
 22 in a moment:
 23 "(e) any occurrence of [that phrase again] murder or
 24 suicide at the premises."
 25 5, I'll also come back to in a moment.

1 Then 6:
 2 "Damage to property in the vicinity which deters
 3 potential customers."
 4 Then just going back, we have the two provisions
 5 which have a 25-mile radius requirement. Extension 5
 6 is:
 7 "Pollution or an oil spill within 25 miles."
 8 Note that the maximum indemnity for that one is
 9 a mere £2,500.
 10 4(d) is:
 11 "Any occurrence of notifiable human disease within
 12 25 miles of the premises with a limit of £25,000."
 13 Now, my Lords, every single one of these extended
 14 perils will have some underlying cause which could
 15 itself be the cause of additional loss to the
 16 policyholder. Looking at each type of peril broadly,
 17 first, we've got damage to property. Well, that could
 18 easily form part of a wider issue. There might be
 19 a major flood or a severe weather event.
 20 Secondly, vermin and pests, they never come single
 21 spies. I won't quite submit, my Lords, that in London
 22 you are never more than 6 feet from a rat, but if you do
 23 see a rat or a mouse or a cockroach you can be pretty
 24 sure that you are not far from many, many more of them,
 25 some of which may be at the premises, some of which may

1 not be, and there may be a common cause to any given
 2 infestation.
 3 Diseases, similarly occur in outbreaks, as the FCA
 4 emphasises many times in its case. Even a murder at the
 5 premises could be part of a campaign of terrorism which
 6 could lead to action by the authorities leading to
 7 business interruption, and oil spills have been known to
 8 pollute not just 25 miles area, but thousands of miles
 9 of coastline length in the worst cases.
 10 My Lords, we accept that essential facts of nature
 11 of that kind may be taken to be known by the parties and
 12 with that knowledge, the parties to this contract agreed
 13 to draw particular lines on the causal chains that might
 14 lead from those underlying causes to loss and the lines
 15 are the ones set out in the boxes on page 316 and 317
 16 {C/5/316} and {C/5/317}.

17 Indeed, one could say that that's fundamentally what
 18 insured perils are. They're the agreed stopping points
 19 on the legal causal chain that must be traced through
 20 the complex net of factual issues and factual causes.
 21 In any insurance, the insured will normally benefit from
 22 drawing that line further back from the loss so as to
 23 have more available routes of recovery. The insurer
 24 will benefit from drawing that line closer to the loss
 25 so that there are less available routes factually of

1 recovery. That is one of the key matters that any
2 insurance wording will resolve and of course it may well
3 have an impact on the price of the cover because it's
4 a key matter going to the risk.

5 One further part of the wording to notice on page
6 {C/5/317} in the right-hand box contains the exception
7 exclusions to box number 4 and section exclusion (iii)
8 is:

9 "For any loss arising from those premises that are
10 not directly affected by the occurrence, discovery or
11 accident."

12 What I draw attention to in that exclusion is the
13 phrase "the occurrence, discovery or accident" which
14 words are strongly redolent of specific and discrete
15 events of the sort listed in box 4.

16 My Lords, just stopping to take the words literally
17 at this stage, what extension of 4(d) actually says is
18 that there is an indemnity for interruption to the
19 business at the premises as a result of any occurrence
20 of a notifiable disease within 25 miles of the premises.
21 This is, therefore, cover for damage, the form of which
22 is interruption to the Business at the Premises, only
23 when caused by the peril or fortuity of any occurrence
24 of a notifiable disease within 25 miles of the premises.
25 That's what it actually says.

1 My Lords, the bulk of the business interruption
2 losses with which this case is concerned were
3 immediately caused by government or public responses to
4 COVID-19. The underlying cause was the pandemic itself.
5 As Mr Crane showed you, the judgment at paragraph 81,
6 which if you want to look at it again is {C/3/57} points
7 out that the question that arises on disease clauses is
8 whether there is cover in respect of a pandemic where it
9 cannot be said that the key matters which led to
10 business interruption, and in particular the
11 governmental measures, would not have happened even
12 without the occurrence of COVID-19 within the specified
13 radius.

14 That is the question. There is some attempt by the
15 FCA perhaps to suggest differently on this appeal, but,
16 my Lords, if an individual insured can prove that their
17 losses were caused by occurrences within the radius,
18 then Argenta has never denied cover. That's never been
19 part of the dispute between Argenta and its
20 policyholders. This test case concerns whether or not
21 that is one of the things that has to be proved. The
22 effect of the judgment is that that is one of the things
23 that does not have to be proved.

24 The central question on Argenta's appeal is whether
25 there is cover under extension 4(d) in a case where the

1 insured peril, as defined in section 4(d), does not
2 feature on the causal chain leading to the relevant
3 losses, and Argenta submits that once one reads the
4 policy and identifies the question, with all respect to
5 the court below, it is obvious that there can be no such
6 cover.

7 My Lords, my six grounds.

8 Ground 1 is the identification of the peril and what
9 counts as damage and loss, and I obviously in a sense
10 made submissions about this as I've shown you the
11 policy.

12 Ground 1 is that the court below was wrong to
13 identify the relevant peril in Argenta1 as being
14 a composite of business interruption at the premises as
15 a result of extension 4(d). That's to say bringing
16 business interruption into the peril itself.

17 At the trial, the precise identification of the
18 peril in Argenta1 as being any occurrence of
19 a notifiable disease within 25 miles of the premises was
20 common ground. Argenta pointed that out in writing and
21 orally and was never questioned or contradicted on it.
22 The court overrode that common ground without
23 acknowledgement or explanation. Even on this appeal, my
24 Lords, it remains common ground that the words "as
25 a result of" denote proximate causation in Argenta1 and

1 I'll come back to show you that shortly.

2 On our view of the peril, those words at page
3 {C/5/316} appear between the peril and the damage, which
4 is exactly what you would expect. But on the
5 Divisional Court's analysis and the FCA's case, they are
6 an anomaly. Our analysis is also consistent with the
7 fact that the wording does not state any causal
8 connection between such interruption and loss.

9 My Lords, the FCA notes this point in its
10 respondent's written case at {B/10/403}. If I could
11 just ask your Lordships to look at that, at
12 paragraph 224.2. At 224.2, your Lordships see the FCA
13 write:

14 "Argenta unusually does not include a provision
15 indemnifying for loss resulting from the interruption.
16 It does not specify a causal link between loss and
17 interruption at all, it just provides an indemnity for
18 the interruption. This most likely imports the default
19 proximate cause test between loss and the interruption."

20 So the FCA is driven to argue that the lack of any
21 causal link most likely imports proximate cause. In our
22 submission, that involves strain and artificiality. The
23 natural construction of the words used at {C/5/316} is
24 that the indemnity is for the damage which is
25 constituted by such interruption of the Business. That

1 construction does not invoke causation at all, which is
2 consistent with the absence of causal wording between
3 those two matters.

4 I also refer my Lords on this point to our written
5 case at {B/5/124} at paragraphs 27 to 28 where
6 your Lordships may recall that we have referred to some
7 authorities showing the way that "peril" has always been
8 understood in insurance law, including of course
9 section 55, which Mr Crane has already read to my Lords
10 and we spell out at paragraph 28 the analogy between
11 other forms of more basic insurance, if you like, and
12 business interruption cover.

13 My Lords, what we say about this is also entirely
14 consistent with the history of business interruption
15 cover which the FCA has set out in its written case at
16 {B/10/361}. Your Lordships may recall that at
17 paragraphs 93 to 95 the FCA set out that the origin of
18 business interruption cover was to permit the recovery
19 of consequential losses from property damage. There had
20 been authorities saying that that was not covered and
21 indeed in Argenta it's expressly stated that
22 consequential loss is not covered. That's at page
23 {C/5/353}. We don't need to go to it.

24 In other words, business interruption started not as
25 a peril but as a form of damage involving consequential

1 loss which was not recoverable in the property section.
2 It was made recoverable by making Damage into a peril
3 which was then insured against under the
4 business interruption section.

5 The later addition, historically later, of
6 non-damage extensions didn't change the analysis, all it
7 meant was that damage in the form of
8 business interruption was indemnified if it was caused
9 either by the originally defined peril Damage or one of
10 the new non-damage extended perils. My Lords, on this
11 issue of what counts as the peril, the judgment contains
12 no reasoning, only conclusions, so there's nothing for
13 me to take you to in the judgment.

14 The weak support given to the judgment by the FCA's
15 respondent's written case at {B/10/401}, paragraph 218
16 where they talk about the provisions of some policies
17 that may have a causal link between
18 business interruption and loss, that of course does not
19 apply to Argenta at all. The points that are made
20 against Argenta are at paragraphs 219 and 220
21 {B/10/401}. I'm not going to take time now, but when
22 your Lordships remind yourselves of paragraph 219 and
23 220, you'll see that they are purely to the effect that
24 the issue does not ultimately matter.

25 As to whether the issue doesn't matter,

1 your Lordships were shown by Mr Crane paragraph 100 of
2 the judgment, which shows that the Divisional Court
3 certainly thought that it mattered, indeed thought that
4 it was critical, so it clearly did matter to their
5 decision, even if it should not have done.

6 So, my Lords, ground 1 of our appeal should succeed
7 because the words of Argenta correspond precisely to
8 the orthodox analysis we have set out. There's no
9 reasoning before your Lordships from the court below to
10 suggest a contrary answer and there's no reasoning from
11 the FCA either that could support any different result.
12 My Lords, we say ground 1 should succeed.

13 My second ground is that the court wrongly concluded
14 that the words "as a result of" in Argenta's
15 business interruption extension did not require
16 proximate cause.

17 Now, my Lords, in the introductory part of the
18 respondent's written case at {B/10/346}, paragraph 31,
19 the FCA appears to adopt the view that we criticise on
20 this point, but in the light of what I'm about to say,
21 it seems that what they say there is not intended to
22 apply to Argenta. None of the individual judgment
23 paragraphs they cite at 31 relate directly to Argenta.

24 Later in the written case, when the FCA deals with
25 Argenta specifically, at {B/10/401}, where we were just

1 before, at paragraph 219, which I was referring to on
2 a slightly different point a moment ago, they say that,
3 if you look at paragraph 219 going over onto page 402
4 {B/10/401}, the FCA says:

5 "We have misunderstood the judgment on this point."

6 They say that where the term is "resulting from" the
7 FCA accepts this requires a proximate cause test. They
8 say there is no dispute on this point and Argenta is
9 aiming at the wrong target.

10 My Lords, I assume that when they say "resulting
11 from" they mean "as a result of", which are Argenta's
12 words, and the point is also made explicitly in relation
13 to Argenta again in the FCA case at {B/10/443},
14 paragraphs 361 to 362. So it seems from those
15 paragraphs as if it is expressly and clearly common
16 ground on this appeal that the words "as a result of"
17 mean "proximately caused by".

18 Now, my Lords, I maintain my submission that the
19 Divisional Court got this point wrong as well, for all
20 the reasons given in our written case at paragraphs 42
21 to 46, but given the time constraints, I will assume
22 that your Lordships will accept what is put before them
23 as common ground on this appeal and I will not spend
24 further time on it.

25 But, my Lords, whether because we are right to

1 criticise the judge below -- the judges below -- in
2 ground 2 or whether because it's now common ground, in
3 either event your Lordships should hold that "as
4 a result of" in the Argenta wording are words of
5 proximate causation.

6 On that basis, it follows that what Argenta1
7 actually says is: one, it indemnifies for; two,
8 business interruption; three, proximately caused by;
9 four, any occurrence of a notifiable disease within
10 a radius of 25 miles of the premises.

11 As the court below acknowledged at paragraph 81,
12 which, as I say, you've seen before, it has not been
13 shown in this test case that occurrences within the
14 radius of any particular Argenta policyholder caused the
15 governmental measures which caused most of their losses.
16 That's enough to establish that it has not been shown
17 that the actual words of Argenta1 are satisfied by the
18 generality of claims for COVID-19 losses.

19 The remaining question is whether there's any basis
20 to read the policy as meaning something different from
21 what it actually says; and that takes me to ground 3.

22 Ground 3, my Lords, is that the court wrongly
23 distinguished Argenta1 from QBE2 and 3 which it had
24 found were not triggered by most COVID clauses. Like
25 ground 1, ground 3 of our appeal relates to a point that

1 was not argued at trial. Nobody suggested that the
2 points that the court found made QBE2 and 3 different
3 were relevant points, so we never had the opportunity to
4 address this either as well as to address ground 1.

5 The court was of course right to hold that QBE2
6 and 3 did not provide cover, but it was wrong to
7 distinguish Argenta1 from them.

8 My Lords, if you go to {C/13/852}, you can see the
9 operative words of QBE2 at paragraph 3.2.4(c) and they
10 are:

11 "Loss resulting from interruption or interference
12 with the business in consequence of any of the following
13 events:

14 "(c) any occurrence of a notifiable disease within
15 a radius of 25 miles of the premises."

16 Now, at first sight that's rather similar to the
17 clause I've been showing you at some length in Argenta.
18 What's the difference? The answer is given in the
19 judgment at {C/3/103}, at paragraphs 231 and 232, and
20 the judges below found two differences.

21 At paragraph 231, which I think you have seen
22 already, the point that is being made is that the words
23 "the following events" in the stem at 3.2.4 of QBE2 show
24 that what's insured under (a) to (f) are matters
25 occurring at a particular time in a particular place and

1 in a particular way, and that relates to the
2 Axa Reinsurance authority about the meaning of the word
3 "event". In particular, what their Lordships say in the
4 last eight lines of paragraph 231 is this, they say:

5 "Given the reference to events and taken with the
6 nature of the other matters referred to in (a) (b) and
7 (d) to (f), the emphasis in (c) appears to us in this
8 clause not to be on the fact that the disease has
9 occurred within 25 miles, but on the particular
10 occurrences of the disease within 25 miles. It is the
11 event which is constituted by the occurrences of a
12 disease within the 25-mile radius which must have caused
13 the business interruption or interference. If there
14 were occurrences of the disease at different times
15 and/or different places, these would not constitute the
16 same event and the clause provides no cover for
17 interruption or interference with the business caused by
18 such distinct events."

19 The court thus rightly accepted two points upon
20 which I rely. First, the other matters in the list of
21 extended perils are relevant to the construction of the
22 individual sub-peril with which we're concerned; and
23 secondly, "event" and "occurrence" are at the very least
24 capable of being used in the same sense as each other.
25 There's no problem with an occurrence being an event.

1 We return now to the Argenta wording at {C/5/317},
2 but this is also a list of events in the sense in which
3 that word was used by the court below.

4 "(a) is a closure or restriction on the premises."

5 That must be an event at a particular time and
6 place.

7 "(b) any occurrence of a notifiable disease at the
8 premises or attributable to food and drink supplied from
9 the premises."

10 Plainly an event in a particular time and place
11 occurring in a particular way.

12 "(c) a discovery of an organism likely to result in
13 a notifiable disease plainly an individual event."

14 We will leave (d) to last. Come to (e):

15 "Any occurrence" again, this time it can only be
16 an event in the sense used in the judgment because it is
17 a murder or suicide at the premises.

18 Then going back to (d), we have the third use in
19 this list of five of "any occurrence", and read in
20 context, it's plain that this kind of any occurrence is
21 an event in the same sense.

22 My Lords, in our written case at {B/5/143} at
23 paragraph 81, we have cited some authorities supporting
24 the view that "occurrence" is usually used in the sense
25 of "event". On the next page, at paragraph 82, we've

1 referred to the primary meaning of the word "occurrence"
2 from the Oxford English Dictionary. We say that the
3 natural reading of "occurrence" in this context is the
4 same in our policy as it is in QBE2.

5 The second difference identified by their Lordships
6 below is in the judgment at {C/3/103}, paragraph 232,
7 where their Lordships say that QBE2 states that:

8 "The insurer shall only be liable for loss at those
9 premises which are directly subject to the incident."

10 They find that the word "incident" further
11 emphasises the focus of the clause.

12 I've already shown you, my Lords, that the
13 equivalent provision in Argenta at {C/5/317} refers to
14 "occurrence, discovery or accident," that's the
15 exclusion on the right, which gives exactly the same
16 emphasis in my respectful submission. In any event, if
17 these words "incident" and "event" are really the magic
18 words that unlock the obvious construction, they are
19 used in Argenta¹ to cover generally the insured perils
20 under the policy.

21 If you go to {C/5/349}, this is in Argenta, near the
22 beginning of the policy — sorry, it's not near the
23 beginning, I've got that wrong, near the end, 349, part
24 of the general conditions, you will see that general
25 condition 16(2) and 17(1) both refer to incidence in

1 a way which simply means a matter that might trigger
2 cover. It means a peril under the policy.

3 For the word "event" your Lordships can find that in
4 the Argenta policy right near the beginning at page
5 {C/5/265}. In the first line:

6 "When an event occurs that may give rise to a claim,
7 you should contact your broker."

8 At page 270, in the top paragraph:

9 Definition of "excess":

10 "the amount that will be deducted ... from the total
11 agreed amount of any claim (only one EXCESS will be
12 deducted from the total amount for claims arising out of
13 one event) ..."

14 Using the word "event".

15 Then, turning back to the end of the policy, at page
16 {C/5/350}, in the general conditions under the
17 "Contracts (Rights of Third Parties) Act condition" if
18 your Lordships go to paragraph 2(4):

19 "Up to and at the time of the occurrence of any
20 event which is the subject of any claim under this
21 policy ..."

22 The person claiming shall observe fully the
23 conditions, et cetera.

24 If those are the magic words, my Lords, we have
25 them. But, my Lords, we don't make our submissions on

1 the basis of magic words, as the court below appeared to
2 make its finding, the fundamental issue is what would a
3 reasonable business person understand by the term, "Any
4 occurrence of a notifiable disease within a radius of
5 25 miles of the premises in the context of this policy"?
6 The answer, we say, is again, with respect, rather
7 obvious: any occurrence indicates a single event.

8 You can see what you might call the unities of the
9 reinsurance kind of event are all present here. If you
10 look in the judgment at {C/3/84} paragraph 158, your
11 Lordships see four lines down:

12 "Further, it is common ground between the FCA and
13 Argenta that an occurrence of COVID-19 for the purposes
14 of extension 4(d) requires there to be at least one
15 person within the relevant 25-mile zone on the relevant
16 date who has contracted COVID-19 such that it is
17 diagnosable whether or not it's been verified by medical
18 testing and whether or not it's symptomatic."

19 There's never been any dispute about what is the
20 nature of the occurrence and it is an event. The place
21 where the event takes place, of course, is expressly
22 stated to be within a 25-mile radius of the premises,
23 and the time when a person contracts COVID or comes into
24 the area already having COVID, is obviously a particular
25 time. So all the characteristics of an event, as the

1 Divisional Court used that term, are clearly met.

2 My Lords, this is a convenient point to mention
3 an argument that has surfaced in the FCA's respondent's
4 case in several places which is that because we accept
5 there could be more than one occurrence, it follows that
6 this becomes an insurance for an outbreak of a disease,
7 including an outbreak that exists both within and
8 without the 25-mile radius. That argument involves
9 a fallacy which is really a jagged fault line running
10 all the way through the FCA's case, which is the
11 confusion between, on the one hand, situations that
12 include the insured peril and on the other, situations
13 that constitute the insured peril.

14 To illustrate the point perhaps we can look at
15 extension 4(b) at {C/5/317} which includes the supply of
16 food and drink from the premises. So imagine, my Lords,
17 that some supply of food and drink from the premises
18 leads one or more customers to contract cholera, which
19 you saw earlier is a notifiable disease, what
20 constitutes the insured peril is each occurrence of
21 cholera that is attributable to the supply from the
22 premises. It does not matter whether there is one or
23 more than one such occurrence, if they cause damage to
24 the business, there's cover for that.

25 Now, imagine it's discovered that the underlying

1 cause of the problem was an infection in the mains water
 2 supply of the whole region. It may then turn out that
 3 there was a wider outbreak of cholera which included
 4 occurrences attributable supply from the premises and
 5 also included other cases. Extension 4(b) still insures
 6 the consequences of the cases which constitute the
 7 peril, it does not insure the consequences of the whole
 8 regional outbreak, even though they include the
 9 occurrences that form the peril.

10 Now the FCA's response to that answer is what they
 11 call the jigsaw or the indivisible cause argument which
 12 is the subject of Argenta's ground 4.

13 My Lords, the indivisible cause — perhaps we should
 14 just see it where the court has actually declared the
 15 existence of this thing, which is in bundle {C/1/6}. In
 16 relation to Argenta, you see near the top of page 6
 17 declaration 10:

18 "In Argenta1 and other policies the occurrence of
 19 a case of COVID within a relevant policy area is to be
 20 treated as part of one indivisible cause. Namely, the
 21 national COVID—19 outbreak and the governmental and
 22 public reaction of any business interruption.
 23 Alternatively, [and of course will take us to ground 5]
 24 each such occurrence to be treated as a separate but
 25 effective cause of national action and any subsequent

1 business interruption."

2 Now, my Lords, apart from this case, the combined
 3 might of the FCA's legal team has not been able to
 4 unearth one single case or text authority anywhere in
 5 the whole world where the metaphor of a jigsaw or the
 6 analysis of a part of an indivisible cause has been
 7 applied to any form of causation, not just insurance
 8 law. That's because these phrases are euphemisms, they
 9 are fig leaves for overriding all previous concepts of
 10 legal, effective or proximate causation.

11 The two metaphors, which are used interchangeably by
 12 the FCA, are not even compatible with each other,
 13 because the jigsaw obviously is divisible into its
 14 parts. That's the essence of a jigsaw. If a policy
 15 insures one piece of a jigsaw and it turns out later
 16 that that piece which was insured is part of a jigsaw,
 17 it does not follow that the whole jigsaw is what was
 18 insured. That is simply wishful thinking after the full
 19 picture is revealed, contrary to the dictum of
 20 Sir Thomas Bingham which your Lordships were shown by
 21 Mr Crane.

22 The orthodox approach to legal causation is to view
 23 it as a chain. If authority is wanted for that rather
 24 mundane proposition, and perhaps it's not, but you can
 25 find it in our bundles in The Kos at {E/15/298} where

1 you can see in the judgment of Lord Clarke at
 2 paragraph 75 confirmation that legal causation generally
 3 runs in chains, not in jigsaws or in parts of
 4 indivisible wholes.

5 Now, my Lord, I don't mean by saying that to
 6 oversimplify the causal enquiry. The chain of legal
 7 causation is picked out against the background of the
 8 net of factual causation in all its complexity, and it's
 9 that task of picking out the relevant chain which is
 10 ultimately accomplished with the use of the court's
 11 common sense. But the criterion to which the court
 12 applies its common sense is the words of the parties'
 13 agreement in a contract case including an insurance
 14 case.

15 The effect of the jigsaw indivisible cause argument
 16 is the following. The effect is this: square 1 is the
 17 insured peril defined in the policy; occurrences within
 18 25 miles. Instead of going from there directly to the
 19 loss, as you might in any ordinary case, in this case,
 20 you climb up a causal ladder to a more remote cause, the
 21 pandemic. You then slide down a causal snake through
 22 the government reaction in order to reach the final
 23 destination of the loss. But during the whole journey,
 24 you don't go back to square 1. The peril is treated as
 25 just a starting point which has no linear relevance to

1 the loss that you claim. The effect of the jigsaw
 2 approach is stated in the FCA's respondent's case in
 3 many places, one of them where we can just see two
 4 points together so it's convenient is {B/10/347} in the
 5 FCA's respondent's case where, at paragraph 39, they say
 6 this, and we'll obviously need to turn the page in
 7 a moment:

8 "As to this question of construction, the court's
 9 primary findings were that the cover for the disease
 10 outbreak as a whole is not confined to interruption
 11 caused by the part of the outbreak which is inside the
 12 radius. Accordingly, there is cover for the disease if
 13 it has a local presence and the radius qualifier is
 14 merely adjectival."

15 So there's two points there that I want to draw out.
 16 The first is the FCA invites the court to rewrite the
 17 clause so that it insures outbreaks of
 18 notifiable disease. At other times they go further and
 19 they suggest that the insured peril is simply disease
 20 and the court sometimes refers to the insured peril as
 21 COVID—19. It's also transparent in the judgment that
 22 the effect of it is to rewrite the clause, and to see
 23 that in relation to Argenta your Lordships can look at
 24 {C/3/85}, judgment paragraph 161.

25 And if your Lordships look at paragraph 161, I'll

1 paraphrase it if I may. They say: point 1, starting on
2 the second line, the Argenta clause 4(b) — 4(d) does
3 not mean what it actually says. Point 2, starting on
4 the fourth line, instead it means something different.

5 And point 3, this does no violence to the language used.
6 Now, with all respect, their Lordships protest too
7 much. Violence to the language is precisely what they
8 have done by that form of reasoning.

9 If a clause did purport to insure an outbreak before
10 a disease, that word would obviously require definition
11 because, as Mr Crane reminded you, not all
12 notifiable diseases are brand-new pandemics where we
13 know exactly when they started and what a response is
14 a response to. Many diseases have been around for
15 centuries and they wax and wane at varying speeds. As
16 you've seen already at {E/5/88}, mumps and measles are
17 among notifiable diseases and the policy has to apply
18 equally to them as it does to COVID-19. And in fact, as
19 you've seen, Argenta1 does not purport to insure against
20 outbreaks and it does not purport to insure against
21 diseases. It only purports to insure against occurrence
22 of notifiable diseases within a particular radius.

23 The FCA's emphasis that such — my Lord,
24 Lord Leggatt has a point.
25 LORD LEGGATT: Are you suggesting, Mr Salzedo, that it's

1 necessary to prove a causal link for the purpose to
2 apply between a particular individual case and the
3 interruption of the business? Surely there can be a set
4 of cases — even on your construction, wouldn't you
5 accept that there could be 50 occurrences of a disease
6 that causes an interruption and you don't have to show
7 that each is separately and discretely a cause.

8 MR SALZEDO: Yes, absolutely right, my Lord, I do accept
9 that and, as I mentioned earlier, that's where the —
10 the FCA treat this as — that point as if it's
11 a concession that we're insuring outbreaks and I hope
12 I dealt with that by saying — by submitting that the
13 fact that we accept that if there are 50 outbreaks
14 within a 25-mile radius the question then will be,
15 "After that date, what did those 50 outbreaks cause?"
16 does not mean that we accept that we are insuring in
17 general an outbreak consisting of those 50 plus another
18 100,000 from somewhere else. And that's the distinction
19 between the two cases. But, yes, if I spoke as if I was
20 suggesting that there had to be an individual causal
21 chain from each one, then I didn't mean that. But of
22 course it does depend — it may be relevant to the date
23 on which any claim starts from. If an interruption is
24 claimed from a certain date, it's the cases up to that
25 date that have to cause the interruption. There may be

1 more cases at a later date, there may be different cases
2 at a later date, and — but I certainly accept it's that
3 group of occurrences within the 25 miles which are the
4 insured peril and from which a causal chain must be
5 picked out to loss.

6 LORD LEGGATT: Thank you.

7 MR SALZEDO: Now, given that the Argenta policy does not
8 purport to insure outbreaks or diseases, your Lordships
9 might expect to find something in the judgment or in the
10 FCA's written case to deal with the point of language as
11 how as a matter of language peril 4(d) could be
12 understood to mean that there's cover for the effects of
13 an outbreak as far as the borders of the UK, or maybe
14 it's England and Wales, or maybe it's England — I'm not
15 sure what "national" means — but no further.

16 The only linguistic point made in the judgment to
17 support this is at {C/3/85}, paragraph 160. And in the
18 first sentence of 160 their Lordships said:
19 "Critical here again is in the fact that
20 Extension 4(d) does not say 'any occurrence of
21 a NOTIFIABLE HUMAN DISEASE only with a radius of 25
22 miles of the PREMISES' or anything which dictates such
23 a reading."

24 My Lords, there's the obvious point that what's
25 missing is generally treated to be quite a weak argument

1 of construction but, leaving that aside, there are four
2 reasons at least — four main reasons I would like to
3 put forward as to why that proposition makes no sense.

4 First, the word "only" is implicit in every
5 definition of an insured peril. If damage caused by
6 fire is insured by clause X, it's only such damage which
7 is insured by clause X.

8 Secondly, adding the word "only" where the court
9 would have it added seems to mean that the disease
10 itself must not spread outside the 25 miles in order to
11 remain a peril. But we've never suggested the fact that
12 the disease or a given outbreak may include occurrences
13 outside the radius is an answer to a claim. The
14 suggested wording by the court, therefore, would impose
15 a restriction for which we've never contended.

16 And, thirdly, the word "only" is equally missing
17 from QBE2 and 3 where its absence did not concern the
18 court and the same point might be made, while I'm on
19 this, about any of the alleged anomalies or the
20 indivisible cause point altogether, as we point out in
21 our written case at paragraph 94(2). The fact that QBE2
22 and 3 can be read sensibly free of those concerns shows
23 that those concerns are not decisive in a way that would
24 require Argenta1 to be read contrary to its express
25 terms.

1 And, fourth, the word "only" is not found in any of
2 the Argenta BI extensions either. As I showed
3 your Lordships earlier, peril 4(b), for example, at
4 {C/5/317} is syntactically identical to 4(d).

5 In our written case, at paragraph 74(3), we made the
6 point that the judgment below would imply that 4(b) —
7 which you remember is cases at the premises or
8 attributable to food and drink supplied from the
9 premises — that that clause would cover any loss from
10 the pandemic, which is even more extraordinary than the
11 result reached in relation to 4(d).

12 As Mr Crane mentioned, the FCA's response to that
13 point is in their written case at {B/10/394} at
14 paragraph 194. And what the FCA say in paragraph 194,
15 in the last sentence of that paragraph, is:

16 "The clause envisages measures directed specifically
17 at the premises to stop that repetition or spread;
18 measures that would be taken on a national or wide area
19 basis. The fortuity is therefore, as a matter of
20 construction, contemplating and limited to
21 at—the—premises aspect of any disease, not a wider
22 outbreak."

23 So they concede that 4(b) is limited.

24 They then attempt at paragraph 195 to distinguish
25 4(d). And the only point they make in paragraph 195 is

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1 that 25 miles is further away and suggests a wider
2 outbreak and potentially more responsive measures than
3 the words "at the premises".

4 Now, my Lords, that's true, of course. The question
5 though is: how much wider? And the answer is given in
6 the question. It's precisely 25 miles wider.

7 The FCA does not and cannot point to anything in the
8 wording of peril 4(d) that would assist a reasonable
9 reader to understand that the phrase "within a radius of
10 25 miles" is, in their term, adjectival and thus plays
11 a quite different role to the words "at the premises" in
12 4(b).

13 Now, my Lords, I've got a couple more things to say
14 about "adjectival", but I see the time and I wonder if
15 your Lordships would prefer to take a break now.

16 LORD REED: Yes, thank you, Mr Salzedo. We'll adjourn now
17 and resume at 2 o'clock. Thank you.

18 MR SALZEDO: Thank you.

19 (1.00 pm)

(The luncheon adjournment)

21 (2.00 pm)

22 LORD REED: Welcome to the Supreme Court where we're hearing
23 the appeal in the proceedings brought by the
24 Financial Conduct Authority against a number of
25 insurers. We're ready now to return to Mr Simon Salzedo

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1 QC who is making submissions on behalf of insurers named
2 Argenta.

3 Mr Salzedo.

4 MR SALZEDO: My Lord, thank you. Just before we broke for
5 lunch I was showing your Lordships the phrase "merely
6 adjectival" which, as you know, is in the judgment but
7 I was showing it from the FCA's written case at
8 {B/10/394}. I was making the submission that labelling
9 the express definition of the peril as "merely
10 adjectival" does not advance the argument, but it does
11 reconfirm that what the FCA is asking the court to do is
12 to rewrite the clause. It also begs the obvious
13 question: if the radius limit is merely adjectival, then
14 what is the noun?

15 Now, in the clause we know what the noun is, it's
16 "any occurrence", but that doesn't assist the FCA's case
17 because to say "within 25 miles is adjectival of any
18 occurrence" doesn't really say anything other than the
19 words of the policy. What they seem to mean by using
20 the phrase "merely adjectival" is actually that you
21 should change the noun and that the noun is not "any
22 occurrence" but the noun should be something like "any
23 outbreak of a disease including an occurrence". But,
24 "outbreak" is not relevantly in the wording at all. So
25 when your Lordships see this phrase "merely adjectival"

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1 your Lordships should bear in mind that what's really
2 being hidden by it is actually an attempt to change the
3 noun, not an attempt to say what is and isn't
4 an adjective.

5 My Lords, the court below, of course, did purport to
6 claim to be determining the intention of the parties in
7 the traditional sense, but it nowhere formulated in
8 relation to Argenta what exactly the intention of the
9 parties was and more importantly on this point, the
10 point about the jigsaw point, the court, I'm afraid,
11 lost sight of the principle that the intention of the
12 contracting parties is to be gathered primarily from the
13 words of the contract and not from anything else.

14 My Lords, I move then to ground 5, separate
15 concurrent causes. So this is the alternative argument
16 of the FCA, which the court below described as less
17 satisfactory but said it would in any event accept if
18 the first argument was not, and that is that each and
19 every occurrence of COVID-19 was a concurrent proximate
20 cause of all the government measures and public
21 reactions that came after that occurrence.

22 Now, my Lords, we've dealt with this in our written
23 case at {B/5/148} from paragraphs 97 to 105, and I adopt
24 all of those points. But in my remaining time I'd like
25 to develop just one point about this.

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1 The law on this point includes, and perhaps almost
 2 starts in terms of express statement, with a well-known
 3 statement of Mr Justice Devlin in
 4 *Heskell v Continental Express*, which was before the
 5 court below, although it's not itself in our bundles,
 6 but you can see it in bundle {G/11/118} where, at
 7 paragraph 53 of I think one of the skeleton arguments
 8 that was before the court below, there's a quotation
 9 from Mr Justice Devlin in *Heskell v Continental Express*
 10 that where:
 11 " ... a breach of contract was one of two separate
 12 causes of loss which were 'both co-operating and both of
 13 equal efficacy,' that would establish liability ."
 14 My Lords, although other aspects of the decision in
 15 *Heskell* have been questioned since, that particular
 16 dictum has been followed many times. As your Lordships
 17 know, it was accepted by the Court of Appeal in
 18 *Wayne Tank*. If we could quickly look at that at bundle
 19 {F/50/1055}. In the judgment of Lord Denning, at
 20 page 67C of the report, you can see that Lord Denning
 21 also talked of:
 22 " ... not one dominant cause, but two causes which
 23 were equal or nearly equal in their efficiency in
 24 bringing about the damage."
 25 My Lords, at the foot of that page, just going over

1 to the next page {F/50/1056}, Lord Denning again
 2 referred to the matter in a similar way:
 3 "Their exemption is not taken away by the fact that
 4 there was another cause equally efficient also operating
 5 to cause the loss."
 6 And your Lordships can see in our bundle at
 7 page 1057 {F/50/1057}, which is the next page on that
 8 Lord Justice Cairns at the very top of the page also --
 9 well, in fact, sorry, if you start at the bottom of 1056
 10 {F/50/1056}, just starting at the bottom of 1056
 11 Lord Justice Cairns said:
 12 "But for my part I do not consider that the court
 13 should strain to find a dominant cause if, as here,
 14 there are two causes both of which can properly be
 15 described as effective causes of the loss. Mr Le Quesne
 16 recognised that if there are two causes which are
 17 approximately equal in effectiveness, then it is
 18 impossible to call one rather than the other the
 19 dominant cause. I should prefer to say that unless one
 20 cause is clearly more decisive than the other, it should
 21 be accepted that there are two causes of the loss and no
 22 attempt should be made to give one of them the quality
 23 of dominance."
 24 Similarly, in *The Miss Jay Jay*, if your Lordships
 25 would look at that, please, at {E/23/584}, in the

1 judgment of Lord Justice Lawton on the right-hand side
 2 of that page, 36, from the report, he refers to
 3 *Wayne Tank* and said:
 4 "In that case there were two causes of a fire ...
 5 This Court adjudged that the dominant cause came within
 6 the exception. All three members of the Court, however,
 7 considered what should happen when there were two causes
 8 which were equal or nearly equal in their efficiency in
 9 bringing about the damage ..."
 10 That was the case being considered.
 11 Similarly, at {E/23/588}, in the judgment of
 12 Lord Justice Slade, at the very top of this page,
 13 page 41 {E/23/589} of the report:
 14 "I therefore conclude that the loss in the present
 15 case is properly to be treated as having been
 16 'proximately caused' by a peril insured against ... even
 17 though the faulty design ... may have been of equal
 18 efficiency in bringing about the damage."
 19 So what we have here is a series of statements of
 20 the law, which have been treated as authoritative ever
 21 since, which suggest the following: that the process the
 22 court goes through is, first, to identify the
 23 efficacious or effective or proximate or substantial
 24 causes of the loss, of which there will normally be one,
 25 two, perhaps in a case that hasn't yet come to court

1 there could be three, and then the court will work out
 2 whether one of them is dominant, in which case it is the
 3 proximate cause, or if more than one of them are of
 4 approximately equal efficacy. In that case the
 5 well-known consequences, for insurance anyway, set out
 6 in *Wayne Tank* and *The Miss Jay Jay* take effect.
 7 Now, my Lords, in this case if you were to say that
 8 all of the hundreds of thousands of occurrences of COVID
 9 in the UK in the early months of 2020 were of equal
 10 efficacy, including the vast number that were never
 11 diagnosed and many of which had no symptoms whatsoever,
 12 so nobody knew they existed, that could only be on the
 13 basis that the causal potency of which one was
 14 approximately zero.
 15 Now, you might say, yes, 100,000 things all with
 16 approximately zero causal potency are of equal efficacy.
 17 But, my Lords, the problem with this argument is that it
 18 turns the process on its head. The court does not start
 19 by saying there are millions of facts about the world
 20 which all contributed an infinitesimal amount to the
 21 final outcome and to the policyholder's loss and, since
 22 all those contributed an infinitesimally small causal
 23 amount, they're all of equal efficacy and therefore
 24 they're all proximate causes. Of course the court does
 25 not do that.

1 Instead, the court starts, obviously with the
2 assistance of the parties, by identifying from among the
3 millions of facts about the world the ones that are
4 candidates to be proximate causes. The ones that are of
5 sufficiently important causal effect to qualify. In the
6 case of insurance, the key question is whether the
7 insured peril is among those candidate proximate causes.
8 If there's a dispute, the court then chooses from among
9 those candidate proximate causes and in some cases will
10 say more than one is of equal efficacy.

11 The effect of the judgment below on this point is to
12 say that there's an infinite number of infinitely small
13 contributions and that adds up to the whole. But anyone
14 with a mathematical background will tell you that if you
15 start dividing by zero or by infinitely small
16 quantities, then your analysis will lead you to
17 fallacious results. The same is true of causation.

18 My Lord, Lord Leggatt.

19 LORD LEGGATT: May I put a hypothetical case to you,
20 Mr Salzedo.

21 Suppose that there is a bus standing at the edge of
22 a cliff and 20 people get together and between them they
23 push the bus over the cliff leading to its destruction.
24 We can suppose that any one individual wouldn't nearly
25 be strong enough on their own to push the bus over the

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1 cliff. Indeed, it would have taken 15 or 16 of them to
2 do it. That also means that if you ask, in relation to
3 any one particular individual, whether that person
4 hadn't taken part would the bus still have been
5 destroyed, the answer is "yes". But might we not want
6 to say in that example that each person's contribution
7 was an equally effective cause of the loss?

8 MR SALZEDO: My Lord, the final question — obviously
9 an equally effective cause it may well be on
10 your Lordship's example, but that doesn't make it
11 a proximate cause because the question is what are the
12 substantial causes?

13 In that case, it would depend what purpose you were
14 asking the question for. I mean, to make it equivalent
15 to an insurance context, you'd need to be saying that
16 the bus had insurance against the possibility of
17 passenger 1 destroying it, but no insurance against the
18 other 19 doing so.

19 Now, if that was the position, there would then have
20 to be a factual enquiry as to what was the nature of the
21 joining together of the 20 people in their decision to
22 push the bus over the cliff and what were the causes of
23 that.

24 Now, if the position is that passenger 1 was simply
25 someone who went along, was overborne, perhaps, by the

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1 forceful personalities of some other passengers who
2 decided that this was the thing to do, then it may well
3 be that passenger 1's contribution was not a proximate
4 cause of the loss. If passenger 1 was the ringleader,
5 then it may be that theirs was. If your Lordship is
6 simply positing well, as a matter of physical force they
7 all joined together equally, then my submission is
8 that's a totally unrealistic example because this isn't
9 a question in physics, this is a question in legal
10 causation and in legal causation what matters is what
11 caused it to happen.

12 Now, as a question of physics you've then got 20
13 exactly equal causes and it may be that a physicist
14 would say that they are all, 20, equally the cause, if
15 that's the case. It may be a physicist could work out
16 you needed ten. In legal causation, the question is:
17 was there some kind of joint effort? Was there a motive
18 force and, if so, what was it and what caused it?

19 My submission is one can come up with logically
20 possible physics examples, but in the law one looks for
21 the proximate causes and in all the time of the
22 development of the common law, as it happened, I'm not
23 sure there's ever been more than two and certainly not
24 more than three. I'm not saying it's impossible, I'm
25 not saying it couldn't be three or four, there's no

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1 reason to make a principled division in terms of number,
2 but where there is a reason to take a principle division
3 is in the order of enquiry which is you've got to look
4 for seriously effective causes and then choose your
5 proximate cause or causes from among them.

6 My Lords, the reason you have to do that is because
7 if you use the analysis of the court below and just say
8 you've got an infinite number of infinitely small
9 causes, then you can prove effectively anything and the
10 certainty of contractual construction is set at nought
11 and, in our submission, that is not the way to go.

12 My Lords, therefore that ground should also be
13 upheld, in my respectful submission.

14 Ground 6 is the Orient—Express which I leave to
15 Mr Kealey.

16 My Lords, can I assist your Lordships any further?

17 LORD REED: Thank you very much, Mr Salzedo.

18 In that case we can turn next, I think, to Mr Kealey
19 on behalf of MS Amlin.

20 Submissions by MR KEALEY

21 MR KEALEY: My Lord, yes, I'm Gavin Kealey and I act for
22 MS Amlin. I shall be making submissions on the disease
23 clauses in the Amlin contracts, on the relevance and
24 application of the factual "but for" causation test in
25 those contracts and generally, and on behalf of insurers

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1 on Orient—Express.
 2 Now, it's not my purpose to defend either
 3 Lord Hamblen or Lord Leggatt in relation to the
 4 Orient—Express. They can defend themselves much more
 5 adequately than ever I could, but nevertheless I'm going
 6 to have an attempt which may or may not be successful.
 7 Our written case, my Lords, is at {B/7/205} and it is
 8 commended to your Lordships. I commend it to
 9 your Lordships mainly because I had no part in its
 10 writing and therefore it is much better than anything
 11 that I can actually personally deliver, but it is very
 12 good. Any gaps in my oral submissions — and there will
 13 be lots of them — can be filled by looking at our
 14 written case.
 15 Now, in the relation to the Orient—Express, I'll
 16 come back to that towards the end of my submissions but
 17 we say that the decision of Hamblen J, as then he was,
 18 if I can call him that, in Orient—Express is relevant to
 19 two essential matters.
 20 First, the identification of the insured peril as
 21 distinct from the uninsured cause of the insured peril.
 22 Secondly, the existence, application and effect of the
 23 factual "but for" causation test, both as a matter of
 24 contract, but more specifically as a matter of insurance
 25 contract law. It is also, as it happens, a decision on

1 wide area damage. It is instructive in the present
 2 context of wide area disease, and we say that it was
 3 right to decide it both at, as it were, first instance
 4 by the arbitral tribunal and also on appeal by
 5 Mr Justice Hamblen.
 6 Now, you've just heard Mr Crane and Mr Salzedo. We
 7 adopt their submissions. Whilst our causes are not
 8 identical to those of QBE and Argenta, we say that on
 9 the proper analysis, the differences are not
 10 substantive.
 11 My Lords, I'm going to be unfortunately a little
 12 tedious because I have to take you to the MSA disease
 13 clauses before I delve into areas of law of factual
 14 causation.
 15 Now, there are two MSA disease clauses, MSA1 and
 16 two. They are materially identical, so I'm just going
 17 to focus initially on MS A1 and your Lordship will see
 18 MS A1 in {C/10/504} and the relevant page at which you
 19 should begin is 504.
 20 One thing that you should bear in mind while I take
 21 your Lordships through, as it were, the preamble parts
 22 of this contract, is that the causal connector in my
 23 client's disease clause is the word "following". So
 24 when I emphasise the word "following" you'll know why
 25 I am placing emphasis on it. If I emphasise another

1 causal connector, you will probably be able to deduce
 2 why I'm placing emphasis on that other causal connector.
 3 But the welcome page is at {C/10/504}. If you have
 4 it in front of your Lordships, it is part of the
 5 contract. It is not just a welcome page, rather like
 6 a sort of invitation or just say "hello, it's nice to
 7 see you", it is actually part of the contract and you'll
 8 see that from the second paragraph:
 9 "This document, any endorsements, certificates and
 10 the schedules must be read together as one contract as
 11 they form your policy.
 12 "In return for payment of the premium shown in the
 13 schedule, we agree to insure you against ..."
 14 The first bullet point is:
 15 "Loss or damage you sustain."
 16 In other words, physical damage. It's the material
 17 damage clause that your Lordships find typical in these
 18 contracts. The second bullet point is:
 19 "Loss resulting from interruption or interference
 20 with a business following damage."
 21 The third bullet point, not relevant, is:
 22 "Legal liability you incur for accidents."
 23 That's the welcome page, and you'll see that it says
 24 "following damage". Now if you compare that, my Lords,
 25 with the main business interruption insuring clause,

1 which your Lordships will see in the same document at
 2 page 560 {C/10/560}, and as I read this out you'll
 3 recall the emphasis I placed on "following", following
 4 damage. In the insuring clause, the draftsman has
 5 said, this is business interruption option, section 6:
 6 "For each item in the schedule, we will pay you for
 7 any interruption or interference with the business
 8 resulting from damage to property used by you at the
 9 premises for the purposes of the business occurring
 10 during the period of insurance caused by an insured
 11 cover and provided that damage is not excluded under
 12 section 1."
 13 Now, there are two things to be borne in mind when
 14 I read that out as they come to me. Firstly, of course
 15 "resulting from" is equivalent to "following". In other
 16 words, the draftsman uses "resulting from"
 17 interchangeably with "following". My Lords, whether
 18 that's as a matter of elegance of prose or whether it is
 19 deliberate, I know not, and nor do you but it's quite
 20 clear that they are interchangeable.
 21 Secondly, and this is just a passing remark of no
 22 great significance, but your Lordships may like to point
 23 it out or I will point it out to you, it says:
 24 "Provided that damage is not excluded."
 25 In other words, when the draftsman wants to use a

1 proviso, the draftsman uses a proviso. When it says
 2 "provided that damage is not excluded", then that's the
 3 proviso that it employed. There was no such proviso in
 4 any of the disease clauses. You've heard from Mr Crane
 5 and Mr Salzedo on that, but the draftsman in this
 6 contract could well have used the same proviso language
 7 if he or she had wanted.

8 Definition of damage, because we've seen damage is
 9 emboldened, is way back at 512, so it's {C/10/512}. And
 10 damage there, my Lords, is:
 11 "Loss or destruction of damage to the property
 12 insured as stated in the schedule."
 13 In other words, it's physical loss or damage as
 14 found by the court below and we don't disagree with that
 15 at all.

16 Then your Lordships, I'm afraid to jump again, to go
 17 now to bundle {C/10/560}, same bundle. So just below
 18 the insuring clause that we've just looked at, we see,
 19 as it were, at the second hole punch that your Lordships
 20 may or may not have, we have "Claims — basis of
 21 settlement A — Gross Profit".
 22 It says:
 23 "The insurance by this item is limited to loss of
 24 gross profit not exceeding the limit of liability due
 25 to:

1 "a) reduction in turnover ..." et cetera.
 2 Then it says:
 3 "... the amount payable will be:
 4 "1 for reduction in turnover, the sum produced by
 5 applying the rate of gross profit to the amount by which
 6 the turnover during the indemnity period will following
 7 the damage ..."

8 In other words, that's the amount by which the
 9 amount of the turnover will, following the damage, in
 10 other words caused by the damage, "fall short of the
 11 standard turnover."
 12 Then your Lordships should know the definition of
 13 "standard turnover" which is at page 559 {C/10/559},
 14 that immediately preceding that on which I am.
 15 "Standard turnover" is defined as:
 16 "The turnover during that period in the 12 months
 17 immediately before the date of the damage which
 18 corresponds with the indemnity period to which
 19 adjustments will be made as necessary to provide for the
 20 trend of the business and for variations in or other
 21 circumstances affecting the business had the damage not
 22 occurred."
 23 So the figures adjusted represent as nearly as may
 24 be reasonably practicable the results which, but for the
 25 damage, would have been obtained during the relative

1 period after the damage.
 2 So the "but for" factual causation test is directly
 3 applicable to the standard turnover and to adjustments
 4 to be made.
 5 Now, these are very typical clauses. They're called
 6 trends clauses, standard turnover clauses. They're
 7 covered by my Lord Mr Justice Hamblen in Orient—Express.
 8 They are typical of all the contracts with which
 9 your Lordships are concerned and indeed the way in which
 10 the court below treated the reference to "damage" in the
 11 context of the extensions to business interruption was
 12 to replace "damage" with "insured peril" and we don't
 13 disagree with that at all.

14 In relation to the extensions, the
 15 business interruption extensions, it would read:
 16 "Affecting the business had the insured peril not
 17 occurred so that the figures adjusted represent nearly
 18 as may be reasonably practical the results which but for
 19 the insured peril would have been obtained during the
 20 relevant period after the operation of the
 21 insured peril."
 22 My Lords, if you could now go to page 566
 23 {C/10/566} — I haven't even got to the disease clause
 24 yet, but if you go to 566, you will see the "Action of
 25 competent authorities". This is the beginning of the

1 business interruption optional additional cover section,
 2 and it's provided as standard. So it comes with the
 3 policy, my Lord.
 4 "We will pay you for:
 5 1. Action of competent authorities.
 6 "loss resulting from interruption or interference
 7 with the business following action by the police or
 8 other competent local, civil or military authority
 9 following a danger or disturbance in the vicinity of the
 10 premises where access will be prevented provided
 11 always ..."

12 Again, my Lords, the draftsman knows exactly what
 13 a proviso looks like and can even write it:
 14 "... provided always that there will be no liability
 15 under the additional cover for loss resulting from
 16 interruption to the business during the first 24 hours."
 17 My Lords, there's a generous display there of the
 18 word "following". Now, en passant, I mention that the
 19 court below correctly accepted that the word "following"
 20 in that clause meant "caused", not some loose causal
 21 connection. Rather, my Lords, a direct causal
 22 connection. In other words, the business interruption
 23 must have been caused by the action of police,
 24 et cetera, and must have been caused by the action of
 25 police, et cetera, following a danger in the vicinity of

1 the premises.
 2 So you can have a danger in the vicinity of the
 3 premises, which could be, in fact, outside the vicinity
 4 of the premises as well, but the court below considered
 5 that it was only the danger within the vicinity of the
 6 premises which was the necessary causal requirement.
 7 Your Lordships see that, my Lords, at the judgment at
 8 paragraph 437, which if your Lordships could turn to it,
 9 is in bundle {C/3/155}.

10 My Lords, I think Mr Crane read 436. I'm going to
 11 read 437 to you.

12 "Even if there were a total closure of insured
 13 premises pursuant to the Regulations, there could only
 14 be cover if the insured could demonstrate that it was
 15 the risk of COVID-19 in the vicinity in that sense of
 16 the neighbourhood of the insured premises, as opposed to
 17 in the country as a whole, which led to the action of
 18 the government in imposing the regulations.

19 "It is highly unlikely that that could be
 20 demonstrated in any particular case. The narrow and
 21 localised nature of this cover means that the wider
 22 issues of causation and counterfactuals, such as we've
 23 discussed in relation to Arch and EIO [that's
 24 Ecclesiastical, my Lords] wordings above and such as we
 25 discussed earlier in the judgment in relation to the

1 so-called disease clauses and hybrid clauses do not
 2 arise."

3 So the court there construed "following" as meaning
 4 "caused by" and required that which was local -- that
 5 which was local, my Lords -- to be causative of the
 6 business interruption.

7 Against that background, my Lords, I now turn to the
 8 disease clause which your Lordships will find at
 9 page 567. That's {C/10/567}. Which is obviously the
 10 primary cause with which I'm concerned at this stage of
 11 my submissions.

12 Now, your Lordships see that clause and as you cast
 13 your eyes down, you will see that, apart from (a)(iii),
 14 every insured peril there identified is something
 15 occurring at or from the premises. The exception is
 16 (a)(iii). It says:

17 "Consequential loss as a result of interruption or
 18 interference with any a business carried on by you at
 19 the premises following:
 20 "iii. any notifiable disease within a radius of
 21 25 miles of the premises ..."

22 Now, there's four specific components to which
 23 I wish to draw your attention.

24 First, "notifiable disease" is not an abstract
 25 concept, it is a defined term, and the definition, my

1 Lords, you'll find back at page 559 {C/10/559}. It's
 2 not disease generally, as the court below appears to
 3 have thought. Just for your reference, my Lords,
 4 paragraph 196 at {C/3/94}. It is specifically, my
 5 Lords, illness sustained by any person resulting from:
 6 "b) any human infectious or contagious disease
 7 (excluding ... AIDS)) an outbreak of which the
 8 competent local authority has stipulated will be
 9 notified to them."

10 Now, in doing that I've actually missed out (a).
 11 That was actually deliberate so I could emphasise now
 12 (a) because it is:

13 "Illness sustained by any person resulting from food
 14 or drink poisoning or any human infectious or contagious
 15 disease."

16 Now, it is all preceded, my Lords, by illness
 17 sustained by any person resulting from (a) or (b). It
 18 is therefore specifically illness or illnesses sustained
 19 by persons resulting in our case from COVID-19. If
 20 a person sustains an illness, in other words falls ill
 21 from disease, that in any normal sense is a form of
 22 occurrence or event. It is specific to that person. It
 23 is something that that person has sustained. It is
 24 something that that person has had, as it were, befallen
 25 upon him. It's not a state. It's not a situation.

1 It's not a state of affairs. It's not the existence of
 2 something. It is actually someone sustaining illness.
 3 It is an event. It is an occurrence in all but name.

4 If your Lordships take notifiable disease and the
 5 definition and you plug that in at page 567 to the
 6 notifiable disease clause, it reads as follows, my
 7 Lords:

8 "Consequential loss as result of interruption of or
 9 interference with the business carried on by you at the
 10 premises following illness sustained by any person
 11 resulting from any infectious or contagious disease,
 12 an outbreak of which the competent local authority has
 13 stipulated will be notified to them."

14 That's the first component.

15 The second component, my Lords, that you have to
 16 bear in mind is that a boundary is set around the
 17 insured premises. The boundary is "within a radius of
 18 25 miles of the premises". So the cover is in respect
 19 of illness or illnesses sustained by persons resulting
 20 from food or drink poisoning or infectious disease, here
 21 COVID-19, within 25 miles of the insured premises. And,
 22 my Lords, "within" means inside not outside the
 23 boundary.

24 What the parties have done is to have drawn a line.
 25 The insured takes the risk of illness outside the line,

1 and the insurer takes the risk of illness within the
 2 line. It's as simple as that.
 3 That which is outside the line, is uninsured; that
 4 which is inside the line, is insured.
 5 Now, as we say in our case, which I've asked you to
 6 read later on, if you haven't already read it, that may
 7 be an arbitrary line, but it is a line.
 8 The third component, my Lords, is the "causal
 9 connector following". That, of course -- and I'm going
 10 to come back to that and develop my submissions, that is
 11 a causal connector, there's no dispute between the
 12 parties, and the court held that it was a causal
 13 connector, albeit a loose causal connector. That is
 14 a causal connector linking the 25-mile cases of COVID
 15 with the business interruption and the
 16 business interruption losses.
 17 The fourth component, my Lords, is to a degree
 18 superfluous and even some would say totally inapposite,
 19 but it's the meaning of "consequential loss".
 20 Consequential loss, which is emboldened is defined at
 21 {C/10/512} and you'll ask yourselves why is that fool
 22 Kealey taking us to this? Because I've just said it's
 23 perhaps superfluous and inapposite. But if
 24 your Lordships look at consequential loss, there is some
 25 meaning or sense to my madness. It says:

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1 "Loss resulting from interruption of or interference
 2 with the business carried on by you at the premises in
 3 consequence of damage to property used by you at the
 4 premises for the purpose of the business."
 5 So we've got following damage, we've got resulting
 6 from damage, we've got in consequence of damage. All
 7 those in the eyes of the draftsman and anyone reading
 8 this, we would respectfully suggest, all those causal
 9 connectors are the same. They are all interchangeable.
 10 Though the reason why, my Lords, consequence loss might
 11 be regarded as a little inapposite is because if you
 12 plug consequential loss into the notifiable disease
 13 clause at {C/10/567} -- and I hate to read it out, but
 14 I have to -- and your Lordships will see why it makes
 15 little sense, because it says:
 16 "We will pay you for loss resulting from
 17 interruption of or interference with the business
 18 carried on by you at the premises in consequence of
 19 damage to property used by you at the premises for the
 20 purpose of the business as a result of interruption of
 21 or interference with the business carried on by you at
 22 the premises following any notifiable disease ..."
 23 Which, you might say, makes little or no sense, but
 24 there is some sense. The idea of consequential loss
 25 being plugged in there in conjunction with "in

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1 consequence of damage" indicates that the draftsman,
 2 whether not terribly well done or terribly ill done, was
 3 trying to convey the causative connections that we say
 4 exist between insured peril and business interruption
 5 and business interference which we say is the loss. We
 6 endorse what Mr Salzedo said before us.
 7 Now, I'm going to repeat something that one of my
 8 learned friends, probably both of them, said before me
 9 and therefore you will say "Well, don't say it", but I'm
 10 going to say it nevertheless until you tell me to shut
 11 up, which is that those parts of clause 6 which talk
 12 about disease or other perils at the premises, the FCA
 13 has accepted, it seems, that "following" does not denote
 14 some loose causal connection. But, rather, we would say
 15 a tight causal connection such that what occurs at the
 16 premises must be the source of and so must have caused
 17 the business interruption at the premises.
 18 Put another way, the FCA has accepted in relation,
 19 for example, my Lords, to 6(a)(i) that this is not a
 20 case of the insured being covered for
 21 business interruption at the premises resulting from
 22 notifiable disease everywhere in the country, provided
 23 that someone at the premises at some stage can be proved
 24 to have sustained disease there.
 25 My Lords, that you will see reflected at

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1 paragraph 194 of the FCA's respondent's case and 195,
 2 that's at {B/10/394}.
 3 Now, the FCA has not told us what it thinks is the
 4 correct answer to the interpretation of "following" in
 5 relation to those parts of the definition of
 6 "notifiable disease" which comprise illness sustained by
 7 any person resulting from food or drink poisoning. Must
 8 those illnesses have caused business interruption at the
 9 premises or is it sufficient for recovery that there
 10 should be business interruption at the premises as
 11 result of food or drink poisoning anywhere in the
 12 country, provided that someone may be proved to have
 13 sustained similar food or drink poisoning at the
 14 premises? The answer to that is obviously not.
 15 It would be ludicrous to suggest that the food and
 16 drink poisoning at the premises should not have been
 17 directly causative of the business interruption, but
 18 that is part of the definition of "notifiable disease"
 19 and one can imagine who would drink poisoning in the
 20 area of the premises up to 25 miles, even possibly,
 21 I can't think of many instances, but it's not
 22 impossible. It's quite clear, in our respectful
 23 submission, that when you have one causal connector
 24 following in one clause, one would expect it to mean the
 25 same thing in respect of (a) (i), (ii), (iii), (b), (c)

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1 and 4, not something different.
 2 We would endorse the suggestions made by my learned
 3 friends before me that "following" there, the
 4 implication of my learned friends' submissions,
 5 "following" there is a causal connector, it's not
 6 a loose causal connector and we're going to tell
 7 your Lordships in a moment that it means proximate
 8 cause, equivalent to, resulting from or in consequence
 9 of, and we'll also going to tell your Lordships that it
 10 doesn't much matter at the end of the day, even if it is
 11 a looser connecting cause, because we say that the
 12 factual causation test must apply. Once you have
 13 a cause, it's either a cause or it's not a cause and,
 14 therefore, by definition, if you have a cause, the
 15 "but for" factual causation test must be satisfied.
 16 So after that rather terse introduction, my Lord,
 17 the key question on the MS A disease clause is framed by
 18 the language of the contract. It is this: did illness
 19 or illnesses sustained by any person or persons
 20 resulting from COVID-19 within 25 miles of the insured
 21 premises cause business interruption or interference at
 22 those premises and the business interruption losses
 23 claimed by the insured? That question has two elements.
 24 The first, on which I have already made submissions, is
 25 illness sustained by any person resulting from COVID-19

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1 within 25 miles of the insured premises.
 2 The second element, on which I've also made some
 3 submissions, is causation. Assuming that the insured
 4 can prove cases of illness within 25 miles, have those
 5 cases so operated as to satisfy the causal connection
 6 that has to be established between those cases and the
 7 business interruption losses for which the insureds
 8 claim an indemnity under the MS A policies.
 9 This second element, as you know, arises in the
 10 specific context of contracts of insurance. As my Lord
 11 Lord Hodge said in McCann's Executors, your Lordships
 12 will see that, I needn't take it out, it's at bundle E,
 13 divider 43, page 1196 {E/43/1996} which, as my Lord,
 14 Lord Hodge, knows it's a Scottish case, but it's equally
 15 applicable in this instance to this country. As my Lord
 16 said:
 17 "The context is important whenever questions of
 18 causation are being asked."
 19 That's paragraph 13 of my Lord's opinion:
 20 Because "it determines the nature of the causal
 21 investigation."
 22 Those are almost his words. As in this case, as in
 23 that case, so also in this. The relevant context is
 24 contracts of insurance and more specifically, my Lords,
 25 insuring clauses within those contracts.

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1 If I can answer a question that my Lord,
 2 Lord Leggatt asked a moment ago in relation to buses or
 3 a bus, the causation question is not an abstract one as
 4 to cause. It is not what was the cause of the
 5 business interruption losses suffered at the insured
 6 premises. That is, with respect, the wrong question.
 7 Rather, it is: did the insured peril cause the
 8 business interruption losses at the insured premises
 9 within the meaning and application of the causal
 10 requirements of the insurance contracts? So taking my
 11 Lord's example, a bus and 20 people pushing the bus,
 12 well if only one person of those was an insured, or if
 13 only that person's efforts were insured, the question
 14 would be: did that one person cause the bus to go over
 15 the cliff? The answer to that, dare I say it, unless he
 16 was a Hercules of Herculean proportions and all the
 17 others were very, very small and weak people, the answer
 18 to that is probably no, because that person cannot
 19 satisfy the factual causation requirement of "but for".
 20 In other words, he cannot satisfy the factual cause
 21 test. But for that person's efforts, the bus would
 22 still have gone over the cliff and that's the answer, in
 23 our respectful submission, to my Lord, Lord Leggatt's
 24 question. I hope that's the right answer. Anyway,
 25 that's my answer.

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1 We say that the causal connection that the insured
 2 has to prove between the 25-mile cases and the BI losses
 3 at insured premises is one of or akin to proximate
 4 cause. We say that based on the language and the law,
 5 but irrespective of that, as I've just indicated, the
 6 minimum causal connection that the insured has to prove
 7 is that the business interruption losses would not have
 8 been suffered but for those proved 25-mile cases of
 9 COVID-19. That, my Lords, is the basic and fundamental
 10 factual causation test found in contract and in tort,
 11 with very few and very exceptional exceptions on which
 12 no party relies in this case.
 13 We say, as a matter of simplicity, X cannot in any
 14 sense be a cause of Y, whether proximate or not, if Y
 15 would have happened irrespective of X. In other words,
 16 but for X.
 17 My Lord.
 18 LORD LEGGATT: On that basis, Mr Kealey, it means, in my
 19 example, none of the people caused the bus to go over
 20 the cliff.
 21 MR KEALEY: And that is why --
 22 LORD LEGGATT: You can equally say of any individual that
 23 their efforts alone were not. So you embrace that
 24 conclusion, do you?
 25 MR KEALEY: No, I just tell your Lordship that

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1 your Lordships just asked the wrong question. If you
 2 are, say, a scientist and you're asking the question:
 3 what caused the bus to go over the cliff? You would say
 4 it was the joint efforts of all 20. But that's not the
 5 right question. The scientist is not an insurance
 6 contract lawyer and is not looking at the right
 7 question. The right question is the question that
 8 I identified, which is: is that one person, if that one
 9 person is the insured, did he or she cause the bus to go
 10 over the cliff?
 11 Now, the answer to that is no because but for that
 12 one person's effort, the bus would still have gone over
 13 the cliff and therefore, dare I say it — and I don't
 14 mean to say it without respect, I'm saying it with the
 15 utmost respect — you've asked the wrong question. What
 16 caused business interruption losses at everybody's
 17 restaurant, say, in England? Well, it's the national
 18 lockdown or the public disinclination to go to
 19 restaurants because they don't want to die of COVID—19
 20 or whatever it is. That is the scientist or the medical
 21 expert or the politician's question and the answers.
 22 If your Lordship asks: did 25-mile radius cases of
 23 COVID—19 cause that restaurant to shut down? The answer
 24 is, and given by the court below, no. The answer given
 25 by the court below was different because of its approach

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1 to causation, but the answer — the right answer — is,
 2 no, those cases didn't. You're not asking the right
 3 question if you say: "What caused the restaurant to
 4 close down?" You should be asking: "Did the
 5 insured peril cause the restaurant to close down?" That
 6 is the very important point that I made earlier by
 7 reference to what my Lord, Lord Hodge said in McCann's:
 8 "The context is important because it determines the
 9 nature of the causal investigation."
 10 In fact, my Lord, it determines the question, it
 11 determines the causal investigation.
 12 LORD LEGGATT: Mr Kealey, at the risk of commanding your
 13 respect, even utmost respect again, I'm going to try
 14 another hypothetical on you, if I may.
 15 MR KEALEY: That's a bit frightening, no.
 16 LORD LEGGATT: This time it's the board of a company and
 17 they decide at a company directors' meeting to put on
 18 the market a dangerous product and it only requires
 19 a majority of the board to vote for that, but in fact
 20 they unanimously vote for it. One of them is insured
 21 under directors' liability insurance and he makes
 22 a claim on the basis that his vote, for which he has
 23 subsequently incurred liability, let's say, of damages
 24 as a cause of the dangerous product going on the market.
 25 Now, if you look at his vote in isolation it would have

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1 made no difference if he had voted the other way because
 2 the decision would have been just the same, so it's not
 3 a "but for" cause (overspeaking).
 4 MR KEALEY: (Overspeaking). Wrong question, my Lord.
 5 LORD LEGGATT: On your analysis is uninsured because it's
 6 not a proximate cause.
 7 MR KEALEY: Wrong question. You're talking about
 8 a liability insurance, D&O liability insurance. If that
 9 director has been found liable or his liability is
 10 established by judgment, settlement or award, that is
 11 an insured peril that has arisen under the contract of
 12 insurance and that is the proximate cause of the loss
 13 under the insurance policy and he's entitled or she's
 14 entitled to be indemnified.
 15 So with the utmost, utmost respect, my Lord, I would
 16 say that if you're looking at different types of
 17 contracts of insurance, you may have to ask different
 18 types of questions to come to the right answer.
 19 LORD LEGGATT: Right, okay.
 20 MR KEALEY: I'm sure your Lordship is going to find a much
 21 more difficult question for me to answer in due course,
 22 which is why I'm going to rush to the end of my
 23 submissions before you've had the time.
 24 Now, the importance, my Lords, of the causal
 25 investigation is heightened by the FCA's fundamental

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1 case that there is a single proximate cause of all
 2 losses suffered by all insureds under all wordings
 3 without distinction. You can look at it later, I'm
 4 going to tell your Lordship what the FCA says.
 5 Particulars of claim, paragraph 53.1, that's at
 6 {D/16/1582}. The FCA says that the proximate cause of
 7 all losses is:
 8 "The nationwide COVID—19 disease, including its
 9 local presence or manifestation and the restrictions due
 10 to an emergency danger or threat to life due to the harm
 11 potentially caused by the disease."
 12 The FCA then refined its case a little bit, I don't
 13 actually think that it was much of a refinement, it
 14 looks like a slightly more generous approach. In its
 15 trial skeleton, that is the skeleton below,
 16 paragraph 225 {D/20/1603} the FCA said:
 17 "The single [the definite article] the single
 18 proximate cause is the disease everywhere and the
 19 government and human responses to it."
 20 I need you to bear that in mind, my Lords.
 21 We say that there's an obvious disconnect between
 22 what the FCA says is the proximate cause of all losses
 23 suffered by the insureds and what is insured under my
 24 singular Amlin disease clause. It is this disconnect
 25 which in our submission causes the FCA real problems,

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1 and it sought to surmount them in essentially two ways.
 2 First, as we've seen, it seeks to introduce the
 3 proximate cause of all the insured's BI losses into the
 4 insuring clause through the front door of construction
 5 by the use of what we say is an absent proviso.
 6 Secondly, it seeks to introduce the proximate cause
 7 of all the insured's BI's losses into the counterfactual
 8 by the back door of causation reversing not just the
 9 insured's 25-mile cases of illness, but much more
 10 besides, including the underlying source or cause of
 11 those cases. In other words, the disease everywhere
 12 else.
 13 Now, neither of those attempts works, however, and
 14 that's because, my Lords, what was covered were cases or
 15 incidents of illness sustained by individuals as a
 16 result of COVID-19 within 25 miles of insured premises,
 17 but those were not causative of any loss at those
 18 premises. Whilst what was causative was the national
 19 COVID-19 pandemic and the responses of the government
 20 and public to that national pandemic, but that was not
 21 covered. The FCA and the court below have, with
 22 respect, conflated what was covered but not causative
 23 with what was causative but not covered.
 24 With that I turn back to the definition of
 25 "notifiable disease". We say that the insuring

1 agreement was clearly confined to cases of specific
 2 illness sustained by specific persons as result of
 3 COVID-19 within and that means, my Lords, not outside
 4 the boundary of 25 miles. It's a basic line.
 5 Can I ask your Lordships in due course to focus on
 6 paragraphs 37 and 39 of our case, the Amlin case
 7 {B/7/219}. The cases of illness beyond the boundary of
 8 25 miles are simply irrelevant. The insuring agreement
 9 did not extend to any national or global epidemic or
 10 pandemic. That might be the cause of individual cases
 11 of illness within 25 miles, but it's not insured. It
 12 didn't extend to any national, global, pandemic or
 13 epidemic provided just one case of COVID-19 could be
 14 proved, perhaps years after the event, to have existed
 15 within the 25-mile radius. That, is my Lords,
 16 a misconstruction of the policies: see paragraph 24.1 of
 17 our case at {B/7/213}. Your Lordships should know that
 18 if that had been the intention, my Lords, then it was
 19 very easy to do, all one needed to do was say:
 20 "Following any notifiable disease, provided that
 21 there is a case of it within a radius of 25 miles of the
 22 insured premises or following any notifiable disease
 23 anywhere as from the date when the insured proves a case
 24 of notifiable disease within a radius of 25 miles of the
 25 insured premises to have occurred."

1 That's what should have been in the clause in order
 2 to, as it were, maintain the FCA's construction and
 3 that's nowhere near the clause.
 4 My Lords, I mean one can imagine we've taken, as
 5 they say, extreme examples but one can imagine how
 6 ridiculous this is. You have the Scilly Isles without
 7 a case of COVID-19 for months, but a trawler goes by and
 8 on that trawler someone contracts COVID-19 and it
 9 happens to be within 25 miles of the Scilly Isles. It
 10 has no causative impact whatsoever. In fact, the person
 11 on board doesn't know that he or she has COVID-19 and
 12 when the trawler docks, say, at Southampton, that person
 13 is tested and is found to have had it for a week.
 14 Suddenly every single business in the Scilly Isles,
 15 which has suffered business interruption losses as
 16 result of the government's lockdown, can recover all
 17 their business interruption losses.
 18 Let's say that someone with COVID-19, I don't know
 19 who it could be, but with COVID-19 travels from London
 20 to Edinburgh. Anywhere within 25 miles of that railway
 21 line would suddenly be able to recover all their
 22 business interruption losses as a result of that one
 23 person travelling up on a railway line, 25 miles either
 24 side of the railway line, even though all their
 25 business interruption losses were actually attributable

1 to the government lockdown.
 2 Further, my Lords, any case of illness sustained by
 3 individuals as a result of COVID-19 within 25 miles of
 4 insured premises are simply not indivisible from cases
 5 of COVID-19 sustained by individuals beyond that
 6 boundary. Dare I say it, my Lords, my illness is not
 7 your illness. My pathogen is not your pathogen and
 8 they're not somehow rendered indivisible by virtue of
 9 deriving from the same virus or being part of the same
 10 global pandemic or national epidemic. These
 11 distinctions, that's to say between COVID-19 within 25
 12 miles and COVID-19 outside 25 miles, are required to be
 13 drawn by the definition of "notifiable disease" and the
 14 25-mile circumscription by radial distance of the
 15 insured premises. That, my Lord, with respect,
 16 despatches the court's finding, judgment paragraph 111,
 17 that's {C/3/69} and at paragraph 532, see {C/3/179} and
 18 indeed the FCA's argument of indivisibility such that
 19 the disease in the UK was somehow one indivisible cause
 20 of all business interruption losses and therefore
 21 somehow or other the cases of disease within 25 miles of
 22 premises are harvested by some magical process into the
 23 epidemic or the pandemic. That just doesn't work as
 24 a matter of logic.
 25 My Lords, I now turn briefly to the cause -- well,

1 actually not so briefly — but briefly to the causal
 2 connector of "following". Yes, my Lord. My Lord,
 3 Lord Briggs.
 4 LORD BRIGGS: (Inaudible) the expressions, and I'll for this
 5 purpose include disability, have to be looked at in
 6 context. I think it may be that one wouldn't — you and
 7 I, if we each separately and on different days got COVID
 8 of different severities in different places would think
 9 that they were thoroughly divisible in terms of their
 10 (Inaudible) and all sorts of other things. But where
 11 it's divisible for the purposes of assessing what effect
 12 it had on the government reaction and the restrictions
 13 the government imposed, might lead to a very different
 14 conclusion, might it not?
 15 MR KEALEY: Your Lordship is absolutely right, absolutely
 16 right on that, but the way in which it was approached by
 17 the court below was, as I think one of my learned
 18 friends has already said, if one looks at the court
 19 below, the court below asked the question or set out the
 20 proposition, and I'll find it, if your Lordship can just
 21 forgive me for one second.
 22 It was whether the insured could recover for
 23 business interruption losses at their premises even —
 24 ah, here it is, my Lord — it's at paragraph 81 of the
 25 judgment at {C/3/57}. The court asked the question

1 whether:
 2 "There is cover in respect of a pandemic where it
 3 cannot be said that the key matters which led to
 4 business interruption and in particular the governmental
 5 measures would not have happened even without the
 6 occurrence of COVID-19 within the specified radius."
 7 That's at {C/3/57}. We say that the answer to that
 8 question must be no. Your Lordship is entirely right,
 9 it really does depend upon not only the facts of course,
 10 as your Lordship has postulated, but it really does
 11 depend — I go back to the point which it depends on the
 12 context in which the question is asked and in which case
 13 one has to ask the right question.
 14 Talking about "following", my Lord, "following"
 15 imports a causal connector. Everyone is agreed on that.
 16 In fact, one of its prominent dictionary synonyms
 17 include resultant, resulting, ensuing, consequent. See
 18 our case at footnote 15 {B/7/226}. The FCA and the
 19 court held that "following" imports something looser
 20 than proximate cause and we don't accept that. I've
 21 explained to you why.
 22 "Following", my Lord, firstly — and I will take
 23 this very briefly — is the causal link between the loss
 24 and the peril. We endorse what Mr Salzedo said and we
 25 endorse not only what we said, but we say that where the

1 clause says "Loss resulting from interruption or loss as
 2 a result of interruption following notifiable disease"
 3 the loss and the interruption are there, my Lords, we
 4 say as part and parcel of the loss. In other words, the
 5 interruption is damage to the insured interest and the
 6 loss is simply the pecuniary consequence of that damage
 7 to the insured interest.
 8 We say that "following" is actually the causal link
 9 between the loss and the peril and therefore the default
 10 position of importing the proximate cause test under
 11 section 55 of the Marine Insurance Act 1906 applies: see
 12 paragraph 59 of our appellant's case {B/7/228}.
 13 As I've said before, these are not essential planks
 14 of our argument, the essential plank of our argument
 15 stands regardless of whether the insured peril includes
 16 or doesn't include business interruption or interference
 17 and regardless of whether "following" means proximate
 18 cause or some looser causal connection. The essential
 19 plank of our argument is that on its proper
 20 construction, the minimum causal connection that the
 21 insured has to prove is that the BI losses at the
 22 insured premises would not have been suffered but for
 23 the 25-mile cases of illness.
 24 That was rejected by the court below. The court
 25 below rejected the submission that the word "following"

1 involved the application of any "but for" test, despite
 2 emphasising and repeating that the word still involved
 3 a causal connection. The court below espoused a test of
 4 causation that seemingly does not accept the "but for"
 5 principle and the FCA, my Lord, says that the "but for"
 6 causation test is only relevant to quantification and
 7 your Lordships will see that in their case at a number
 8 of paragraphs: 11.4, 11.8, 31, 32, 33, 214, 355.
 9 It's only relevant to quantification, says the FCA,
 10 and not to the causal link between the disease and the
 11 interruption or even to the link between the
 12 interruption and the loss. The FCA does not accept that
 13 "but for" is an inherent part of or a necessary
 14 precursor to proximate cause: see their case at
 15 paragraphs 31 and 32. So a proximate cause can exist
 16 despite not satisfying the factual "but for" test.
 17 That's the FCA's case.
 18 It disputes, my Lord, the application of the
 19 "but for" test in causation even outside the field of
 20 insurance: see the FCA's respondent's case at
 21 paragraph 374 {B/10/449}. The FCA also says that there
 22 is no insurance case which refers to the "but for" test
 23 as part of but a precursor to the proximate cause test.
 24 My Lords, in our respectful submission, not only is that
 25 wrong, but again it's answering the wrong question.

1 The right question is whether there are any cases
 2 where something has been held to be a proximate cause
 3 which is not a "but for" cause. With the exception of
 4 cases of multiple wrongdoers and cases of exceptions
 5 such as the Fairchild v Glenhaven in the area of tort,
 6 which isn't a proximate cause case, the answer to that
 7 is no. With the exception of exceptional cases, we
 8 haven't found any authority that finds a proximate cause
 9 which does not satisfy the "but for" test, nor, it would
 10 seem, has the FCA, otherwise we would have received that
 11 authority from them.

12 The "but for" test, the factual causation test, this
 13 is important, is intrinsic to contracts and to contracts
 14 of insurance, because it is intrinsic to the essence of
 15 the insurer's indemnity obligation and to the insured's
 16 relative right to an indemnity. Contracts of insurance
 17 are contracts of indemnity. They indemnify against loss
 18 caused by a peril insured against. If but for the peril
 19 there would have been no loss, there is no indemnity.
 20 I'm going to come back to that in a minute.

21 But I want to start with the established legal
 22 background to the Amlin contracts ie the legal
 23 background, the legal context in which those contracts
 24 were entered into. Now you know, I hope, and certainly
 25 I submit, that the law employs the "but for" factual

1 causation test as an undemanding essential threshold
 2 test to distinguish causes from non-causes, necessary
 3 but not sufficient.

4 Now, sir Christopher Staughton said in Assicurazioni
 5 Generali v Arab Insurance Group, at paragraph 187,
 6 that's {E/9/161} in the context of inducement:

7 "Causation cannot in law exist when even the 'but
 8 for' test is not satisfied."

9 If the parties to the Amlin policies had wanted to
 10 indicate something non-causal, they could have used
 11 language such as "connected with" or "relating to".
 12 They didn't. They used "following" and that is a causal
 13 connector and therefore the factual causation test has
 14 to be satisfied. That which is said to have followed
 15 an event must by definition be something that would not
 16 have followed but for that event. There is nothing in
 17 the policy wording, we submit, to indicate any intention
 18 to adopt some novel or bespoke concept of causation
 19 which doesn't entail the basic factual cause test,
 20 contrary to the court's judgment.

21 Construing the MS A's disease clauses against the
 22 established legal background, we say it imports the
 23 "but for" test. So starting with the legal background,
 24 I will take this quite quickly and move to insurance
 25 contracts particularly.

1 Whenever a legally relevant cause needs to be
 2 selected, such as proximate cause in insurance, the
 3 "but for" test provides a range of candidates that
 4 satisfy the factual causation enquiry for which the
 5 legally relevant cause is to be selected. The
 6 "but for" test of factual causation does not replace or
 7 supplant the test of legal causation. Now, that
 8 two-stage process was described by Lord Hobhouse in
 9 a case. Could I asked your Lordships to take out
 10 {E/35/1005} and go to the case of
 11 Reeves v Commissioner of Police, that's bundle E,
 12 divider 35 at page 1005. I'm not going to take your
 13 Lordships to many authorities because I know time is
 14 short, but I'm going to take your Lordship to this and
 15 one or two others.

16 At 1005 at letter C, B to C, Lord Hobhouse said:

17 "Any disputed question of causation factual or legal
 18 will involve a number of factual events or conditions
 19 which satisfy the "but for" test. A process of
 20 evaluation and selection has then to take place. It
 21 may, for example, be necessary to distinguish between
 22 what factually are necessary and sufficient causes. It
 23 may be necessary to distinguish between those conditions
 24 or events which merely provide the occasion or
 25 opportunity for a given consequence and those which in

1 the ordinary use of language would, independently of any
 2 imposed legal criterion, be said to have caused the
 3 relevant consequence. Thus, certain causes will be
 4 discarded as insignificant and one cause may be selected
 5 as the cause. It is at this stage that legal concepts
 6 may enter in either in a way that is analogous to
 7 the factual assessment — as for proximate cause in
 8 insurance law or in a more specifically legal manner
 9 than the attribution of responsibility bearing in mind
 10 responsibility may not be exclusive. In the law of tort
 11 it's the attribution of responsibility that is assumed
 12 that is the relevant legal consideration."

13 This "but for" test also applies to the assessment
 14 of a liability to pay contractual damages at common law.
 15 The two-stage enquiry was described by my Lord
 16 Lord Leggatt, with whom the other members of the Court
 17 of Appeal agreed in a recent case called Minera Las
 18 Bambas v Glencore. You needn't take it out, I'm going
 19 to read out to your Lordships the passage, unless the
 20 author wishes to look at his own words, at bundle
 21 {G/139/2405}. What the judge then said is as follows:

22 "The distinction between factual and legal causation
 23 is well recognised in assessing liability to pay damages
 24 at common law. In order to recover damages for a loss
 25 caused by a breach of contract or other actionable

1 wrong, both tests must generally be satisfied. The test
 2 of factual causation is whether, but for the defendant's
 3 breach of contract, the loss would have occurred. This
 4 requires a simple factual comparison to be made between
 5 the claimant's actual financial position and the
 6 financial position which the claimant would have
 7 occupied if there had not been a breach. However, not
 8 every loss or gain which would not have occurred but for
 9 the breach is treated in law as caused by the breach
 10 such that the defendant is held legally responsible for
 11 it. In particular, an unreasonable act or omission of
 12 the claimant without which the loss wouldn't have
 13 occurred may be held to break the chain of causation."

14 Now, my Lords, that's a classic, if I may
 15 respectfully suggest, established description of
 16 causation. Anyone agreeing a contract should, as
 17 a matter of fact or context, be taken to have it in
 18 mind. Lord Justice Leggatt's description, in fact,
 19 echoed that authoritatively stated by Lord Nicholls in
 20 the tort of conversion case, I will give you the
 21 reference, my Lord, it's Kuwait Airways v Iraqi Airways,
 22 it's at {E/25/803-804} and that's a description by
 23 Lord Nicholls and he says:

24 "I take as my starting point the commonly accepted
 25 approach that the extent of a defendant's liability for

1 the plaintiff's loss calls for a twofold inquiry:
 2 Whether the wrongful conduct causally contributed to the
 3 loss and, if it did, what is the extent of the loss for
 4 which the defendant ought to be held liable. The first
 5 of these inquiries widely undertaken as a simple "but
 6 for" test is predominantly a factual inquiry."

7 Now, as it happens, Lord Hoffmann agreed with Lord
 8 Nicholls. The FCA relies upon the extrajudicial
 9 writings of Lord Hoffmann a few lines later in which
 10 Lord Hoffmann says of the two-stage test is not
 11 recognised in English law. I suspect Lord Hoffmann had
 12 overlooked his own involvement and agreement in
 13 Kuwait Airways that there was a two-stage process, but
 14 that's just by the way.

15 The FCA's assertion that there is no established
 16 two-stage causation test is wrong. Importantly, as
 17 we're speaking in the context of insurance, the
 18 "but for" test is also an established and essential
 19 component of any insurance contract. This is important,
 20 my Lords, because we say the FCA doesn't quite
 21 understand, we say with respect, the character of
 22 an insurance contract.

23 It's a contract of indemnity. As my Lord
 24 Lord Leggatt said in *Endurance v Sartex*:
 25 "the insurer is under the contractual obligation to

1 hold the insured harmless from loss caused by an insured
 2 peril to prevent the indemnified person from suffering
 3 loss that is *damnum*."

4 "The insurer is automatically in breach of contract
 5 and liable in damages if an insured peril operates and
 6 causes the insured indemnifiable harm. The insured is
 7 therefore entitled to be put by the insurers into the
 8 position in which he would have been but for the breach
 9 and no better and no worse."

10 My Lord, I won't repeat what you said in *Endurance*.
 11 It's at {E/37/1053}. Your Lordship said in different
 12 terms in *Minera Las Bambas* at {G/139/2396}.

13 This is the important bit, my Lord. If but for the
 14 insured peril operating the insured would have been in
 15 exactly the same position, then the insurer has not even
 16 breached its insurance obligations. There will have
 17 been nothing from which the insurer was bound to hold
 18 the insured harmless. There will have been no
 19 indemnifiable harm. Therefore, but for the insured
 20 peril, but for the insured peril, the insured would have
 21 suffered exactly the same harm and therefore the breach
 22 of contract, or the supposed putative breach of
 23 contract, will not even have occurred, because the
 24 insurer is only in breach if the insured suffers *damnum*
 25 as a result of the insured peril. If but for the

1 insured peril the insured would have suffered the same
 2 *damnum*, ergo the insured peril caused no indemnifiable
 3 harm, the insured was never in breach of any contract.

4 Finally in this context -- I'll have to rush
 5 a bit -- the "but for" test is also an inherent part of
 6 the proximate cause test. An insured peril cannot even
 7 begin to be a proximate cause unless it is also
 8 a factual cause. That's clear, my Lords, from the
 9 judgment of Lord Justice Lindley in the case of
 10 *Reischer v Borwick*. That's in {F/40/829}.

11 If your Lordships look -- and I don't invite
 12 your Lordships to do so now because of time -- at
 13 {F/40/831-833}, it's clear that a proximate cause is
 14 necessarily one that as a minimum is a "but for" cause,
 15 and that appears from Lord Justice Lindley's judgment.
 16 It also appears, my Lord, appears from my Lord
 17 Lord Hodge's opinion in the case of *McCann*, the case to
 18 which I referred earlier. I'll quote from Lord Hodge at
 19 {E/43/1200} where my Lord said:

20 "It appears to me that in using the concept of
 21 proximate cause the court in most circumstances applies
 22 not only a 'but for' test to establish a causal
 23 connection between two or more events on the particular
 24 occasion, but also further tests such as directness of
 25 effect and the degree of causal contribution of an event

1 to identify an operative cause."
 2 That's at paragraph 12 of my Lord, Lord Hodge's
 3 opinion, cited with approval by Lord Clarke in *The Kos*.
 4 That's {E/15/298}. It also happens to have been
 5 followed by Mr Justice Hamblen, as then he was, in the
 6 *Orient-Express*.
 7 Even where the insurance contractual language
 8 mandates a looser causal connection than proximate
 9 cause, such as by the use of the phrase "attributable
 10 directly or indirectly to", the courts have held that at
 11 a minimum the "but for" test must be applied. The
 12 Master of the Rolls, Lord Phillips, said in
 13 *Blackburn Rovers v Avon Insurance*, an insurance case:
 14 "Disablement cannot be said to attributable, either
 15 directly or indirectly to a pre-existing condition
 16 unless, at the least, the condition is a *causa sine qua*
 17 *non* of the disablement."
 18 That's at {E/11/195}. Then there's one final point
 19 on "but for" causation, my Lords. The FCA refers to
 20 concurrent interdependent and so-called concurrent
 21 independent causes in its written case. It's very
 22 important to bear in mind the differences between the
 23 two.
 24 Where the insurer's loss is attributable to at least
 25 two causes in combination, in the sense that the loss

1 would not have happened if only one of the causes had
 2 been operative and each is a proximate cause, that
 3 situation is one of concurrent interdependent causes.
 4 In that situation, both causes satisfy the "but for"
 5 test precisely because the loss would not have happened
 6 if either one had not been operative. In that case, the
 7 law is that the insured can recover so long as one of
 8 the causes is insured and the other is not excluded: see
 9 *Wayne Tank and Miss Jay Jay* at {F/50/1045}, {E/23/580}.
 10 *Wayne Tank and Miss Jay Jay* and all the cases
 11 applying the principles established in those cases,
 12 including the *B Atlantic*, see Lord Mance, that's at
 13 {H/3/44} are all cases of interdependent causes. Each
 14 cause is both a "but for" and also a proximate cause of
 15 the loss. As was recognised by my Lord, Lord Hamblen in
 16 *Orient-Express*.
 17 By contrast, the phrase "concurrent independent
 18 causes" is used where there are two concurrent events
 19 each of which would have been sufficient on its own to
 20 produce the entirety of the insured's loss but neither
 21 of which was necessary. Concurrent independent causes
 22 do not satisfy the "but for" test: see Lord Clarke in
 23 *The Kos* at paragraph 74 that's {E/15/298} and
 24 Mr Justice Hamblen in the *Orient-Express* at
 25 paragraph 32, that's {E/31/928}. They are not,

1 therefore, a cause in any relevant sense of the
 2 insured's loss.
 3 There are exceptions to that, my Lords. The best
 4 known exception that might arise is where both
 5 concurrent independent causes are covered under one
 6 policy, but neither satisfies the "but for" test on
 7 account of the other, or, as you know in tort, where two
 8 people each separately shoots a bullet and each bullet
 9 kills someone. These are exceptions. That's not this
 10 case.
 11 My Lord, I should mention that the FCA have come up
 12 with a new and unknown category of cause which it calls
 13 an "intermediate category of interlinked concurrent
 14 causes": see the FCA respondent's case, paragraph 346 at
 15 {B/10/439}. Now, whilst of course novelty is not
 16 something necessarily to be discouraged at law, this
 17 particular category is not known, as far as I'm aware,
 18 to the law and, dare I say it, is not very coherent in
 19 them.
 20 My Lord, one applies the "but for" test and one asks
 21 the question that the court below asked: whether there's
 22 cover in respect of pandemic where it can be said the
 23 key matters which led to business interruption,
 24 et cetera, wouldn't have happened even without the
 25 occurrence of COVID-19 within the specified radius? One

1 answers that no and that's the answer.
 2 I'm not going to mention any of the cases cited by
 3 my learned friends, other than to say what they are,
 4 because neither of them is relevant. *Silver Cloud* and
 5 *McGhee*, they're just not authorities of any relevant
 6 propositions to this case.
 7 At the end of the day, my Lords, while the FCA might
 8 be able to prove covered notifiable disease, it cannot
 9 prove that it covered any BI loss and while it might be
 10 able to prove what caused the BI loss, it can't prove
 11 that that cause was covered.
 12 Now I move to the counterfactual and *Orient-Express*.
 13 The FCA says that even if insurers are right on the
 14 construction of the insuring clause, in other words
 15 there is a radius of 25 miles, when you get to the stage
 16 of assessing the insurers' indemnity and the applying the
 17 "but for" counterfactual, whether under the trends
 18 clause or otherwise you reverse out not just the proved
 19 cases of disease within 25 miles, but disease
 20 everywhere. In other words, you reverse more than the
 21 insured peril and it says that, my Lords, in its
 22 respondent's case at paragraphs 11.4, 38, and 356 that's
 23 {B/10/338}, {B/10/347} and {B/10/441}.
 24 Now, that's not right, it's not even supported by
 25 the court below. Reversing only the insured peril

1 indemnifies the insured for loss caused by the insured
2 peril. No more and no less. Reversing more than the
3 insured peril impermissibly expands the scope of the
4 insuring clause, and provides an indemnity for something
5 that's not insured. Reversing less than the
6 insured peril penalises the insured. The FCA's
7 justifications just don't stand up.

8 It first asserts the inextricability of the disease
9 within and outside the radius. I've already spoken
10 about that. Secondly, it asserts that the
11 counterfactual must be realistic and the counterfactual
12 which reverses disease anywhere within the 25-mile
13 radius is unrealistic. The answer to that is given by
14 Mr Justice Hamblen in the Orient-Express. The purpose
15 of the counterfactual is to give effect to the indemnity
16 principle to reverse the insured peril. There's no rule
17 that requires it to be realistic or not artificial. In
18 fact, the FCA's own proposal that there's no COVID-19
19 anywhere in the UK, but exists everywhere else in the
20 globe, is as unrealistic and artificial as they come.

21 Thirdly, the FCA repeats that it is impractical,
22 even impossible, to assess insured's losses on the
23 insurers' counterfactual. There's no basis for that
24 submission, there's no evidence. In any event, it's
25 dealt with, my Lords, at paragraph 97.4 of our

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1 appellant's case at {B/7/242} also at Hiscox appellant's
2 case at 72 to 76. That's {B/6/174} to {B/6/176}.

3 Anyway, I don't have time to deal with all this. If
4 there are any difficulties of quantification, they
5 simply have to be confronted just as the arbitral panel
6 did in the Orient-Express, confronted, as it was, with
7 difficult questions of assessment where one had to
8 assume that the hotel was undamaged, but the entire city
9 was devastated.

10 I now turn to the Orient-Express. It's addressed in
11 considerable detail, my Lords, you will find that at our
12 case at {B/7/244} to {B/7/252} and I can do very little
13 to improve on it but, my Lords, the facts are well
14 known. Your Lordships should go to the case itself and
15 I think the case is at {E/31/921}. If your Lordships
16 will forgive me, I'm just getting it out. One second.

17 The facts are well known, my Lords. Katrina and
18 Rita devastated New Orleans. The Windsor Court Hotel
19 suffered significant physical damage. Its owner,
20 Orient-Express Hotels, had insurance against direct
21 physical loss and damage except as excluded. In other
22 words, it had all risks physical damage cover, and it
23 also had insurance against business interruption loss
24 directly arising from such physical damage.

25 The essential issue in that case was how the main

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1 business interruption insuring clause should respond
2 where the hurricanes had not only damaged the insured
3 hotel, but had also devastated the wider area
4 surrounding the hotel.

5 If your Lordships have that case in front of them,
6 then you can turn to the policy and the terms at
7 paragraphs 12 to 15. That's at page 923 {E/31/923}.

8 The principal clauses of relevance are the following:

9 "(1) The policy's insuring clause:

10 "In consideration of the Insured ... paying the
11 premium ... the Insurers ... agree ... to indemnify the
12 Insured:

13 "(a) under the Material Damage and Machinery
14 Breakdown Sections against direct physical loss
15 destruction or damage except as excluded herein ..."

16 le, this is all-risks cover:

17 "... to Property as defined herein such loss
18 destruction or damage being hereafter termed Damage."

19 My Lords, "Damage" was a defined term and it meant
20 loss, destruction or damage which was not excluded, ie
21 in the context of that case, it was loss, destruction or
22 damage as caused by an included peril, namely
23 hurricanes.

24 Then (b):

25 "Under the Business Interruption Section against

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1 loss due to interruption or interference with the
2 Business directly arising from Damage and as otherwise
3 more specifically detailed herein."

4 And (2):

5 "The insuring clause at the head of the
6 Business Interruption section said:

7 "'If any property owned used or otherwise the
8 responsibility of the Insured for the purpose of or in
9 the course of the Business suffers Damage as
10 defined ..."

11 Et cetera.

12 "... and the Business be in consequence thereof
13 interrupted or interfered with the Insurers will pay to
14 the Insured the amount of the loss resulting from such
15 Interruption in accordance with the provisions."

16 Can I invite your Lordships to read the trends
17 clause, similar to our clause and similar to the clauses
18 in all our policies, and your Lordships will see the
19 reference to "but for the damage" towards the end of the
20 trends clause.

21 When you've done that, if your Lordships could read
22 paragraphs 13, 14, 15 and 16, you will see that there
23 were two other clauses in the policy: the prevention of
24 access clause and the loss of attraction clause, both of
25 which responded to what had occurred and under which the

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1 insurer paid the required indemnity because both of
 2 those clauses are talking about property in the vicinity
 3 of the insured location, in other words the hotel, being
 4 damaged. As the learned judge said at paragraph 16:
 5 "Orient—Express Hotels has recovered an indemnity
 6 under the POA and LOA clauses, but this is subject to
 7 significantly lower limits than would be the case under
 8 the insuring clause."
 9 Now, my Lords, the insured peril for the purposes of
 10 the material damage section was the fortuitous
 11 non—excluded event or cause. On the facts it was the
 12 hurricanes. If your Lordships go back to the policy at
 13 paragraph 12:
 14 "The agreement was to indemnify the insured against
 15 damage except as excluded herein."
 16 Under "business interruption", the peril was
 17 different. The peril under the business interruption
 18 section was its:
 19 "Loss due to interruption or interference with the
 20 Business directly arising from Damage as otherwise more
 21 specifically detailed herein."
 22 The insured peril was Damage and that is also
 23 reflected, as one would expect, in the trends clause,
 24 "but for the Damage."
 25 If your Lordships go to paragraph, I think, 52 of

1 the judgment at page 931, that's {E/31/931}, to
 2 paragraph 52, in our respectful submission, the judge
 3 got it right and the court below in this case got it
 4 wrong.
 5 Sixthly:
 6 "OEH submits that the Generali's approach subverts
 7 first principles in that it involves seeking to strip
 8 out from the claim for the business interruption loss
 9 caused by insured damage, not merely the concurrent
 10 consequences of extraneous circumstances, but the
 11 concurrent consequences of the very peril that caused
 12 the damage which was a proximate cause of the
 13 business interruption loss in the first place."
 14 In other words, only OEH was submitting that you
 15 have to strip out the hurricanes and all the damage
 16 caused by the hurricanes everywhere in New Orleans, and
 17 that's what you need to strip out. But the learned
 18 judge said:
 19 "However, the relevant insured peril ..."
 20 This is under BI:
 21 "... is the damage, not the cause of that damage."
 22 Similarly in our case, my Lords, we say that the
 23 relevant peril were the 25—mile radius cases of illness,
 24 not the cause of those cases of illness, not the
 25 pandemic outside.

1 The non—excluded fortuitous cause, ie the
 2 hurricanes, were not themselves the peril under the BI
 3 section, they were the cause of the peril. They weren't
 4 irrelevant to coverage, however, my Lords, they
 5 identified and defined what physical damage was insured.
 6 It had to be physical damage caused by non—excluded
 7 fortuitous causes. The perils under the property damage
 8 and under the business interruption section were not the
 9 same.
 10 The tribunal's award quoted at paragraph 17 of the
 11 judgment at page 924 {E/31/924}, if your Lordships look
 12 at paragraph 15, this is the tribunal of which my Lord
 13 Lord Leggatt was a member:
 14 "The issue arising on the construction of the policy
 15 is of fundamental importance to the approach to the
 16 Business Interruption claim, it had a major effect on
 17 the nature and quality of the evidence adduced.
 18 "Expressed in summary terms, the issue is this: does
 19 the insuring clause of the policy provide cover, as OEH
 20 submits, for any and all losses suffered by the hotel as
 21 a result of the hurricanes and their effect, both on the
 22 city of New Orleans and in causing damage to the hotel,
 23 or does it provide cover as Generali submits only for
 24 the losses caused by the damage to the hotel itself but
 25 not, save for the other extensions, losses caused by

1 damage to and devastation of the city?
 2 "If, for example, the consequence of the damage to
 3 the city but not to the hotel was a severe shortage of
 4 staff or a lack of demand for hotel accommodation, are
 5 those matters which Generali can deploy?"
 6 Then, my Lords, you have paragraph 17 of the award
 7 there quoted. If your Lordships go to the end of
 8 paragraph 18 of the award {E/31/925}, that's at
 9 page 925, just above paragraph 19 of the award:
 10 "The third question, in Mr Fletcher's formulation in
 11 opening submissions, was what is the loss resulting from
 12 interruption?
 13 "It is the third question on which the parties part
 14 company. On behalf of Generali, Mr Picken QC submitted
 15 that the words are clear: the cause of the loss has to
 16 be and be shown by OEH to be interruption or
 17 interference resulting from the physical damage to the
 18 Hotel and not from the damage to the City of New Orleans
 19 or, say, want of demand ..."
 20 Et cetera:
 21 "Mr Fletcher did not, in the view of the Tribunal,
 22 ever supply a convincing answer to this submission. He
 23 criticised the submission as one creating a false
 24 hypothesis because the cause of the damage to the City
 25 and to the Hotel was the same event or events and he

1 submitted that the policy was intended to cover losses
2 resulting from all damage caused by the events which
3 damaged the Hotel and only to exclude losses resulting
4 from damage which was completely unconnected in the
5 sense that it had an independent cause. He submitted
6 that the law relating to concurrent causes would in any
7 event enable the Hotel to recover in circumstances where
8 a given loss was caused both by Damage to the Hotel and
9 the damage to the City. And he submitted that the
10 effect of excluding losses resulting from damage to the
11 City was to require an artificial and hypothetical
12 enquiry to be made."

13 Very much like the submissions of the FCA in this
14 case to be made.

15 "But none of these submissions in the view of the
16 Tribunal address the language used in the provisions to
17 which we have referred and which we have emphasised.
18 The language requires OEH to establish that the cause of
19 the loss claimed is the Damage to the Hotel. It is not
20 necessary or relevant for this purpose to go behind the
21 Damage and consider whether the event which caused the
22 Damage also caused damage to other property ... the fact
23 that there was other damage which resulted from the same
24 cause does not bring the consequences of such damage
25 within the scope of the cover."

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1 My Lords, the tribunal goes on to say that in any
2 event the language of the trends clause is conclusive of
3 the subject.

4 Now, my Lords, that's exactly what we're doing in
5 this case. This case, the FCA case. I want to move, my
6 Lords, to, if I may, to paragraph 20 {E/31/926} of the
7 judgment:

8 "Generali point out that the answer to the question
9 of law raised is moot. The tribunal has not excluded
10 recovery of losses concurrently caused by damage to the
11 hotel and damage to the vicinity or consequent loss ...
12 It has only excluded losses which would have been
13 suffered in any event but for the damage to the hotel.
14 Such losses are not to be regarded as caused in fact by
15 the damage. At the hearing it became apparent that the
16 crucial issue of law dividing the parties was the
17 appropriateness of applying the 'but for' causation test
18 in this case."

19 Now, in fact, my Lords, I should mention that the
20 court below criticised my Lord Lord Hamblen for not
21 focusing on the proximate cause. It is, dare I say it,
22 not surprising ...

23 (No audio feed provided from the court)

24 "... submits that this is one of those 'very
25 occasional' cases where fairness and reasonableness

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1 require a relaxation in the standard."

2 And they referred to Kuwait.

3 My Lord, Lord Hamblen emphasised that the exceptions
4 to the "but for" test are pretty exceptional.

5 Paragraph 74, he says that:

6 "This may occur where more than one wrongdoer is
7 involved. The classic example is where two persons
8 independently search for the source of a gas leak."

9 Similar, my Lords, if I could say in that case if,
10 for example, Orient-Express — rather, the insurers in
11 Orient-Express had said, "Ah, well, you haven't suffered
12 a loss, a business interruption loss caused by damage
13 because that loss would have been sustained in any
14 event." When asked to indemnify under the POA or LOA
15 clauses, the insurers would have said or could have
16 said, "Well, you hadn't suffered a loss under those
17 clauses because those clauses would have been suffered
18 in any event as a result of damage to the hotel." The
19 insurers in that instance would have been relying upon
20 their own breach of contract in not preventing harm from
21 occurring under the competing clauses and you can't rely
22 upon your own breach of contract to avoid your
23 liability. So if they had been asked, "Please pay under
24 the damage clause, business interruption caused by
25 damage", they would have said, "Ah, well, you would have

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1 suffered loss in any event because of devastation all
2 around the hotel". Then, if the insured had said, "Can
3 you please indemnify in relation to the prevention of
4 access or loss of attraction clause", the insurer
5 couldn't have turned round and said, "Ah well, you
6 hadn't suffered any loss under that because of the
7 damage to the hotel, because the damage to the hotel
8 caused you loss," the insurer would have been relying
9 upon his own breach of contract in resisting liability
10 under one or other of the clauses. In fact,
11 Lord Hamblen dealt with that under the rubric of
12 "absurdity" where he says:

13 "You can't do that because it would be absurd to
14 allow the insurer to rely upon another clause and not
15 pay out under that other clause."

16 My Lords, I transgress and I've got very limited
17 time and what I need to do, my Lords, to deal with this
18 case better is just rush a little bit and go to
19 paragraph 29, if I could, {E/31/929}:

20 "Although OEH cannot point to any insurance or
21 indeed contract case in which it has been held to be
22 inappropriate to apply the "but for" test, it relies on
23 the generally accepted principle that where there are
24 two proximate causes of loss an insured can recover on
25 the basis that it is sufficient that one of the causes

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1 of the peril insured provided the other cause was not
 2 excluded: see The Miss Jay Jay. Whilst to date this has
 3 been a principle applied in respect of concurrent
 4 interdependent causes, OEH submits that it should be
 5 equally applied to concurrent independent causes.”
 6 My Lord, it wasn't and rightly so, my Lords. Those
 7 cases are not cases where one can recover because they
 8 are concurrent independent causes.
 9 And if your Lordships go to the next paragraph which
 10 I need to take your Lordships to is -- if your Lordships
 11 could turn to paragraph 38 {E/31/929} where the learned
 12 judge dealt with the fairness and reasonableness, and
 13 this is important:
 14 "Thirdly, in any event I am not satisfied that it
 15 has been shown that 'fairness and reasonableness' does
 16 require that the 'but for' test should not be applied.
 17 The tribunal, in accordance with the Trends clause, has
 18 adopted a 'but for' the damage to the hotel causation
 19 test as the basis of assessing the recoverable losses .
 20 If such a test is not adopted what is the alternative?
 21 One possibility would be 'but for the damage to the
 22 Hotel and the City' — ie an 'undamaged Hotel in
 23 an undamaged City' scenario. However, that would
 24 measure the gross operating profit which would have been
 25 made by OEH if the hurricanes had not struck at all and

1 would therefore compensate OEH for all
 2 business interruption losses howsoever caused, even
 3 where those losses were not in any way caused by damage
 4 (and as such are not recoverable under the main insuring
 5 clause of the policy).”
 6 And that's exactly the answer to the FCA's case in
 7 this matter. It's not "but for" the 25-mile radius
 8 cases and COVID-19 everywhere else, which is what the
 9 FCA would like to say through some theory of
 10 indivisibility or proximate cause; it is "but for" the
 11 25-mile radius cases. It's not "but for" the 25-mile
 12 radius cases and the cause of those cases, namely the
 13 epidemic or the pandemic even extending to China. It is
 14 "but for" the 25-mile radius cases. You don't add
 15 anything in to that insured peril in order to expand the
 16 scope and extent of the indemnity.
 17 So, my Lords, that is the effect of that case. And
 18 if your Lordships would go to paragraph 46 {E/31/930}
 19 this is the wording of the clause, the trends clause:
 20 "As to the wording of the clause, OEH submits that,
 21 even on a literal approach to the words 'had the Damage
 22 not occurred' or 'but for the Damage' ...
 23 Hurricanes Katrina and Rita ... could not have occurred
 24 either.”
 25 Now:

1 "... Hurricanes Katrina and Rita (which caused the
 2 damage) could not have occurred either. One cannot
 3 ignore the damage and yet pretend, for the purposes of
 4 the Trends clause, that the event which caused the
 5 damage still happened. However, this does not follow.
 6 The only assumption required by the clause is that the
 7 damage has not occurred. It doesn't require any
 8 assumption to be made as to the causes of the damage.”
 9 And then it says:
 10 "Secondly, OEH submits that the Trends clause is
 11 dealing with the effect of real 'trends, variations or
 12 special circumstances' which either did affect the
 13 business or which would have affected the business, had
 14 the damage not occurred. It is dealing with the
 15 implications of actual events, not imaginary or
 16 hypothetical ones. The only permitted counterfactual is
 17 to assume that there was no insured damage and to ask
 18 what consequences these actual trends, variations or
 19 circumstances would have had. A hypothetical Rita or
 20 Katrina ... is not a 'special circumstance' which would
 21 have affected the business had there been no damage but
 22 an entirely fictional event.”
 23 Those were the submissions of the hotel:
 24 "However, the clause requires a single assumption to
 25 be made (that there was no damage), and for the actual

1 facts to be considered on the basis of that assumption.
 2 That is what the tribunal have done.”
 3 Similarly, in our case. It doesn't matter how
 4 difficult it is, which it isn't. It doesn't matter how
 5 difficult it is, one reverses with a counterfactual all
 6 of the insured peril, but no more than the
 7 insured peril. There is a single assumption to be made,
 8 which is that there are no COVID-19 cases within
 9 25 miles of the premises. That's not an artificial
 10 assumption. The Scilly Isles survived for months
 11 without a COVID-19 case. Bits of Northumbria didn't
 12 have any COVID-19 cases at the beginning.
 13 "Thirdly", it says, paragraph 48:
 14 "... OEH submits that the opening part of the Trends
 15 clause required adjustments to be made for 'the trend of
 16 the Business ... [et cetera] ... these words are looking
 17 at trends, variations or circumstances independent of
 18 the (insured) Damage.”
 19 This is just the same as the FCA's case:
 20 "However, the trends, variations and circumstances
 21 considered by the Tribunal were independent of the
 22 insured Damage, albeit not independent of the cause of
 23 that Damage.”
 24 Similarly in our case. You look at trends and
 25 circumstances independent of the 25-mile cases but not

1 independent of the cause of those 25-mile cases.
 2 Quite simply, my Lords, if in that case the insured
 3 had wanted business interruption cover from hurricanes,
 4 it could have asked for business interruption cover from
 5 hurricanes. In other words, business interruption
 6 losses caused by hurricanes. That's not what it asked
 7 for and that's not what it got. It got
 8 business interruption loss indemnity from damage, and
 9 that was all. Similarly, in our case.

10 If I could take your Lordships to -- I've taken
 11 your Lordships to paragraph 52, where we've got the
 12 insured peril, and then I want to go to 57 and 58 and
 13 then you'll be pleased to know that I have to be quiet
 14 otherwise I will be garrotted by my fellow insurers.

15 57, at page 931 {E/31/931}:
 16 "I agree with the tribunal that the clause [that's
 17 the trends clause] is concerned only with the damage,
 18 not with the causes of the damage. What is covered are
 19 business interruption losses caused by damage, not
 20 business interruption losses caused by damage or 'other
 21 damage which resulted from the same cause'. Nowhere in
 22 the Trends clause does it state that 'variations or
 23 special circumstances affecting the Business either
 24 before or after the Damage or which would have affected
 25 the Business had the Damage not occurred' has to be

1 something completely unconnected with the damage in the
 2 sense that it had an independent cause to the cause of
 3 the damage. The assumption required to be made under
 4 the Trends clause is 'had the Damage not occurred'; not
 5 'had the Damage and whatever event caused the Damage not
 6 occurred'."

7 So at 58 {E/31/932}, the learned judge says:
 8 "I agree with Generali that OEH's construction
 9 effectively requires words to be read into the clause or
 10 for it to be re-drafted."

11 And then the last few lines:
 12 "... [that] is inconsistent with the causation
 13 requirement of the main insuring clause which OEH
 14 accepts requires proof that the losses claimed were
 15 caused by damage to the hotel."

16 Now, translating that into our case -- I've already
 17 made the submission and then I'll be quiet. Translating
 18 that into our case, my Lords, that was a case of wide
 19 area damage. Our case is a case of wide area disease.
 20 That was a case of specific damage to a hotel. Our case
 21 is a case of supposed 25-mile COVID-19 cases. The only
 22 peril insured against in our case are COVID-19 cases
 23 within 25 miles. That's the only peril. If these
 24 insureds had wanted pandemic cover or epidemic cover on
 25 a national scale, then they didn't get it. And perhaps

1 they could have if they'd asked, I know not, but they
 2 didn't get it.

3 And what the court below has done and what the FCA
 4 seeks to achieve is that the business interruption
 5 losses which were caused by the national pandemic should
 6 be recoverable by the insured, even though the
 7 insured peril was confined to COVID-19 cases within
 8 25 miles of the premises. That was the deal that was
 9 made and that's the bargain which has to be enforced by
 10 this court. As soon as you start messing around with
 11 things outside that perimeter or boundary, you are
 12 reverse engineering the contract of insurance, dare
 13 I say it, and you may be unduly -- and I'm sure you
 14 won't be -- influenced by the circumstances that we are
 15 considering this issue in the light of what has occurred
 16 over the last six to nine months. Whereas if you'd been
 17 asked this question a year ago, dare I say it, you would
 18 have had no hesitation in saying this is a case where
 19 the insured peril is 25-mile radius cases. Had those
 20 caused business interruption losses? The fact that
 21 there is some disease outside is an irrelevance. You
 22 can't reverse engineer those cases either through
 23 construction or through causation into the
 24 insured peril. No, FCA or insureds, we're awfully sorry
 25 but no.

1 And those, my Lords, are our submissions. I'm sorry
 2 to have shouted at you rather a lot recently.

3 LORD REED: Thank you very much, Mr Kealey.

4 We still have another quarter of an hour and so
 5 we'll turn next to counsel for Royal & Sun Alliance,
 6 Mr David Turner QC.

7 Submissions by MR TURNER

8 MR TURNER: My Lords, as you know, RSA brings an appeal in
 9 respect of two of the policies which were under
 10 consideration at first instance. Taking them in the
 11 order in which I'm going to deal with them, the first is
 12 the Cottagesure policy known as RSA1, and that's
 13 a policy which is specifically designed for the owners
 14 of holiday cottages. That policy includes a hybrid
 15 clause with a 25-mile radius disease provision. I was
 16 going to deal with it second because it's a hybrid
 17 clause but, given the time, it's better to take it first
 18 because I will be shorter on RSA1.

19 On RSA3, the Eaton Gate Commercial Combined policy,
 20 that is a policy which contains amongst other clauses
 21 a 25-mile radius disease clause, as well as an exclusion
 22 we say in respect of epidemic.

23 In terms of the points I'm going to make beyond
 24 preliminary points, I'll deal, as I've indicated, with
 25 RSA1 before RSA3.

1 Just in relation to causation, I should say that
 2 I adopt Mr Kealey’s submissions in relation to “but for”
 3 causation and counterfactuals and the Orient–Express,
 4 and I adopt whatever Mr Crane and Mr Salzedo before him
 5 said in relation to causation.

6 I also adopt the submissions of Mr Crane and
 7 Mr Salzedo in relation to radius provisions generally,
 8 and I adopt prospectively Mr Lockey’s submissions in
 9 relation to pre–trigger losses. I also adopt the
 10 submissions of those who have gone before in relation to
 11 the significance of the words “interruption or
 12 interference” in the context of the insured peril,
 13 adopting, if I may, also the approach taken by my Lord
 14 Lord Hamblen in the Orient–Express case, where those
 15 words were not seen to be integral to the insured peril
 16 but simply descriptive generally.

17 One further point on causation, you’ve been taken to
 18 paragraphs 111 and 112 which deal with indivisibility
 19 and each occurrence being an effective cause of the
 20 national restrictions. Can I just draw your attention
 21 to paragraph 418 of the judgment {C/3/149}. It’s in the
 22 context of one of Hiscox’s wordings, but this is where
 23 the Divisional Court seems to have provided a ruling
 24 which directly contradicted that which it had reached at
 25 paragraph 112 {C/3/69}, because in paragraph 418 the

1 Divisional Court said:
 2 “... it cannot be said that any such localised
 3 incident of the disease ...”

4 That’s an incidence of disease at that point within
 5 a one–mile radius:
 6 “... caused the imposition by the government of the
 7 [national] restrictions.”

8 And we say that that is correct and the approach
 9 that should have been adopted in relation to the other
 10 policies.

11 In relation to RSA1, by way of summary, this is
 12 a policy which provides disease cover only as an adjunct
 13 to primary business interruption cover, which itself is
 14 parasitic on insured material damage to the insured’s
 15 property. The policy only responds to the consequences
 16 of a notifiable disease either at the premises or within
 17 the specified radius of the premises. Disease outside
 18 the specified radius is not part of the insured peril.

19 This policy does not include a trends clause, but it
 20 does include quantification machinery in the form of
 21 a definition which I will take you to and the
 22 consequence is that the insured peril must be the sole
 23 cause of the loss.

24 Can I take you, then, to the relevant policy terms,
 25 and they are to be found in {C/15/1114}, starting at

1 page 1114. My Lords, they are summarised in our written
 2 case, which I should also have said I adopted, {B/9/29},
 3 and the summary starts in appendix A at page 322 of
 4 bundle B {B/9/322}.

5 There is a one–document provision of the sort that
 6 Mr Kealey took you to in relation to his wordings which
 7 can be found on page 1118 {C/15/1118} of the policy.
 8 It’s the third paragraph down. So everything to be
 9 construed as one document. The following page
 10 {C/15/1119} sees the start of the property damage
 11 section.

12 Business interruption insurance, the section starts
 13 at page 1125 {C/15/1125} and the insurance, the BI
 14 insurance, only applies where it is shown as included in
 15 the schedule.

16 Can I take you then to the schedule. And if we go
 17 to that at page 1195 {C/15/1195}, the schedule itself
 18 starts at page 1194 {C/15/1194}.

19 At {C/15/1195}, in respect of business interruption
 20 insurance, what is insured is loss of gross revenue. And
 21 “Loss of Gross Revenue” is itself a defined term and we
 22 see the definition for that at page {C/15/1186}. It’s
 23 on the left–hand side of page 1186. It’s:

24 “The actual amount of the reduction in the Gross
 25 Revenue received by You during the Indemnity Period

1 solely as a result of Damage to Buildings.”

2 So this is the provision I was referring to which
 3 the learned judges said was part of the quantification
 4 machinery and so I can knock this point on the head.

5 In their judgment at paragraph 297, which is in
 6 {C/3/119}, what they said is that:

7 “... the contractual quantification machinery
 8 including the definition of Loss of Gross Revenue is
 9 intended to be applicable to heads of cover which do not
 10 involve physical damage and are to be read accordingly.”

11 So, in other words, it was exactly the same
 12 manipulation of contractual language that they made in
 13 respect of the trends clauses where the trends clauses
 14 provided for physical damage, and no distinction to be
 15 made about the manipulation of language. And no point
 16 arises on this appeal that that manipulation should not
 17 be made in the context of RSA1 or, indeed, in respect of
 18 any of the other wordings that your Lordships are
 19 considering.

20 The business interruption insuring clause back in
 21 {C/15/1135}, in the right–hand column comes under
 22 a heading that would normally indicate that what being
 23 discussed is a basis of settlement clause, but in fact
 24 the heading itself is not particularly helpful because
 25 it’s clearly setting out the insuring provision on the

1 right—hand side:
 2 "If Damage by any Event covered under this Insurance
 3 occurs ..." et cetera " ... and causes interruption ...
 4 We will pay ... the amount of loss resulting from the
 5 interruption or interference caused by the Damage ..."
 6 There is, as you would expect, a material damage
 7 proviso which one finds on the following page
 8 {C/15/1136} in the right—hand column under the heading
 9 "Material Damage Requirement".
 10 The key extensions are to be found at
 11 page {C/15/1129}, so back in time. "Extensions to
 12 cover":
 13 "This insurance also covers ...
 14 1 Failure of public supply ..."
 15 So that's failure of supply effectively to the
 16 premises.
 17 2 is the disease murder, suicide, vermin and pests
 18 provision which is in terms that you will have
 19 encountered in the other policies that you have already
 20 seen. So:
 21 "Loss as a result of.
 22 "A) closure or restrictions placed on the Premises
 23 as a result of notifiable human disease manifesting
 24 itself at the Premises or within a radius of 25 miles of
 25 the Premises."

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1 And then a series of other clauses, which by now
 2 will be familiar to you: injury or illness ; closure of
 3 the whole or part of the premises by order of the public
 4 authority as a result of defects in drains or sanitary
 5 arrangements; murder, rape or suicide at the premises;
 6 closure or restrictions on the premises as a result of
 7 vermin and pests at the premises.
 8 Damage, as you would expect, is defined in the
 9 normal terms. I will just give you the reference. It's
 10 {C/15/1184}. I will not ask you to turn it up, but
 11 it's:
 12 "Accidental loss, destruction or damage."
 13 So dealing very quickly, if I may, with the scope of
 14 the peril , and asking you to keep page 1129 {C/15/1129}
 15 open, for present purposes only disease within 25 miles
 16 is relevant. I adopt with gratitude everything that's
 17 has been said before me in relation to that.
 18 Your Lordships will see that what is covered is both
 19 disease or closure or restrictions as a result of
 20 a notifiable disease manifesting itself at the premises
 21 or within a radius of 25 miles of the premises. I adopt
 22 Mr Crane's submissions in relation to the present
 23 participate . The suggestion that is implicit in the
 24 FCA's submissions, given their acceptance that the "at
 25 the premises" part of this peril applies solely to the

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1 consequences of disease at the premises rather than
 2 disease in the country, provided that it occurs at the
 3 premises, plainly the word "manifesting" cannot
 4 transform its meaning or form simply between the disease
 5 at the premises or the disease within the specified
 6 radius.
 7 There is no scope, we say, for syntactical
 8 distinction to be drawn between "the 25—mile radius"
 9 provision and "at the premises" provision, and the FCA's
 10 concession in paragraph 194 therefore disposes of this
 11 particular point.
 12 In terms of the required causal link , which is that
 13 there be disease within the specified radius which leads
 14 to closure or restrictions which leads to loss, we say
 15 that that causal links are plainly links of proximate
 16 causation throughout and that is the only sensible
 17 construction of the words "as a result of". Certainly
 18 those words would not admit of any distinction to be
 19 drawn between section 55 and the statutory presumption
 20 of a requirement for proximate causation, and the FCA
 21 has effectively conceded the point, as you're aware, in
 22 paragraph 219 of its own case in response at {B/10/401}.
 23 They cannot have some looser causal link internally
 24 to the peril between the disease and the closure or
 25 restrictions than they have at the beginning of the

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1 clause, the link between the loss and the peril , because
 2 it would be fanciful to suggest that those words somehow
 3 changed their meaning in the same clause, and I adopt
 4 Mr Salzedo's submissions in relation to that.
 5 You already have my submissions in relation to the
 6 definition of "loss of gross" — ah.
 7 MR EDELMAN: My Lord, I just wanted to say that I've had
 8 a message from my solicitors saying I think the public
 9 link has gone silent. So —
 10 MR TURNER: Right.
 11 MR EDELMAN: — the solicitors and junior counsel listening
 12 to this may not be able to hear it on the public link .
 13 MR TURNER: And indeed the transcript has stopped working as
 14 well , my Lords.
 15 LORD REED: Yes.
 16 MR TURNER: I'm pretty well at the end. I probably need
 17 30 more seconds but, given the link's gone down, can
 18 I ask for those 30 seconds to be tomorrow morning.
 19 LORD REED: There are probably all sorts of reasons why
 20 that's a good idea, Mr Turner.
 21 Very well, then. We'll adjourn now and resume at
 22 10.30 am tomorrow morning. Thank you.
 23 MR TURNER: Thank you, my Lords.
 24 (4.01 pm)
 25 (The court adjourned until 10.30 am

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1 on Tuesday, 17 November 2020)

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