OPUS₂

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

Day 1

July 20, 2020

Opus 2 - Official Court Reporters

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1	Monday, 20 July 2020	1	with 700 types of policy and about 370,000 policyholders
2	(10.30 am)	2	who could potentially be affected by this litigation .
3	Hearing via Skype for Business	3	I emphasise the word "potentially "but that is, as it
4	Housekeeping	4	were, a ballpark figure for how important some of the
5	LORD JUSTICE FLAUX: Are we ready, Mr Edelman?	5	issues in this case are to so many policyholders in this
6	MR EDELMAN: My Lord, yes, we are.	6	country who are confronting the financial impact of the
7	LORD JUSTICE FLAUX: I will ask my clerk to call the case on	7	coronavirus epidemic.
8	then.	8	But can I again emphasise on behalf of the FCA that
9	Yes, Mr Edelman.	9	it is important for the defendants to bear in mind that
10	MR EDELMAN: My Lords, hopefully you will have received all	10	the FCA is not, if the FCA is not arguing a point or
11	of the materials that you require . As you will have	11	testing a particular type of clause, it does not
12	seen, the FCA have served a 300-page opening and has	12	represent any concession that it is not arguable or that
13	been confronted with almost three times that amount from	13	such clauses do not respond to COVID-19 losses. This
14	the insurers . We have done our best to digest the	14	litigation does not seek to prevent individual
15	material in the time available .	15	policyholders pursuing claims or complaints to the FOS,
16	LORD JUSTICE FLAUX: We did. Mr Justice Butcher and	16	and they should be entitled to advance arguments that
17	I regret our decision not to impose a page limit on you	17	the FCA has not advanced if they wish to do so.
18	all, but there it is.	18	So the court should, we would respectfully ask,
19	MR EDELMAN: I'm afraid, my Lord, sometimes with the benefit	19	avoid making findings or making any comment on issues
20	of hindsight, but there it is, my Lord. We have done	20	that are not before it and, as a matter of fairness,
21	our best to try and cope with that volume of material	21	should not shut out policyholders on such points in
22	and I hope that the court has had sufficient time to be	22	circumstances where it will not be hearing arguments on
23	able to pre-read at least a sufficient amount for the	23	those points in this test case.
24	purposes of today.	24	I mention that because insurers , for example
25	LORD JUSTICE FLAUX: Yes.	25	Argenta, have sought in their skeleton argument to shut
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1	MR EDELMAN: My Lord, I should have said, ordinarily I would	1	out policyholders taking a point on backdating the date
2	introduce all other counsel but that would use up too	2	of notifiability , whether the New World Harbourview case
3	much time and hopefully you have got a cast list .	3	is wrong, by seeking a declaration in these proceedings
4	LORD JUSTICE FLAUX: We have.	4	in circumstances where the point is not being argued by
5	MR EDELMAN: My Lords, there is a limited amount of time	5	the FCA. That is inappropriate, as are all other
6	available and a lot of ground to cover. We will try to	6	attempts by insurers to seek the court's endorsement of
7	avoid in our oral submissions repeating what we have	7	their stance on issues that have not been raised by the
8	said in writing. But hopefully the defendants will not	8	FCA.
9	take the absence of repetition as an abandonment of any	9	This is not an ordinary piece of litigation where if
10	points, nor should they assume that just because every	10	a claimant does not raise a point it is treated as
11	argument that they make in their 850 pages of written	11	having abandoned it. These are selected issues which
12	submissions is not addressed orally , that somehow that	12	the FCA have raised as individual issues of importance
13	means that somewhere on the 775th page we are to be	13	which it wishes to have the court determine, and the
14	treated as having conceded an argument to which we	14	fact that other issues are not raised is neither here
15	didn't respond orally . We are going to have to be	15	nor there and should not be taken as any abandonment of
16	selective, but if there is something that they think is	16	points on behalf of policyholders .
17	more important than we did, then we will deal with it in	17	My Lords, with that introduction, can I move on to
18	reply. But they shouldn't be taking anything as	18	the structure of our submissions and just to give you

it is only an estimate, that there are over 60 insurers 25 If there are one-off policy concepts, then we will

associated with that.

a batting order which at least will cover us for today.

hearing from substantively , dealing with the pandemic

and the public authority response to it, and she will

also deal with some policy trigger concepts that are $% \left(1\right) =\left(1\right) \left(1\right)$

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Firstly , it is going to be Ms Mulcahy you will be

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Submissions by MR EDELMAN

affected by this litigation . I can tell you now that as

a result of work that the FCA has done, the estimate is,

MR EDELMAN: My Lords, the court was given for the first $\ensuremath{\mathsf{CMC}}$

information about the number of policies directly

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a concession.

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deal with those when we get to the $\;$ policies , but that is the $\;$ first $\;$ topic .

I will then briefly deal with principles of construction; by and large, as one would expect, uncontroversial but there are a few points that I will want to make briefly. Then I will be dealing with prevalence, again that will be relatively brief, before we move on to the main topic for today, it may run over into tomorrow but we will see about that, and the main topic is, of course, the causation issues which have been raised by the defendants. On that, Ms Mulcahy will be dealing with the cases, but I will be saying something about causation more generally before she turns to the law. Then after she has finished with the law on causation I will be saying something additional about trends clauses and how they should be approached.

My Lords, that being the agenda for today before we move on to the policies , I can tell my Lords the order in which we will be dealing with them if it is helpful now, but if not I will tell you tomorrow, with that introduction I will hand over to Ms Mulcahy. I will put my microphone on silent and I just remind all other counsel that they should also keep their microphones on silent when they are not speaking.

LORD JUSTICE FLAUX: Good morning, Ms Mulcahy.

(10.39 am)

Submissions by MS MULCAHY MS MULCAHY: Good morning, my Lords.

I am going to outline the development of the pandemic and then I am going to deal with the key events, announcements and forms of public authority action which will form the factual backdrop to the issues of construction of the policies; for example, whether a particular step amounted to advice or to action or to a restriction within the meaning of the policies, whether it gave rise to a prevention of access or a hindrance of use, whether it constituted or gave rise to an interruption or an interference with the insured business.

The factual background is also relevant to considering the causation points on the counterfactual; for example, how divisible are the forms of public authority action, and should some of them, but not all of them, be excised when considering the "but for" counterfactual; do you just focus on the business closure orders or the orders that can be said to fall into that category, or some of them, or do you take a broader view of the government action as a whole.

I am intending to take you to the key pieces of advice and legislation $\,$ and look at the documents, and

I will also introduce the different categories of business which have been used for the purposes of the assumed facts and show you their origins in the legislation and announcements.

Those categories 1 to 7 are set out in the amended particulars of claim at paragraph 19. Just for your reference that is $\{A/2/13\}$, and they have been used by all of the parties as a useful shorthand when considering business types as they have been impacted differently by different forms of public authority action.

That is the reason for taking you to these documents. I am going to be working from the agreed facts bundle, agreed facts document 1, which is the chronology of the government response to COVID-19 in the UK, which I believe you may have in hard copy, it is $\{C/1/1\}$. But I am also going to go to the accompanying bundle, which I don't think you do have in hard copy, but if you would like it and the legislation that I am also going to go to, then we would be very happy to provide with you a hard copy of that if you request it .

Can I start with the pandemic but looking at it initially , and briefly , internationally .

The origin of the COVID-19 pandemic was towards the end of last year with cases of pneumonia of unknown

origin occurring in Wuhan, in Hubei Province in China. On 31 December, New Year's Eve, 44 cases were reported to the World Health Organisation . If we can bring up the bundle $\{C/2/1\}$ you will be able to see the announcement of that there, referring to the number of cases .

On 12 January 2020 it was announced that a coronavirus had been found in samples taken from the patients concerned and the associated disease was given the name COVID-19.

On 30 January the World Health Organisation declared there to be a public health emergency of international concern. We can see that on $\{C/2/16\}$ in the middle of the page. You can see in bold it was declared that there was a PHEIC, a Public Health Emergency of International Concern.

On 11 March, which is at {C/2/107}, the World Health Organisation declared COVID-19 to be a pandemic. And a pandemic is defined by the WHO as the "worldwide spread of a new disease" in contradistinction from the an epidemic, which is defined as "an illness or health-related behaviour or events which occur at the level of a region or community in excess of normal expectancy".

Those are the gist of the global pandemic. I am now

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going to look at the pandemic nationally and the UK Government action in response to it. I am going to simply refer to the government here, meaning the UK Government, although the devolved administrations all took action in their respective jurisdictions, as set out in the chronology. I will mention that briefly, but I was proposing to deal with it on the basis of the UK Government's steps.

Firstly , on 22 January the UK Department of Health and Social Care and Public Health England, PHE, raised the national risk level from "very low" to "low". We can see that on the agreed facts chronology; it is $\{C/1/2\}$, it is row 2.

They raised it again, if we go over the page, on 30 January; it was raised from "low" to "moderate", and that was to plan in case of a more widespread outbreak, which was a prescient move.

On 31 January, we can see this from row 6, the Chief Medical Officer for England, Professor Chris Whitty, announced the first two confirmed cases, both in the same family; and the document relating to that is at $\{C/2/19\}$.

On 3 February, the government gave health advice to the public regarding hand washing and sanitisation .

Then the first piece of legislation was enacted on

10 February. We have that in the legislation bundle, it is $\{J/14/1\}$ and these were the Health Protection (Coronavirus) Regulations 2020. If we look at regulation 3, which is over the page $\{J/14/2\}$, we can see that they apply:

"... where the Secretary of State declares, by notice published on the government [Government website] that the incidence or transmission of coronavirus constitutes a serious and imminent threat to public health, and that the incidence or transmission of coronavirus is at such a point that the measures outlined in these regulations may reasonably be considered to be an effective means of preventing the further, significant transmission of coronavirus (a serious and imminent threat declaration)."

That declaration was made on the same day, and these regulations provided for the screening and detention and isolation of individuals .

Moving on, on 22 February -- and this is back in agreed facts 1, row 9, it is $\{C/1/5\}$, Scotland was the first of the national administrations to make COVID-19 a notifiable disease . Five days later , on 29 February -- over the page, row 14 -- Northern Ireland followed suit .

In between those dates, again if we just go back

a page to row 10, on 25 February the government instructed that travellers to the UK from certain countries had to self-isolate even if they were showing no symptoms, and also told employers and business, we see at row 11 that they had to adopt certain practices, for example in relation to hygiene and preventing travellers from certain regions from attending work.

Alongside this, the disease continued to spread. Again, if we go over the page, row 14, on 27 February Northern Ireland had its first reported case. Sorry, I should have said on 28 February the first case occurred in Wales. Then on 1 March, the first case in Scotland

Then we have at the bottom, on 2 March there is the first confirmed death in the UK from COVID-19, row 16, and that was announced on 5 March by the Chief Medical Officer, and we see the announcement at $\{C/2/97\}$.

Cases of the disease then rose rapidly during March across the UK, and so did consequent deaths.

Interlinked with that spread there was further and cumulative government action. If we go to $\{C/2/60\}$, on 3 March the government announced an action plan. If we go forward two pages $\{C/2/62\}$ to just see the index, I don't need to go into this in detail, you will see

that it was dealing with the response, the phased response to the pandemic — not declared a pandemic as yet, but to the disease, and the four phases were: to contain, to delay, to research and to mitigate.

Then on the following day, 4 March, the government issued formal advice on social distancing, heralding its likely implementation soon across the UK. That can be seen at page 86 of that same bundle $\{C/2/86\}$.

Now pausing there, 3 March is the date that we say there was an "emergency", within the meaning of the policies , and Arch agrees that in relation to its wording.

There were similar concepts or are similar consents under other policies, such as "a danger" or reference to health reasons or concerns, and it is the FCA's case that likewise these were enmeshed in the UK from this point in time, from 3 March.

On 5 March, England made COVID-19 a notifiable disease, we can see that in the same bundle at page 95 $\{C/2/95\}$, and Wales then followed suit on 6 March, a day later .

On 12 March, which was the day after the WHO declared a pandemic, the government raised the risk level from "moderate" to "high". We can see that, it is row 27 in AF1, $\{C/1/10\}$.

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Then on the same day, again 12 March, the government, by an announcement on its website, instructed anyone who showed symptoms to self-isolate even if they had not been to certain countries, and it was stated:

"This means we want people to stay at home [you will see this from row 27] we want and avoid all but essential contact with others for 7 days from the point of displaying mild symptoms, to slow the spread of the infection ."

The government also that day issued similar guidance to those with relevant symptoms who were, and note the words, "required to stay at home". It was said:

"Stay at home and do not leave your house for seven days."

So individuals showing symptoms of the disease but also the businesses that they worked in were affected by that instruction. Going to work was out of the question if you had any of the relevant symptoms.

Now, 12 March is our alternative case as to the date when there was an emergency, and Ecclesiastical pleads this date for its wording.

I am going to come on now to 16 March and the Prime Minister's announcement on that date, which we say was a key date in relation to the chronology. But

before I do, I would like to show you the scientific advice that led up to that announcement. The government is advised by SAGE, the Scientific Advisory Group for Emergencies, and I am going to briefly take you to the summary in relation to two meetings.

The first one is at $\{C/2/119\}$, which is a meeting on 13 March. Just to go to the summary here:

"Owing to a 5 to 7 day lag in data provision for modelling, SAGE now believes there are more cases in the UK than SAGE previously expected at this point and we may therefore be further ahead on the epidemic curve, but the UK remains on broadly the same epidemic trajectory in time to peak. The science suggests that household isolation and social distancing of the elderly and vulnerable should be implemented soon provided they can be done well and equitably. Individuals who want to distance themselves should be advised how to do so, SAGE is considering further social distancing interventions that may thus be applied."

So it was becoming clear that because of the lag in data provision there needed to be an acceleration in action. Then on 16 March, if we go forward in the same bundle to page 125, the next meeting of SAGE has this, the summary:

"On the basis of accumulating data, including on NHS

critical care capacity, the advice from SAGE has changed regarding the speed of implementation of additional interventions. SAGE advises there is clear evidence to support additional social distancing measures be introduced as soon as possible. These additional measures will need to be accompanied by a significant increase in testing and the availability of near real-time data flows to understand their impacts."

There is a situation update at paragraph 6:

"London has the greatest proportion of the UK outbreak. It is possible that London has both community and nosocomial transmission (i.e. in hospitals).

"It is possible that there are 5,000-10,000 new cases per day in the UK (great uncertainty around this estimate).

"UK cases may be doubling in number every 5 to 6 days.

"The risk of one person within a household passing the infection to others is estimated to increase during isolation from 50% to 70%."

Then at 13:

"The science suggests additional social distancing measures should be introduced as soon as possible."

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"Compliance with the measures by the public is key."

That was the scientific background. Just to identify where the country was in terms of reported cases of disease at that point, can I take you to bundle $\{A/2/19\}$, it is paragraph 27 of the amended particulars of claim. You will recall this table from previous CMCs. If I can go to 16 March, the position in relation to reported cases for England at that stage was there were 3,220 reported cases, and my understanding is that is agreed as between the parties.

These were spread across all of England's 317 local authorities , apart from 19 of them. We know that, the agreed facts document 3, which is at $\{C/5/7\}$ paragraph 20, confirms the numbers of local authorities , and there is a spreadsheet in the footnote from which that has been derived .

Just staying with this for a moment, the true number of course, because of the lack of testing, is conceded by the defendants to be much higher than the number of reported cases. The actual figure is not agreed, but it is conceded to be much higher. Just to give you a reference for that, it is paragraph 23 of appendix 3 to the Ecclesiastical /Amlin's skeleton where it is stated that all of the defendants, apart from QBE, who simply say it is merely higher, are agreed that the true number is much higher.

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Whilst the figure is not agreed and the defendant isn't being asked to determine the true prevalence, as opposed to addressing certain issues on the assumption that it represents the best available evidence, you will see from the document on screen at 16 March $\{A/2/19\}$ that the Cambridge Public Health England analysis estimates that by 16 March there were actually 391,000 cases spread across England.

In tandem and intertwined with the march of the disease across the country, on 16 March the government took further decisive preventative action, and did so by way of a public announcement from the Prime Minister. If we can go to that, it is $\{C/2/145\}$. I will take you now to the series of announcements, just working through what was said. You will see at the bottom of that page, page 145, the Prime Minister saying:

"As we said last week, our objective is to delay and flatten the peak of the epidemic by bringing forward the right measures at the right time, so that we minimise suffering and save lives. And everything we do is based scrupulously on the best scientific advice."

Then over the page:

"Last week we asked everyone to stay at home if you had one of two key symptoms: a high temperature or a new and continuous cough.

"Today we need to go further, because according to SAGE it looks as though we are now approaching the fast growth part of the upward curve.

"And without drastic action cases could double every 5 or 6 days."

Then we have a series of steps:

"So, first, we need to ask you to ensure that if you or anyone in your household has one of these two symptoms, then you should stay at home for 14 days:

"That means that if possible you should not go out even to buy food or essentials other than for exercise, and in that case at a safe distance from others."

The next paragraph:

"And even if you don't have symptoms and if no one in your household has symptoms there is more that we need you to do now.

"So, second, now is the time for everyone to stop non-essential contact with others and to stop all unnecessary travel."

That is important in the context of the construction issues that arise:

"We need people to start working from home where they possibly can. And you should avoid pubs, clubs, theatres and other such social venues."

If we carry on towards the bottom we have the words:

"So third, in a few days time -- by this coming weekend -- it will be necessary to go further and to ensure that those with the most serious health conditions are largely shielded from social contact for around 12 weeks."

Towards the bottom of that page:

"It is now clear that the peak of the epidemic is coming faster in some parts of the country than in others.

"And it looks as though London is now a few weeks ahead."

At the top of the next page:

"... Londoners [should] now pay special attention to what we are saying about avoiding non-essential contact, and take particularly seriously the advice about working from home ..."

Then we have advice and instruction relating to mass gatherings, so the third paragraph:

"But obviously, logically as we advise against unnecessary social contact of all kinds, it is right that we should extend this advice to mass gatherings as well.

"And so we've also got to ensure that we have the critical workers we need, that might otherwise be deployed at those gatherings, to deal with this

emergency.

"So from tomorrow, we will no longer be supporting mass gatherings with emergency workers in the way that we normally do. So mass gatherings, we are now moving emphatically away from."

So we have a series of announcements there trying to delay the epidemic, telling people to stay at home, stay at home with symptoms, to stop non-essential contact and travel, to work from home.

LORD JUSTICE FLAUX: What day of the week was 16 March? Was it a Tuesday?

MS MULCAHY: It was a Monday, my Lord.

13 LORD JUSTICE FLAUX: It was a Monday, was it?

14 MS MULCAHY: It was a Monday.

15 LORD JUSTICE FLAUX: Monday, was that the week of the football match? It was certainly the week of

17 Cheltenham, wasn't it, or was it the week before?

Perhaps it was the week before.

MS MULCAHY: I think it may have been the week before.

 $20\,$ LORD JUSTICE FLAUX: I think it may have been the week

 $21 \hspace{10mm} \text{before} \,. \hspace{10mm} \text{Yes, it was.} \hspace{10mm} \text{Thank you}.$

MS MULCAHY: Then we have this prohibition on massgatherings. What we would say about this is clearly

this was a national strategy trying to deal with

25 a national emergency.

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We have on the same date, and it is page 139 $\{C/2/139\}$ in this bundle, so slightly earlier , but on the same date the government is issuing further specific guidance on social distancing and on what vulnerable people need to do.

We say 16 March is significant in this case because it would appear to be a key turning point in behaviour. You will have noted the imperative language that was used in the Prime Minister's announcement, and we say that this was part of the government action or advice within the meaning of the wordings, and that this and the subsequent social distancing advice and instruction amounted to prevention of access, hindrance of use, closure, interruption, et cetera.

It is 16 March that is the first action that the FCA is relying on as triggering all those clauses; that is paragraph 69 of its skeleton at $\{I/131\}$ but we don't need to go to it.

We can see that the following day the Chancellor announced a package of financial support for businesses, and it is at page 168 of this bundle, including £330 billion worth of guarantees $\{C/2/168\}$. That was following on from a package of £30 billion the previous week, so one can see that the government was anticipating the economic impact.

If we go over the page to $\{C/2/169\}$ those measures are set out and it is made clear that they are seeking to support businesses and that the economic response is directed at giving government-backed guaranteed loans to support businesses to get through this .

I am going to move on now to further UK Government ${\sf action}$.

I'm sorry, I think I had it the wrong way round. I am told the Cheltenham Gold Cup was on 13 March, my Lord, so it was the previous week.

Moving on now to what happened after 16 March, we have a further announcement on 18 March, it is page 221 of this bundle $\{C/2/221\}$.

In this announcement, can we go over to the second page of it , $\{C/2/222\}$ the Prime Minister is reiterating advice to stay at home and work at home but is also taking further action . If I start at the top, he stated:

"I want to repeat that everyone -- everyone -- must follow the advice to protect themselves and their families , but also -- more importantly -- to protect the wider public . So stay at home for seven days if you think you have the symptoms."

A reminder of what the key symptoms were, and then in the next paragraph:

"Avoid all unnecessary gatherings -- pubs, clubs, bars, restaurants, theatres and so on and work from home if you can."

Then we have further down the paragraph:

"And we come today to the key issue of schools where we have been consistently advised that there is an important trade off. And so far the judgment of our advisers has been that closing schools is actually of limited value in slowing the spread of the epidemic.

"And that is partly because counterintuitively schools are actually very safe environments. And in this disease and epidemic children and young people are much less vulnerable.

"And hitherto the advice has been to keep the schools open if possible \dots "

The next paragraph:

"So looking at the curve of the disease and looking at where we are now -- we think now that we must apply downward pressure, further downward pressure on that upward curve by closing the schools.

"So I can announce today and Gavin Williamson is making a statement now in the House of Commons that after schools shut their gates from Friday afternoon [so that is 20 March] they will remain closed for most pupils ..."

That is Friday 20 March:

"... for the vast majority of pupils -- until further notice . I will explain what I mean by the vast majority of pupils .

"The objective is to slow the spread of the virus and we judge it is the right moment to do that."

Then he states that we also need to keep the NHS going, and other critical workers with children to keep doing their jobs. So the penultimate paragraph on that page:

"We therefore need schools to make provision for the children of these key workers who would otherwise be forced to stay home. And they will also need to look after the most vulnerable children."

If we go to the top of the next page $\{C/2/223\}$ we can see that the Prime Minister says:

"We are simultaneously asking nurseries and private schools to do the same \ldots "

This is relevant to the policies. Arch in its defence, paragraph 49.9, pleads correctly that schools were closed from 20 March. However, Ecclesiastical in its defence, it is paragraph 16.3(b), says that this wasn't a legal prohibition and it didn't prevent or hinder schools from remaining open. So they take a different line in relation to this.

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The next day, 19 March, which is the Thursday of that week, the coronavirus bill was returned through parliament on an emergency basis, including measures to contain and slow the virus . It is a long Act, we don't need to go to much of it, but I will show that you in a moment.

If I just first deal with the announcement on 20 March, it is at page 240 of this bundle $\{C/2/240\}$, continuing the daily cumulative set of announcements. If we go on to the next page $\{C/2/241\}$, we can see at the top, having set out the ambition of the government to turn the tide against coronavirus within three months. he says:

"We are going to do it with testing . We are going to do it with new medicines, and with new digital technology \dots

"And ... now we are going to defeat this disease with a huge national effort to slow the spread by reducing unnecessary social contact."

He thanks everyone for following the guidance issued on Monday, and then identifies again what that guidance was, and then it says:

"But these actions that we're all taking together [again reference to "actions"] are already helping to take the strain off our NHS."

Towards the bottom, the penultimate paragraph:

"I must be absolutely clear with you: the speed of that eventual recovery depends on our ability, our collective ability, to get on top of the virus now."

Then we have further action over the page, fourth paragraph:

"We are collectively telling , telling cafes , pubs, bars , restaurants to close tonight ..."

So this is on 20 March, the Friday:

 $"\dots$ as soon as they reasonably can, and not to open tomorrow.

"Though to be clear, they can continue to provide take-out services .

"We're also telling nightclubs, theatres, cinemas, gyms and leisure centres to close on the same timescale.

"Now, these are places where people come together and indeed the whole purpose of these businesses is to bring people together. But the sad thing is that for today for now, at least physically, we need to keep people apart.

"And I want to stress that we will review the situation each month to see if we can relax any of these measures."

Then skipping two paragraphs:

"So that's why, as far as possible, we want you to

stay at home ..."

That's what was said on 20 March. The UK Government is continuing to shut down individuals and businesses in their activities. Here, as we will see when we get to the categories, we have category 1 businesses, cafes, pubs, bars, restaurants, other than take-out, and category 2, clubs, theatres, cinemas, et cetera being affected. And RSA, for example, accepts this announcement and this order to close as closure of these businesses; it is paragraph 40(e) of its defence.

Now, that shut down of these businesses was enshrined in legislation and it happens on 21 March, on 21 March regulations . If we can go to those, it is in $\{J/15/1\}$ pages 1 to page 5, they are quite short . This is the first of two sets of regulations , the first more limited and the second broader

I will go first to the explanatory note on page 4, $\{J/15/4\}$. At the bottom, we can see that:

"These regulations require the closure of businesses selling food or drink for consumption on the premises, and businesses listed in the schedule, to protect against the risks to public health arising [over the page] from coronavirus. The closure lasts until a direction is given by the Secretary of State ... required to keep ... under review every 28 days."

If we go back to regulation 2, it is on page $\{J/15/2\}$ of that document, it is headed "Requirement to close premises and businesses during the emergency", and we can see that:

"A person who is responsible for carrying on a business, which is listed in part 1 of the schedule

Just to divert there to a regulation 2.9(b):

"A 'person responsible for carrying on a business' includes the owner, proprietor, and manager of that business."

So if we go back at 2(1)(a), during the relevant period they must close any premises, or part of the premises, in which food or drink are sold for consumption on those premises, and must cease selling food or drink for consumption on its premises; or, if they sell food or drink for consumption off the premises, they must cease selling food or drink for consumption on its premises during the relevant period.

And at 4, regulation 2(4), I will move to the schedule in a moment, that relates to part 1 of the schedule:

"A person responsible for carrying on a business which is listed in part 2 of the schedule must cease to carry on that business during the relevant period."

Then if we go back to page $\{J/15/4\}$ we can see at So that deals with the fact of shielding . We have 2 part 1 that part 1 relates to restaurants, cafes, bars 2 a reminder that "tomorrow", [which is the Monday, the 3 and public houses, with some limited exceptions in 3 23rd], "you should not send your child to school unless you have been identified as a key worker." Then towards 4 relation to cafes. Part 2 is cinemas, theatres. 4 5 5 the bottom: nightclubs, concert halls, et cetera, spas, indoor 6 skating rinks, indoor fitness studios, gyms, et cetera. 6 "You have to stay two metres apart; you have to 7 7 So we have designated the part 1 businesses follow the social distancing advice." 8 8 category 1, for the purpose of the categorisation , and Then he says this: q q then the part 2 businesses are category 2. "I say this now -- on Sunday evening -- take this 10 10 So you can see there that restaurants, cafes, advice seriously, follow it, because it is absolutely et cetera had to close completely, except for take-away, 11 11 crucial ." 12 12 which you will see when we get to it the defendants are Then at the bottom: 13 13 arguing means they didn't have to close; because they "... we will keep the implementation of these 14 14 could stay open for take-away, it is said that there was measures under constant review ..." 15 no prevention of access or no complete closure. 15 Over the page $\{C/2/266\}$: 16 "You are doing your bit in following this advice to 16 Category 2 businesses had to close completely. As 17 we have seen, individuals had already been told to stay 17 slow the spread of this disease." 18 at home and to avoid restaurants, so the businesses 18 The following day, 23 March, the same theme 19 19 couldn't serve them anyway, except for take-away food or continues, it is page $\{C/2/290\}$: 20 20 "The coronavirus is the biggest threat this country 21 If we go back to regulation 3 on page 2, we can see 21 has faced for decades ..." 22 22 that contravening regulation 2 was a criminal offence. Then he goes on over the page: 23 23 Those are the 21 March regulations and then we have "Without a huge national effort to halt the growth 24 a further announcement of the Prime Minister on 24 of this virus, there will come a moment when no health 25 22 March. If we go back to $\{C/2/264\}$. This was on 25 service in the world could possibly cope ..." 1 a Sunday, 22 March, and if I can go over the page to 1 Go on a couple of paragraphs: 2 2 $\{C/2/265\}$ we can see towards the top the Prime Minister "To put it simply, if too many people become 3 thanking everyone who didn't visit their mother on 3 seriously unwell at one time, the NHS will be unable to 4 Mother's Day and then he says: 4 handle it -- meaning more people are likely to die, not 5 5 "Everyone who was forced to close a pub or a just from coronavirus but from other illnesses as well. 6 restaurant or a gym or any other business that could 6 "So it's vital to slow the spread of the disease." 7 7 have done fantastic business on a great day like this. Skipping a paragraph: 8 8 "Thank you for your sacrifice . I know how tough it "That's why we have been asking people to stay at 9 9 must be.' home during this pandemic. 10 Then skipping a paragraph he says: 10 "And though huge numbers are complying -- and 11 "The reason we are taking these unprecedented 11 I thank you all -- the time has now come for us all to 12 measures to prop up businesses, superior businesses and 12 "From this evening I must give the British people 13 13 support our economy and these preventative measures is 14 14 a very simple instruction -- you must stay at home. because we have to slow the spread of the disease and to 15 save thousands of lives ." 15 "Because the critical thing we must do is stop the 16 Then he sets out the stage of the plan he advertised 16 disease spreading between households. 17 17 "That is why people will only be allowed to leave at the outset: 18 "We have to take special steps to protect the 18 their home for the following very limited purposes: 19 particularly vulnerable." 19 "Shopping for basic necessities, as infrequently 20 20 as possible. And states there are probably about 1.5 million in 21 21 "One form of exercise a day ... all . and then savs: 22 "But this shielding [which is the protection of the 22 "Any medical need, to provide care or to help 23 23 vulnerable | will do more than any other single measure a vulnerable person, and

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want to do."

that we are setting out to save life . That is what we

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"Travelling to and from work, but only where this is

absolutely necessary and cannot be done from home."

1	"That's all these are the only reasons you should	1	able to remain open if:
2	leave your home."	2	"They are part of the response to support key
3	Then a bit further down:	3	workers or vulnerable groups.
4	"If you don't follow the rules the police have the	4	"There is a specific need for some or all of the
5	powers to enforce them, including through fines and	5	sites to remain open (for example they are housing
6	dispersing gatherings.	6	people who have been flooded out of their homes or being
7	"To ensure compliance with the government's	7	used by public services to provide emergency
8	instruction to stay at home, we will immediately:	8	accommodation or are not able to return to their primary
9	"Close all shops selling non-essential goods	9	residence)."
10	including clothing and electronic stores and other	10	Supporting homelessness, homeless people; or if
11	premises including libraries , playgrounds and outdoor	11	a holiday park or caravan park is somebody's primary
12	gyms, and places of worship.	12	residence they could remain on site .
13	"We will stop all gatherings of more than two people	13	That is relevant to the accommodation industry.
14	in public excluding people you live with.	14	Then on the next day, 25 March, the Coronavirus Act
15	"And we'll stop all social events, including	15	comes into force. If we can go to that, I am just going
16	weddings, baptisms and other ceremonies, but excluding	16	to go to the explanatory note to it, it is at $\{J/12/1\}$.
17	funerals ."	17	I am going to go to explanatory note 3. Having viewed
18	Then over the page $\{C/2/292\}$:	18	the Act, it states:
19	"I know the damage that this disruption is doing and	19	"The Act is part of a concerted effort across the
20	will do to people's lives, to their businesses and to	20	whole of the UK to tackle the COVID-19 outbreak. The
21	their jobs."	21	intention is that it will enable the right people from
22	Then down a paragraph:	22	public bodies across the UK to take appropriate actions
23	"And I can assure you that we will keep these	23	at the right times to manage the effects of the
24	restrictions under constant review. We will look again	24	outbreak."
25	in three weeks, and relax them if the evidence shows	25	So it is making clear that it is one part of
20	in three weeks, and relax them in the evidence shows	20	30 It is making clear that it is one part of
	33		35
1	that we are able to."	1	a concerted effort across the whole of the UK and it is
2	Finally, I would just ask you to note the last line:	2	one part of the overall solution .
3	" I urge you at this moment of national emergency	3	Now, this Act dealt with the need for more doctors
4	to stay at home"	4	and social workers and for registration of births and
5	That was announcement on the 23 March. On the same	5	deaths during the crisis , so we don't need to go to it
6	date the government issued yet further advice on	6	specifically but that is where it fits in the
7	business closures, we don't need to go to it, it was	7	chronology.
8	updated over the following days and again in May to	8	Then we turn to the 26 March regulations. As agreed
9	reflect legislative changes.	9	by the parties in Agreed Facts 3, it is at $\{C/5/7\}$. Can
10	On the following day, 24 March, the government	10	I take you to paragraph 21, this is an agreed fact that
11	issued specific advice to the accommodation industry,	11	by 26 March there were reported cases in all but one of
12	which we have classed as category 6, and that is	12	the lower tier local authorities within England.
13	relevant especially to Argenta and to RSA1, the	13	If we can go back to the particulars of claim at
14	Cottagesure policy . If we could just look at that	14	paragraph 27, it is $\{A/2/19\}$ I think, if we look at
15	briefly , it is on page 300 of the bundle $\{C/2/300\}$. It	15	26 March we can see there that the reported cases
16	makes it clear a third of the way down:	16	amounted to 17,956 at 26 March. And by
17	"Businesses providing holiday accommodation	17	Cambridge University PHE's estimate, which is not agreed
18	should now take steps to close for commercial use as	18	by the defendants, they were saying that in fact there
19	quickly as is safely possible.	19	were 2.47 million cases at that time across England.
90		90	That's the soutest in which the may summant than
20	"Full consideration should be given to the possible	20	That's the context in which the government then
20 21	"Full consideration should be given to the possible exclusions for residents that should be allowed to	20 21	enacts the 26 March regulations, which are important and
			enacts the 26 March regulations, which are important and
21	exclusions for residents that should be allowed to	21	enacts the 26 March regulations, which are important and I am going to take you through them and show you how the
21 22	exclusions for residents that should be allowed to remain. Any decision to close should be implemented in	21 22	enacts the 26 March regulations, which are important and
21 22 23	exclusions for residents that should be allowed to remain. Any decision to close should be implemented in full compliance with the social distancing guidelines."	21 22 23	enacts the 26 March regulations, which are important and I am going to take you through them and show you how the categorisation arises in the light of them. If we can

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those are the explanatory notes to the regulations . I'll just deal with those while I am here.

The regulations require the closure of businesses selling food or drink for consumption on the premises, and businesses listed in part 2 of schedule 2. We see it is to protect against the risks to public health arising from coronavirus, except for limited permitted uses. Restrictions are imposed on businesses listed in part 3 of schedule 2 which are permitted to remain open. The regulations also prohibit anyone leaving the place where they live without reasonable excuse, and ban public gatherings of more than two people. And the closures and restrictions last until they are terminated by a direction given by the Secretary of State. Then a reference to the necessity for review.

If we can go back to page 1 of that document, $\{J/16/1\}$, and I will go forward to regulation 4(1), which is on page 2. We can see there, and this mirrors the 21 March regulations:

"A person responsible for carrying on a business which is listed in part 1 of schedule 2."

Could we go to page 10 to see the list $\{J/16/10\}$. We can see there towards the bottom, again restaurants, cafes, workplace canteens may remain open where there is no practical alternative, bars, public houses, so almost

the same list as in the previous regulations . So that is our category ${\bf 1}.$

If we go back to page 2 now, we can see that they had to close except for take-away. The same formulation. If we go over the page we can see the rest of 4(1)(a). It is worth noting at subparagraph (6) that if the business in question listed in part 1 -- I will come back to part 2 in a moment -- forms part of a larger business , business B, the person responsible for carrying on business B complies with the requirement if it closes down business A. So that is where there is a mixed use business and there is a requirement then to close down that part of the business that relates to category 1, except for take-away.

Looking at regulation 4(4), this is the businesses listed in part 2 of schedule 2, and we will just go to those, this is category 2, they are on pages 10 to 11 of this document $\{J/16/10\}$ to page 11. You can see them at the bottom, similar list to last time; cinemas, theatres, nightclubs, bingo halls, and then over the page, yes, concert halls, casinos, funfairs, et cetera. So those are the businesses that are in category 2.

If we go back, please, to page 3 I think it is $\{J/16/3\}$, at regulation 4(4):

"A person responsible for carrying on [such

a business] must cease to carry on that business or to provide that service during the emergency period."

So that is a requirement to cease to carry on the business.

We then have regulation 5(1), and it states: $\begin{tabular}{ll} "A person responsible for carrying on a business, \\ not listed in part 3 of schedule 2 ..." \end{tabular}$

Let's have a look at part 3 of schedule 2. It is pages 11 to 12 $\{J/16/11\}$. Those are the businesses that could stay open, and we have called these category 3 businesses. So one can see there food retailers, supermarkets, off-licences, pharmacies, newsagents, homeware, funeral directors, and then some health ones at 37, including medical and health services.

Those are the businesses that were permitted to stay open. They weren't being required to close, albeit that there were restrictions being imposed on them.

If we go back to regulation 5(1), we can then look at the businesses other than those businesses $\{J/16/3\}$ and we can see that a business not listed in part 3, offering goods for sale or hire in a shop, or providing library services must, during the emergency period:

"(a) cease to carry on that business or provide that service except by making deliveries or otherwise providing services in response to orders received ..."

Through a website or otherwise by online communication, by telephone or by post. And they had to close any premises which were not required to carry out its business, or provide its services as permitted by that subparagraph above, and to cease to admit any person to its premises who is not required to carry on its business or provide its services as permitted by subparagraph (a).

So this is our category 4 businesses: where you have non-essential shops offering goods for sale or hire, they had to close premises, they had to cease carrying on business and cease admitting persons, except to the extent that the business could be carried on by online or telephone or postal orders.

There is then a further category where there are no specific regulations, the regulations are completely silent about them, other businesses; they are not prescribed to close, nothing is said about them staying open. There is other guidance relating to them such as the 2-metre rule and other employer duties, but these are basically service businesses, such as accountants or law firms or manufacturing businesses and they are not dealt with specifically by the regulations. We have identified those as category 5.

I move on now to category 6, that is dealt with at

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 $\begin{tabular}{ll} regulation 5(3) which is on the screen: \\ \begin{tabular}{ll} "Subject to paragraph (4), a person responsible for the screen of the sc$

carrying on a business consisting of the provision of holiday accommodation, whether in a hotel, hostel, bed and breakfast accommodation holiday apartment [et cetera], must cease to carry on that business during the emergency period."

So we have a requirement to cease business except in the limited circumstances set out in regulation 5(4), which you will see accommodation can be provided for a person who is unable to return to their main residence or needs accommodation while moving house.

If we go over the page, I think there is more on the list $\{J/16/4\}$. Yes. Needs accommodation to attend a funeral, accommodation for the homeless, to host blood donation sessions. So there are some limited exceptions, but holiday accommodation, generally speaking, had to cease business.

Then we have regulation 5(5), and this is category 7, relating to places of worship. You can see there that a person responsible for a place of worship must ensure that during the emergency period the place of worship is closed, except for the uses permitted in paragraph (6). There are some limited uses there, being a place of worship may be used for funerals, to

broadcast an act of worship and to provide essential voluntary services

So that is category 7 in relation to churches. We have also put schools into that category, but schools are not dealt with in these regulations . We have seen the announcement of 18 March requiring schools to be closed, and the position in relation to schools is that there was power to close them provided in the Coronavirus Act, it is at $\{J/13/25\}$, sections 37 and 38 and schedules 16 and 17 to that Act. See at the bottom there "temporary closure of educational institutions" and schedule 16 and 17, which is $\{J/13/157\}$ and 176, we don't need to go to them. Those powers were not exercised, but there was a power to close them.

Ecclesiastical and Amlin, in their skeleton, say that schools were first directly subject to legally restrictive regulations on 1 June 2020. We say that there was this impact of the threat of legislative interference by the Coronavirus Act itself on this much earlier date.

If I can go back now to the 26 March regulations at $\{J/16/4\}$ and look at regulation 6, which imposed restrictions on the movement of individuals . It is made clear there:

"During the emergency period no person may leave the

place where they are living without reasonable excuse."

Then the reasonable excuses are identified there, including the need to obtain basic necessities, exercise, seek medical assistance, provide care assistance, donate blood. Then (f) is important:

"To travel for the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living."

There are some other further exceptions over the page.

Now, that needs to be read obviously with the government announcement on 23 March. You must only go to work if "it is absolutely necessary".

Then we can see here at (i) accessing critical services, including childcare or educational facilities, where these are still available to a child in relation to whom that person is the parent.

So we would say that these are the exception, not the rule, in relation to the ability to travel for work and to go to the premises where you work. If you could work from home, you had to work from home.

Regulation 7 restricts gatherings:
"During the emergency period no person may

participate in a gathering in a public place of more than two people \dots "

With some limited exceptions, including where the gathering is essential for work purposes, and to attend a funeral.

Then we have regulations 8 to 11, which deal with enforcement. So the above restrictions on individuals and businesses, which are all in the same set of legislation, are then enforceable by the relevant authorities. It refers to "relevant person". They are designated later on 4 April 2020. Any offence under the regulations could be fined; it was a summary offence.

May I just go back to regulation 3, which details the emergency period. It's at page $2 \{J/16/2\}$. It makes it clear that the emergency period starts when the regulation comes into force, ends when it is specifically directed to end, and at (2) there is a need for review, the Secretary of State must review the need for the restrictions and requirements at least once every 21 days, with the first review being carried out by 16 March, in order to see whether they were still needed.

So we have a continuation of the same theme. We have a national disease, we have a national public authority response. We have intermingled effects on

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individuals and businesses. We would say that this is all two sides of the same coin. If you are telling people on the one hand to stay away from businesses, and you are closing the business on the other, we would say that is one and the same thing; the purpose is to prevent access to those businesses, even if it is for the ultimate purpose of protecting public health.

We would say from the beginning, the danger and emergency of COVID-19 posed a national threat. It spread nationally and it required an elicited national response; and at each stage, one can see from these announcement and the regulations, the government is acting on the basis of emergency, danger and health concerns. The restrictions prevented activity on the part of individuals and businesses in combination, collectively causing losses. That's why we contend that the disease and public authority action and the specific types of public authority action form an indivisible

As the Secretary of State for Health said later, on 28 April -- can we go to $\{C/1/36\}$ and it is the 28 April row in AF1, it is at the bottom -- the lockdown was imposed at the same time across the whole of the UK for this reason:

"There was a big benefit, I think, as we brought in

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the lockdown measures, of the whole country moving together. We did think about moving with London and the Midlands first, because they were more advanced in terms of the number of cases, but we decided that we are really in this together, and the shape of the curve, if not the height of the curve, has been very similar across the whole country. It went up more in London but it's also come down more, but the broad shape has been similar, which is what you would expect given that we have all been living through the same lockdown measures. The other thing to say is that it is not just about the level, it is also about the slope of the curve and if the R [which is the doubling rate] goes above 1anywhere, that would eventually lead to an exponential rise and a second peak and an overwhelming of the NHS in that area unless it's addressed, so although the level of the number of cases is $% \left(1\right) =\left(1\right) \left(1\right) =\left(1\right) \left(1\right$ the slope of the curve has actually been remarkably [if we can go over the page to page 37 please] similar across the country, so that argues for doing things as a whole country together."

That was the basis on which this was a national lockdown. I will come on to the local lockdown in Leicester in a little bit. But under the March regulations the government could disapply any lockdown

measure at any stage, it had to positively review them every three weeks, which it did, but it nonetheless continued that national lockdown until recently, when it started to lift the lockdown and apply more limited measures, such as to Leicester.

I have a little bit more to deal with on this topic, I am just wondering whether that might be a convenient moment for the shorthand writers to have a break, and then I will finish off this topic and deal with common triggers before handing back to Mr Edelman.

LORD JUSTICE FLAUX: How long a break do you want, five or ten minutes?

MS MULCAHY: I am in your hands, my Lord.

14 LORD JUSTICE FLAUX: Because we are dealing with things
15 remotely, my watch says it is just before quarter to 12,
16 if we say just after 10 to 12, so that gives us sort of
17 seven or eight minutes. Okay?

19 LORD JUSTICE FLAUX: Okay, see you in a second.

20 MS MULCAHY: Yes.

21 (11.43 am)

(Short break)

23 (11.52 am)

 $24~{\rm LORD}$ JUSTICE FLAUX: Are you ready, Ms Mulcahy?

25 MS MULCAHY: Yes, my Lord.

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Much is made by the defendants of whether something is mandatory, in the sense of legal enactments that are enforceable and legally binding. However, it has to be remembered that there was a legal underpinning to all of the government's requirements whether or not they were specifically legislated for, and this is also relevant to the businesses which remained even partially open, of which there were very few. This is because all businesses had legal duties as employers and occupiers, such as tortious duties of care, duties under the health and safety legislation, contractual duties under employment contracts; and those duties were owed to employees, they were owed to customers, they were owed to contractors and to other visitors. They included, in relation to employers, the need to ensure so far as reasonably practicable the health and safety at work of employees through implementation of a safe system of

So we would say it wasn't open to policyholders to breach the UK Government's advice and guidance without risking a breach of their legal duties regarding the health and safety of employees, and as occupiers in relation to the public.

These duties, in combination with the requirements to avoid unnecessary travel, self-isolation and the two

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metre rule, made it impracticable for many businesses to function, even if in law they could remain open or partially open.

Many, even if they were permitted to stay open, had to close temporarily, interrupting their business, to remodel their premises to install plastic screens or distancing markers and impose sanitisers and put up warnings, et cetera, which will have increased the cost of working in that regard.

But quite apart from the legal duties as employers and occupiers, these policies also contain reasonable precautions or reasonable care conditions, requiring policyholders to take all reasonable precautions to prevent injury to any person and to comply with all legal requirements and safety regulations.

To take one example, if we look at the Arch 1 policy , it is at $\{B/2/64\}$ to page 65, you will find this in every policy , you can see at the bottom, it is not particularly easy to read:

"If in relation to any claim you have failed to fulfil any of the following conditions you will lose your right to indemnity or payment for that claim."

Then you will take "all reasonable precautions to prevent" -- this is on page $\{B/2/65\}$ at 2 -- "accident or injury to any person". Then at (c) "comply with all

legal requirements and safety regulations and conduct the business in a lawful manner".

So, viewed in that context, the FCA contends that the government's advice and its guidance was as much of a restriction as any legislative measures, and had to be complied with. It came from an authority, indeed the government, it was the State speaking, it was imperative in nature and it was backed by the implicit or explicit power to legislate if not complied with. And it was taken and obeyed as mandatory. It wasn't simply a matter of individual choice, as the defendants contend; ignoring it would have put a policyholder in breach of its duties as employer and occupier, and in breach of the policy conditions.

We would say that the advice here was a world away from the government's advice to eat five portions of fruit and vegetables a day, which is Mr Kealey's attempt to reduce the argument to the absurd; or to the advice not to smoke or drink more than 14 units of alcohol a week, which Zurich comes up with. This was of a completely different order. And in terms of what was legislated for, orders to cease part or all of the business or orders for customers to stay at home, prevented or hindered access or use of premises and interfered or interrupted businesses as much as direct

orders to close premises.

Just to briefly address some of the points that are made by the insurers in their skeletons, the public authority response was not just to reduce the number of people mixing, and to promote social distancing, as for example Zurich suggests; it was to prevent, to the greatest extent possible, people of different households from being physically together in the same place.

The defendants refer to the authority of Dolan, which says the aim was to prevent such mixing in indoor spaces. You will see the quote at paragraph 100 of Zurich's skeleton, we don't need to go to it. But how do you prevent people from physically being in indoor spaces? You do it by preventing access to those spaces and restricting those businesses' ability to allow access. And that is what the public authority response, including these regulations, did.

Secondly, the ability of people to access business premises was clearly the exception, and not the rule, as it would seem to be suggested. All restaurants, cafes, pubs and bars had to close, except for the limited ability to serve take-away. All theatres, cinemas, et cetera, in category 2, were closed except for the limited ability to broadcast a show.

Exceptionally, a few types of businesses stayed open

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for absolutely essential services, chiefly food and health, but even they had to comply with social distancing and employers' duties, which would restrict activity. All non-essential shops selling goods, department stores, et cetera, had to close, except to do online and telephone orders.

Most people could not access those places due to the restrictions on individual movement and the restrictions on the businesses .

As for the businesses that were not expressly allowed to stay open, like accountants, most of those closed too. Employees had to work from home where they could, so they had no access to those premises. Holiday accommodation shut, except for extremely limited categories. The same goes for schools and places of worship. We all know it, we all lived it, the UK physically shut down. That was the reality.

Save for the essential premises or parts of premises that remained open, like food shops, for the insurers to suggest, as they do in some cases, that there was no prevention of access, or closure or similar, defies any reasonable view of what the lockdown involved and the enormous stresses that it has placed on businesses that have not been able to continue their business; and it is both factually and legally wrong, and entirely fails to

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reflect reality to suggest otherwise.

So far as the restrictions on movement are concerned, they were directed at preventing access to particular premises, in fact most premises. People could only leave home in very rare circumstances, and it is just misrepresentative of the position for the defendants to suggest, as Ecclesiastical /Amlin do in their skeleton, that home working was encouraged where people could possibly work from home. It wasn't "encouraged"; it was required unless it was not reasonably possible to do so.

So we would say that the regulations did order many owners and employees not to access premises for their work. And this was all part of an indivisible and interlinked strategy. It wasn't piecemeal and it wasn't merely advisory; all aspects of the public authority response were targeting individuals and businesses in combination cumulatively over time, and culminating in 26 March regulations. The language was imperative, and we say it wasn't merely advisory, it wasn't a matter of choice.

Finally on this topic, in relation to the defendants' reliance on the Leicester lockdown, which is relied on by Ecclesiastical /Amlin, for example, at paragraph 26.11 of their skeleton, the fact that the UK

Government moved recently to implement a local lockdown we would say underscores the fact that it implemented a national lockdown in March.

The Leicester situation shows that the UK Government was capable or had the ability to impose a local lockdown, but in fact it chose in March to put in place a nationwide lockdown due to there being a nationwide disease, wrapped up with the need for a nationwide response. I won't go through them, but the Leicester regulations, which are at $\{K/22/1\}$, you will see if you skim read them, they are in much the same terms as the regulations that were implemented on 26 March, including the same restrictions on businesses, moving of persons, gatherings, et cetera. And a similar list of businesses , slightly adjusted but a similar list of businesses applied in that case.

That's what I wanted to say about the pandemic and about public authority action . I am going to just briefly address a couple of matters that interrelate with the issues I have just been covering, which are types of public authority action and disease policy triggers . They are addressed in our skeleton starting at paragraph 103 onwards, which is at $\{I/1/44\}$. The rest of the issues as to the meaning of "imposed" or "prevention of access" or "interruption" will be

addressed in the context of the specific insurer policy wordings. It is really more to tell you what is in issue and what is not in issue than anything else at this stage.

I will just pick up the points in relations to the types of public authority action and the fact that the policy wordings require public bodies to take some form of -- there are a number that require public bodies to take some form of action for the policy to offer coverage, and they tend to be referred by way of differing terminology.

There doesn't seem to be any dispute that the UK Government is "government" within the meaning of, for example, Arch, Ecclesiastical and some of Hiscox's clauses; and a "governmental authority" for the purposes of RSA 4; a "public authority" for the purposes of Hiscox's disease clauses; a "competent public authority", Amlin and RSA 2; and a "statutory authority". So there is no dispute about that. All of the insurers, with those wordings, accept that the wording includes and therefore contemplates action by a government.

The FCA relies on that as supporting the case that these wordings were contemplating the sorts of wide area disease, dangers or emergencies that would be likely to

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engage a government's response. Some explicitly refer to government, others include government, but they are all contemplating an outbreak of infectious disease or emergency or similar that engages the government, and that will be an important point when construing the policies and whether they would be expected to cover wide area disease.

The FCA isn't seeking to contend, for the purposes of establishing cover, that the government satisfies any triggers requiring action by a local authority, although the issue as to the meaning of a competent local authority arises on the Ecclesiastical exclusion clause and that will be discussed when we get to Ecclesiastical.

So apart from in one respect, it is agreed that all the public authority clauses relied upon cover UK Government action.

The only dispute for the court to decide is whether the UK Government is a "civil authority". Amlin 1 and Zurich, both types 1 and 2, require proof of action by the police and other competent local, civil or military authority.

Now, Amlin admits that the UK Government and parliament are a competent local civil or military authority if and when exercising authority over the

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location of the premises; that is paragraph 50 of their defence. But Zurich disputes it, on the basis that there is no reference to "government" in the clause, and if the parties had intended cover to attach to the actions of government they would have said so. They contend that a "civil authority" is a reference, in effect, to the Health & Safety Executive or the Civil Aviation Authority or the Fire Service, but does not encompass national government.

Now, we say Zurich is wrong not to admit this, and the FCA and Amlin are right. But I am not going to argue about that now; we will address it in more detail when we consider Zurich, as the issue only affects its wordings.

The second part of looking at types of policy --LORD JUSTICE FLAUX: The Health and Safety Executive is a governmental body, is it not?

18 MS MULCAHY: It is a governmental body.

19 LORD JUSTICE FLAUX: It's not an NGO or something of that 20 kind; it is an arm of government.

MS MULCAHY: It is. The point that Zurich is making is that its body is below national government. So the government itself and parliament would not form within that. It would have to be bodies below that level. But as I said --

 $\begin{array}{ll} 1 & \mbox{LORD JUSTICE FLAUX: We will hear that argument in due} \\ 2 & \mbox{course}. \end{array}$

MS MULCAHY: It will be argued in due course.

 $\begin{array}{lll} 4 & \mbox{LORD JUSTICE FLAUX: I am currently unconvinced by that} \\ 5 & \mbox{point.} \end{array}$

MS MULCAHY: The second point is action or advice. A number of the policies require action or advice by the relevant public authority. We rely on the actions that have previously been discussed, but starting from 16 March 2020. So we list the actions we rely on in our skeleton at paragraph 69, which, so you have the reference, is $\{1/1/31\}$.

Arch, for example, and RSA2 and RSA4, require action or advice. Arch does not dispute that any of the relevant government actions relied upon by the FCA fell within that definition.

By contrast, RSA denies that certain matters were actions or advice, and in its skeleton it only admits that government orders that premises should close, which it describes or names the closure measures, and the instructions as to social distancing and staying at home, which it calls "the social distancing measures", are all action or advice. And it says everything else is not.

We don't need to concern ourselves with anything 58

before 16 March, because it is not being relied on by the FCA as having relevant interrupting effects. But there is an issue there, as to the status of, for example, the Coronavirus Act, the designation of specified authorities to enforce the regulations, the extension of restrictions on 16 April, et cetera, that seems to be in dispute.

There are some other policies that just refer to "action", i.e. it is not action or advice, it is just action, being Ecclesiastical, Amlin 1 and 3 and the two Zurich policies, and there is a difference again of approach between the defendants.

Ecclesiastical appears to accept that advice, instructions, guidelines, announcements, as well as legislation, in relation to churches all amount to action, and that appears to be confirmed by Ecclesiastical 's skeleton argument at paragraph 120.4(c). So they would appear to be conceding that the government instruction on 23 March, that places of worship should close immediately, was action.

Amlin also appears to accept that advice, instructions, announcements and legislation were actions, and that is confirmed in its skeleton at paragraph 135.2. It says:

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"The government acted when it issued advice or guidance and also when it made regulations."

That is the FCA's case.

Only Zurich argues that "action" does not include advice or guidance. It says that in its defence at paragraph 39.2(a). The sole reason appears to be because the clause does not say so; and that position is maintained by Zurich in its skeleton. Again, because it is the only insurer arguing this, we will address that when we come to Zurich, rather than taking up time with it now.

But the FCA's case is that in the context of public authority action, action and advice is overlapping, and that giving advice is an action, it is a thing, an act or thing done.

That's all I wanted to say at the moment, simply to identify what is in issue and with whom.

The final point is on COVID-19 and fulfilling disease requirements. You will see from the list of issues at paragraph 1, which is at $\{A/15/1\}$, it is common ground that COVID-19 fulfills the various disease requirements which are specified by ensuring provisions triggered by disease, including that it became a qualifying notifiable disease within the meaning of the various different wordings to that effect in England

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on 5 March, on 6 March in Wales, and on those relevant dates in other parts of the UK. And the FCA in this claim is not seeking to establish a trigger prior to the disease becoming notifiable under the UK legislation .

All I want to do for present purposes, and it is really as a matter of context when you are construing the policies, is just to note what this means, ie what it means for a disease to be a notifiable disease. It means for England it is one of the now 33 diseases on a list , the discovery of which triggers statutory obligations on doctors, on hospitals, on laboratories and local authorities to report the case of notifiable disease, or such an infectious agent. The local authorities have to report to national bodies, to the health protection authority, to Public Health England.

Just to take you to the regulations relating to that at $\{J/11/11\}$, the explanatory note to the Health Protection (Notification) Regulations 2010, which provide the basis on which diseases can become notifiable, one can see there in the first paragraph that they place obligations on various persons to disclose information to specified third parties for the purposes of "preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination".

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So it is a public health response. These are infectious diseases which might spread and might lead to a public health response. The list on that date, to which COVID was added this year, is at page 8 of that document. Again, it is probably worth just to look to see the types of diseases that are being referred to. You will see there it includes cholera, malaria, plague, it includes I think SARS, smallpox, TB, et cetera.

It is agreed between the parties, it is $\{C/9/2\}$, Agreed Facts 5, that these are epidemic, endemic or infectious diseases, as stated in the Public Health (Control of Diseases) Act 1984, which is the enabling Act for the making of these regulations in 2010. As I said, the regulations have been amended this year to add COVID-19 and the virus SARS-CoV-2 to the list of notifiable diseases and causative agents. But all of the disease clauses referring to notifiable diseases are anticipating this sort of infectious disease.

I am going to hand back now to Mr Edelman. Thank you.

21 (12.13 pm)

Submissions by MR EDELMAN

LORD JUSTICE FLAUX: Yes, Mr Edelman.

MR EDELMAN: My Lords, can I just add one final comment to what Ms Mulcahy has said, and it arises in relation also

to defendants' argument about prevention, and whether what the government said insofar as it wasn't legislatively prohibited is prohibitive, and that is this .

In times of emergency and crisis, the public understands the difference between what the government was telling them to do in March of this year, and exhortations like to eat more fruit and vegetables and drink less alcohol. Behind the government's announcement telling people what they must do was an appeal to comply voluntary in order to avoid or minimise the government being forced to invoke the law. I want to say the fact that in a free society governments impose their will in this way, rather than operating as if is this was a Police State, is what marks us out as society where people realise that freedom comes with social responsibility . Insurance policies should be construed and applied in that context and not as if they were being pored over, as Mr Kealey would have it, by constitutional and human rights lawyers.

My Lords, the next topic is principles of construction, and I can be very brief about this.

Firstly, a few words about Chartbrook. It doesn't give the court free rein to rewrite contracts. The obviousness of an error is not to be judged from

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insurers' perspective, particularly so where the claimed errors were the benefit of hindsight. The error must be one which would have been obvious to a reasonable reader without reference to events which occur after the contract had been entered into, and it must also be clear to the reasonable reader what correction to the language is necessary.

MR JUSTICE BUTCHER: Mr Edelman, this is just RSA, is it? MR EDELMAN: My Lord, it does come in also with other insurers who say that, for example, their trends clauses ought to be read differently and so on. Where they say it is an obvious mistake not to apply our trends clause to something other than damage.

LORD JUSTICE FLAUX: There is a difference, isn't there, between the sort of RSA point and the trends clause point? Because the trends clause point, in essence what is being said is: look, these business interruption insurances can only operate sensibly if there is a contractual machinery for calculation of loss, of which the trends clause forms a part. And they say: if we haven't said that "damage" includes all the insured perils, including non-damaged things, that has sensibly to be the construction the court should put on it, because otherwise there isn't a contractual mechanism.

How do you actually calculate your loss?

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1	I mean, that is the argument.
2	MR EDELMAN: That is the argument, but if it's calculable
3	LORD JUSTICE FLAUX: Qualitatively it's a different sort of
4	argument.
5	MR EDELMAN: It is, but it does require correction to the
6	policy, in the sense that the language as it stands
7	LORD JUSTICE FLAUX: Yes, but correction that falls short of
8	rectification .
9	MR EDELMAN: Absolutely. That is why I mentioned
10	Chartbrook.
11	LORD JUSTICE FLAUX: Yes. Well, Chartbrook is a bit of
12	a busted flush when it comes to rectification .
13	MR EDELMAN: It is not rectification, that is
14	LORD JUSTICE FLAUX: No, it's all right, I'm only just
15	making the point that
16	MR EDELMAN: Yes.
17	Contra proferentem. Not a lot to say about this,
18	I think it is common ground. When the proferens relies
19	on wording which is genuinely capable of two meanings,
20	and the intended meaning cannot reliably be discerned by
21	any other contextual factors, the court is entitled and
22	bound to construe against the proferens.
23	I hope that is uncontroversial . That is the only
24	reliance we intend to place on contra proferentem, but
25	that is it.

Then one more topic on which I want to say a little bit more, which is the factual matrix point made by insurers . It is in the skeleton on construction at $\{1/5/5\}$. If we could have that up, please . It is their reliance on The Kleovoulos of Rhodes for the proposition that Orient-Express is settled law, and that policies should be construed against that background.

Having recently had to argue about the case and the clause considered in The Kleovoulos of Rhodes in The B Atlantic, I think it is important to put some context on what Lord Justice Clarke was dealing with in that case and what he said.

Firstly , as my Lords will know, it concerned a standard Institute marine insurance clause for worldwide use.

Secondly, the Court of Appeal decision on the clause, The Anita, dated back to 1971.

Thirdly, and if we go to $\{K/111/10\}$, please, at paragraph 45 in the second column, you will see that in the judgment of Lord Justice Clarke as he then was, he refers to the fact that Arnould on Marine Insurance in 1981 had treated the clause as having a settled meaning, and he noted the authors were then Sir Michael Mustill and Mr Jonathan Gilman, and also notes that the Institute clauses were reviewed in 1983 and the relevant

words were left unchanged. That is in the light of The Anita having been decided in 1971.

Then in paragraph 46 he moves on to recite the fact that Arnould treated the clause as having a settled meaning, taking into account also the review of the clauses that there had been, and that is paragraph 46.

Then The Kleovoulos of Rhodes itself, the judgment is in 2003, that is 32 years after the previous decision of the Court of Appeal on the point, and with the meaning of the clause having been treated as settled by distinguished authors of the leading text on marine insurance and by those responsible for reviewing it in 1983 in the context of its international use.

It is also important to bear in mind the test that the court applied, at paragraph 44 in column 1 of the page that is on the screen:

"So I turn briefly to the question of whether the meaning of clause 4.15 should be regarded as settled." And he refers to Re Hooley Hill Rubber.

If we could go back to paragraph 27, that is on page 8, please $\{K/111/8\}$, and you will see in paragraph 27 there is a quotation from Hooley Hill Rubber in the middle of the paragraph, and that was referring to a decision, Stanley v Western, it is in fact a decision in 1868, which had stood for 50 years,

and that was the sort of decision that was being considered in Hooley Hill Rubber, which Lord Justice Clarke considered himself to be applying when he went on to conclude that the meaning of the clause was a matter of settled law.

Insofar as this is intended, as it appears to be, to support an argument that Orient-Express should be accorded the same status as The Anita was in The Kleovoulos of Rhodes, we would submit it is utterly misguided.

A number of reasons for that. Firstly,
Orient-Express only dates back to 2010. Unsurprisingly
perhaps, the courts haven't considered the point in the
meantime. It's a first instance decision. Ms Mulcahy,
later on when she comes to the law on causation, will
tell you what happened in relation to the appeal, but
there is the perhaps distinct possibility that insurers
fought off the pursuit of an appeal because they wanted
to bank the decision in order to deter future
policyholders. And it has not met with any positive
approval in textbooks from commentators; on the contrary
it has at the very least been questioned.

I don't want to go at this stage into the rights or wrongs of the questioning; this is purely as a question as to whether these policies should be construed against

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the background of settled law.

If I could remind my Lords

If I could remind my Lords firstly of what we have said in our skeleton at 306, that is $\{I/1/120\}$. There we mention the criticism of it in Colinvaux and in Riley, or the doubt expressed about it. Then, perhaps unsurprisingly because I suspect it is the same author, Colinvaux and Merkin at $\{J/148.1/11\}$ to page 12. Thank you.

If we move on to 12, you will see he deals with Orient-Express, you can see it on the bottom left-hand corner. If I could just move on to page 12, please. You will see that at the foot of page 12 he said the reasoning -- at the end of this passage it says:

"Indeed, the reasoning renders the primary cover under business interruption policies of little value where a catastrophic event has affected both the assured's premises and the surrounding district ."

Hardly a ringing endorsement.

Finally , at $\{K/194/12\}$, just about legible , I think, there is the one reference to Orient-Express, that is the only reference in Professor Clarke's book to Orient-Express, it is in the footnote; and having set out the rule of proximate cause in the first sentence of 25.3, in England the proximate cause is said to be the efficient or dominant cause, footnote 1 refers to

Leyland Shipping, and in the third line it is:

"See (f)., the application of the 'but for' test for factual causation (tort) to a business interruption claim arising out of hotel damage in New Orleans due to Hurricane Katrina."

Without reference to, one can see, insurance precedents such as the Leyland case.

So that is the grand status that Orient-Express was accorded in Professor Clarke's book and it is, again, not entirely complimentary.

Then we have additional factors , the US courts have taken a different approach.

Also, what you will see when we come to the cases is that on the ordinary causation approach, the arguments that we are going to advance before the court, we would submit, were not fully aired. But in any event we say a decision is wrong. Whatever the rights and wrongs of Orient-Express, which we will come to, and we can live with it by distinguishing it as well as arguing that it is wrong, seeking to uphold its application on the basis of settled law principles is nothing short of hopeless.

One other aspect on this , Argenta advances its own separate legal principles , and this is at $\{1/11/12\},$ and it seems to argue there that its policies were sold

through brokers, and so the policies should somehow be construed and applied in accordance with Orient-Express, even if it does not qualify as settled law presumably, and even if this court were to distinguish, qualify or not follow Orient-Express, simply because these policies were sold through brokers who are then taken to have known of Orient-Express.

We submit that is an unorthodox approach to construction, which the court should not adopt, to imbue policyholders and indeed brokers, often just offering business through an internet portal, with full knowledge of all the implications of a first instance decision that merits, for example, only a passing and critical reference in a footnote to Professor Clarke's work is fanciful.

So we submit that one approaches the construction and application of these clauses as a matter of construction and law. Orient-Express is either relevant or it isn't. If it is relevant, then we will argue it should either be distinguished or overturned, but it can't come into the construction exercise.

My Lords, that is all I wanted to say about contractual construction . If I could now move on to prevalence.

As you will have seen, there are policies which

require the policyholder to prove the presence of the disease within a certain distance from the premises, for example 25 miles or 1 mile. The issue is how should the policyholder prove that, and the court ruled that there should be two issues determined at the trial: firstly, the types of evidence on which the policyholder should be entitled to rely; and secondly, assuming that it is the best evidence, would the evidence on which the FCA has relied prima facie be sufficient to discharge the burden of proof.

I will deal with those issues in turn. But as a preliminary point, the defendants appear, particularly this is in the Ecclesiastical /Amlin skeleton, which is adopted by other defendants, that we are seeking to prove somehow that the Imperial Cambridge analysis is the best evidence available. That is not the case. We simply seek to show, in accordance with the court's ruling, that estimates such as the Imperial analysis or the Cambridge analysis are a type of evidence on which a policyholder should be entitled to rely; and, of course, assuming that that is the best evidence that is available, we then say that it is prima facie sufficient to discharge the burden of proof. But we don't seek to positively prove that it is a type of evidence which the court would be bound to accept at this stage, without

turn it up.

anything more. MR JUSTICE BUTCHER: You having made that clear, how much is actually in issue on this? MR EDELMAN: There are some limited issues, my Lord, and I just wanted to go through what those issues are. We have got the NHS death data, and that is the The parties are agreed that the NHS data showing q people who tested positive and died is available. And they agree, and this is in the agreed facts, that if there is only one hospital in a particular trust and that hospital is in the relevant policy area, then that shows that there was the disease in the area. That is paragraph 37A of Agreed Facts 3 and we don't need to

The defendants have admitted that certain uses of that data is permissible.

QBE has admitted that form of evidence may be used; that is their defence paragraph 35.2.

RSA, the defence of which other defendants have adopted, has admitted that it may be used where the NHS trust operated only one hospital in the relevant policy area; that is their defence at 21(b). But what they say is that there is this issue with the timing. They say that you can't rely on it as showing the presence of

COVID on a particular date. They argue that the data only shows that at some point the patient tested positive for COVID, died in hospital and, they say, that person may have been in hospital for COVID, recovered and then died of something else.

Well, we say firstly it is sufficient to show that there was a case of COVID at some point in the recent past, the limited timeframe in question being March, and that would be sufficient for the policy triggers. But secondly and in any event, I mean this really is clutching at straws. Their premise is someone caught COVID in March, within the same month recovered from it in hospital and then died from something entirely unconnected; and for that reason, they say that this data is unreliable as to date.

Well, our submission --

LORD JUSTICE FLAUX: Isn't this one of the reasons why there has been a query about the Public Health England death data? Because they are based upon particular assumptions as to people having tested positive at some point in the past, and then, as it were -- I mean, I follow your point that if somebody has caught it and been very ill with it, you might say well it is unlikely that they then go and die of something else, if they are that ill. But I mean this is part of the general

discussion, isn't it, about the reliability of the data? Which really we can't trespass into, I don't think, not on the evidence we've got at the moment anyway.

4 MR EDELMAN: My Lord, all I am saying is that the test data,
5 the evidence of deaths, in relation to someone who was
6 tested positive, in a hospital, on a given date, is
7 evidence that COVID was present in the relevant policy
8 area. We don't need to prove that the death was caused
9 by COVID. So that is not what we are proving. So
10 I take my Lord's point entirely.

LORD JUSTICE FLAUX: I follow the point that if you have got evidence that somebody tested positive, then you have the presence of the disease and it is neither here nor there as to whether that particular person recovered or not.

16 MR EDELMAN: Yes. Whether the hospital data is right in
17 ascribing COVID as a cause of death is not the point we
18 are getting at. We are just using the death data to
19 show that it was present on a date. And what they are
20 saying is: well, they may have died of something else.
21 Fine.

 $22\,$ LORD JUSTICE FLAUX: So what, you say.

MR EDELMAN: So what? We can still use the death data,
 which records that someone was positive for COVID, as
 evidence that they had COVID.

It may be that the defendants could say: well, this person could have had COVID in some other relevant policy area, travelled to the hospital, being ill with something else, having recovered from COVID, and died. If they are going to exclude the data for that rather far-fetched case, we would say that is a situation where the court ought to say, well, the policyholder can rely on this death data, but of course it would always be open to an insurer to disprove the validity of the data. We are not asking for the court to say that this sort of data is conclusive, but that this sort of data is the type of data on which a policyholder should be entitled to rely.

 $\begin{array}{ll} 14 & \text{MR JUSTICE BUTCHER: If the question is: if this is the best} \\ 15 & \text{evidence, can a policyholder rely on it, that may in} \\ 16 & \text{a way answer itself, may it not?} \end{array}$

MR EDELMAN: Exactly. I mean that is the second question, 18 my Lord.

The first point is: can we get through the hurdle of showing that this is a type of evidence on which we are entitled to rely? And we say, this death data, yes.

Then the next question is: if that is the best evidence that is available, does the court say, "Well, if that's the best you have got it's rubbish, it goes in the bin" or does the court say, "If that were to be the

1	best evidence that was available, that would be
2	sufficient , the type of evidence that would be
3	sufficient to discharge the burden of proof"?
4	We all know there are cases that raise a shipping
5	case: don't know why, so it must have been a Russian
6	submarine.
7	MR JUSTICE BUTCHER: The Popi M.
8	MR EDELMAN: I was struggling for the name, sorry. Yes,
9	it is The Popi M. I had a senior moment forgetting the
10	name. The court would say, "If is that the best you can
11	do, that is not good enough".
12	LORD JUSTICE FLAUX: That is very rare.
13	MR EDELMAN: That is very rare.
14	LORD JUSTICE FLAUX: That was the argument that failed, as
15	I recall bitterly , in The Kapitan Sakharov.
16	MR EDELMAN: Yes.
17	LORD JUSTICE FLAUX: You are entitled say: well, this is
18	evidence of the disease being present in a particular
19	policy area.
20	MR EDELMAN: Yes.
21	LORD JUSTICE FLAUX: There may be other sorts of evidence
22	which could also be relied upon. An obvious example is
23	if you were looking at within one mile of 10 Downing
24	Street then you would rely upon the fact that the
25	Prime Minister contracted COVID. There could be other

forms of evidence, but you say this is, as it were, a sort of base of evidence which policyholders should in principle be entitled to rely upon, although it is always open to insurers to demonstrate that it is unreliable for whatever reason.

MR EDELMAN: Yes, in a particular case.

LORD JUSTICE FLAUX: In a particular case, yes.

MR EDELMAN: That is that data. Then we come to the Office for National Statistics death data, and that shows deaths in weekly reports and does so by local authority, health board and place of death.

The parties are agreed, subject to one point I will come to, that a policyholder can rely on this type of evidence. It won't identify which day in the week somebody had the disease, but the parties are agreed that it will show at least one case of COVID during the period immediately prior to the week in question when the figures are issued. There may be disagreements as to what counts as immediately prior, but I don't think we need to go into that.

The qualification from the defendants is: what if the local authority or health board is partly in the RPA? Then, they say, you can't prove presence based on this data alone; which appears to be a concession that they can rely on the ONS data in combination with some

other evidence. But it is this straggling issue that we now need to move on to, and it applies also where you have got, for example, a hospital trust with more than one hospital in an area, and you have got a record for the trust but that trust area extends beyond the relevant policy area.

You then have cases, there are some cases with a 25 million radius, and if I can just -- you have probably seen it in our skeleton, but $\{1/1/77\}$ and page 78. It is not coming up. That shows how large some of these 25-mile areas can be, and my Lords will have seen it in the skeleton argument.

What we would submit is that what we can do is to apply to these cases a -- firstly , I will deal with the weekly cases; we can use that for a period of time, given the period of infection , so my Lords have in the agreed facts -- and I will give you the references again to speed things along, it is footnote 21 and 24 of Agreed Fact 3. An individual will be infectious for a period of time; that is seven to 12 days the infectious period is said to last for in moderate cases, up to two weeks on average in severe cases , so the average period of infection is about ten days.

So we are entitled to rely on the data for a spread of period. The average period of infection is ten days,

and so we say we should be able to rely on cumulative totals, and so the policyholder can rely on the window of cumulative cases leading up to the date of its claim.

I think what the defendants are saying is you have to prove a case on a particular day. We say, well actually you can take these statistics, in particular, for example, the weekly statistics, but all other reported cases, and they give you a picture for a period.

As I said, you then get to the question of -LORD JUSTICE FLAUX: I am not sure I am following the point
here. If you take, for example, a period beginning with
Monday 16 March, if you have got ONS death data for the
week ending Friday 13 March -- sorry, for that week,
that week, in other words, the week ending 20 March, and
the average infection period is ten days, then it is to
be inferred, isn't it, that the people who died of COVID
during that week were infected with it at the beginning
of that week on 16 March?

MR EDELMAN: Whether they died with it, they died having it.
We don't need to worry about the cause of death. If
they died having it they must have had it for at least
a period of ten days.

24 LORD JUSTICE FLAUX: A period of at least on average ten 25 days.

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MR EDELMAN: Yes, and if they were severe enough to be in hospital they probably had it for at least two weeks. LORD JUSTICE FLAUX: For longer, yes. MR EDELMAN: So what we say is that you can spread the figures backwards from the date, and that includes the weekly totals, because the defendants make a point, they say that the weekly totals don't tell you what day the person was infected, and we say, well, you can spread q that across the period. LORD JUSTICE FLAUX: Yes. Okav. MR EDELMAN: I think I may have jumped ahead. It may have been my fault. More haste less speed. I was trying to jump forward a bit and missed out that point. But that is an important point because they tried to tie us to the particular date of the data as opposed to spreading it backwards by reference to the period of infection. Now we come to averaging and whether averaging is a methodology that a policyholder should be entitled to use. That applies to ONS death data across a local authority area, which is larger than the relevant policy area; reported cases across a regional local authority area, again larger than a relevant policy area; and of

ratio, which I will come to in a moment.

and we recognise that and we have tried to accommodate that by accepting that the averaging should operate on the basis of population weighting.

course again reported cases uplifted by an undercounting

The defendants have objected to even distribution

Now, if one takes for example -- if I can go now please to $\{I/1/81\}$ -- a picture of Cornwall. So that is a 25-mile radius from a central point in Cornwall.

What one can do is identify the number of reported cases up to the date of the claim. But that will be, let's assume that is for Cornwall as a whole, because Cornwall is a relevant authority area. You can see then that the relevant policy area is smaller than the reporting area.

You can then take the population of Cornwall, and the population within the relevant policy area, using publicly available data showing population by postcodes and combining the population of those postcodes, and then you can find the proportion of the population in Cornwall that is within the relevant policy area, and then average the number of reported cases. If there was only one reported case in all of Cornwall in a given period you might say well you can't prove it. But if you have 100 or a 1,000, that is likely to tell you on the balance of probabilities overwhelmingly on the balance of probabilities that there would have been at least one person and probably very many people in the

relevant policy area with COVID.

We say this is a type of methodology which a policyholder should be entitled to use.

Once again, in every case it would be open to an insurer to say that for some reason this methodology is inappropriate: let's look at the numbers and they can all be accounted for by a care home which is outside of the relevant policy area, and that accounts for 100 per cent, or such a high proportion of the cases, reported cases, that makes your analogy inaccurate.

We are not asking you to determine that. All we are simply saying is that weighted averaging should be a type of methodology on which policyholders can rely.

We say that is a methodology that can be used with all this data, wherever necessary, as a type of methodology. It is sufficiently sound to pass muster as a valid methodology. That doesn't mean that it is going to give the right answer in every case, but it is a type of evidence.

Then the next issue is the undercounting ratio.

Again is it appropriate for a policyholder to rely on the type of evidence that the Imperial and Cambridge analysis has produced as a type of evidence that would be an acceptable form of methodology.

MR JUSTICE BUTCHER: Is that in dispute, Mr Edelman? As

opposed to whether that study is right; whether that type of evidence is right, is that in dispute?

MR EDELMAN: What the defendants say is, they say that in order to use this sort of methodology the policyholder has to positively prove that it is reliable. We say that is setting the bar far too high when one bears in mind that what we are dealing with here is what will be the unknowable. We will never know how many people actually had it. All we can do is to look to people like Imperial and Cambridge to come up with models to give us estimates. And they will never ever be more than that; they will be estimates.

So what we say is it is sufficient if the report is relevant, in the sense that it is addressing the right issues at the right timeframe, and the defendants have come up with a report from May. We say that is the wrong timeframe. It has got to be a relevant report which is addressing the prevalence of COVID in the UK in March. And it has to be from a suitably qualified institution .

That is the sort of evidence that a policyholder should be entitled to rely upon. Whether it is reliable evidence would then be tested in the case. But to require a policyholder to prove as a sort of threshold point that it is reliable is, we say, we submit, setting

the standard too high. 1 sort of qualitative burden, before this evidence passes 2 The type of evidence the court should set, all you 2 muster 3 should say at the moment is not to apply any qualitative 3 A claimant should not have to prove that some standard to it other than it should be relevant and from 4 4 respected scientific institution has produced a reliable a suitably qualified institution . 5 5 result. They can just produce the result and that 6 So not a journalist making a back of the cigarette 6 should be of itself a type of evidence on which the 7 7 packet calculation, but from an institution that has parties can rely. recognised expertise and qualification in doing this 8 8 MR JUSTICE BUTCHER: Mr Edelman, I am sorry, I am no doubt q q sort of study. repeating myself. If there is an estimate by 10 They are bound to differ , and to say that it must be 10 a reputable institution and then there is nothing said 11 reliable is to expect the impossible. They are bound to 11 against that, then one might assume that that was likely 12 12 to be concluded to be reliable . Whereas if there was come up with different results. What the policyholders 13 13 will be seeking to do in this case is not to provide an something said to contradict it on reasonable grounds exact number, but to give, if it was proving it, to give 14 14 then one might say that it wasn't reliable . 15 the court a ballpark figure of what is meant by "much 15 MR EDELMAN: Precisely, my Lord, and I don't disagree with 16 higher", which is what most of the defendants accept, 16 that. But I think what we balk at is that the 17 17 that the number of cases was much higher than the number defendants appear to require the claimant not just to 18 of reported cases 18 present the evidence and say, well, look there is 19 LORD JUSTICE FLAUX: Going back to your point about 19 nothing else that contradicts it; here are three 20 Cornwall, for example, I suppose if it were the case 20 studies, they are all in the same ballpark; they have 21 that it was only one reported case for the whole county 21 got to prove reliability . You have actually got to call 22 22 on the relevant date, and if the undercounting evidence scientific evidence to justify the methodology used by 23 23 is that in fact that is an underestimate to the tune of the institution and have it subjected to being as it 24 a 1,000%, so there are in fact ten cases, then you say 24 were tested, in inverted commas, by the defendants 25 the policyholders should be entitled to rely upon that 25 really as they have tried to do -- and I appreciate they 85 1 in principle at least, and it would always be open to 1 have not been able to get their own expert evidence --2 2 the insurers to rely upon their own expert evidence to but as they have tried to do in this litigation 3 say, well, actually it has only been undercounted to the 3 So that's what we say about the exercise. Now 4 tune of 200%; there are only two cases; and they were 4 I have not got much more to say but, my Lords, if you 5 5 both in a care home outside the policy area. would allow me perhaps five minutes more I can finish, 6 MR EDELMAN: Exactly. They would then be able to do that 6 but I am happy to do it at 2.00. 7 7 LORD JUSTICE FLAUX: If you think you can finish this topic for their evidence and say when you are multiplying up 8 8 in five minutes let's go on and finish it. from that number you have got to then focus on where 9 9 MR EDELMAN: Because the next stage is whether, if this is they were because it is more likely there would be 10 a cluster around the reported case, for example. 10 the best evidence that a claimant can provide, all the 11 LORD JUSTICE FLAUX: Yes. 11 types of evidence that we have been discussing, if it 12 MR EDELMAN: All on the individual facts; none of that 12 was the best evidence that was available should it be 13 closed off from insurers at all . We are just saying 13 sufficient to discharge the burden of proof, then in the that there is a starting point. Let's say more 14 14 Equitas and R&Q case methodology shift the burden, 15 15 realistically you had a more significant number in whether one describes that as the evidential burden or 16 Cornwall, you uplift that by the undercounting factor 16 the legal burden is semantics, we all know what we mean, 17 17 according to a relevant and suitably qualified shift the burden on to the insurers to prove something 18 institution 's prediction, and then do the averaging 18 to the contrary, show something to the contrary. 19 process to see where that gets you. 19 Now, the difference we face in this situation from

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the Equitas case is that was a private dispute with

a privately commissioned report, where obviously there

may have been an issue as to reliability given it was

dealing with either publicly available information or,

commissioned by one of the parties; but here we are

having got through the qualifying hurdle of being

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In the vast majority of cases it is going to get you

to such a high number anyway that whether it is 1 in 100

MR EDELMAN: That is why we submit that the court ought not

to put up what the defendants want you to put up, some

or 1 in 50 is not going to make any difference.

LORD JUSTICE FLAUX: No.

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always rebuttable.

LORD JUSTICE FLAUX: Yes, okay.

a relevant and suitably qualified institution, an independent analysis of the information. We submit if that was the best that was available, that ought to be treated by the court as sufficient evidence, recognising that we are in the realms of something that will never be known, and cannot ever be known.

That is an important factor and it was also, in the Equitas case, an important factor there because the practicality of taking apart the LMX spiral to work out individual balances was just not on.

So the court accepted that this is practically impossible and in those circumstances you find a substitute. Ordinarily in litigation, obviously, in private disputes people would have privately commissioned reports. This is a public issue, with publicly available reports. We are not asking you to say anything about any individual report being good or bad; we are simply saying that if, for example, the Cambridge analysis was the best evidence that was available because no other institution either could try it or had tried it, then that ought to be sufficient for a policyholder.

MR JUSTICE BUTCHER: That almost boils down to saying: the best evidence is the best evidence. I mean, you are not asking us to say anything specific about this study,

merely, as I understand it, you are saying that if this is the best evidence then it should be sufficient . MR EDELMAN: Yes. One could say, my Lord, that in some situations, and this goes back to The Popi M, if that is the best you have got, if that is the best evidence that you have got available, it simply isn't enough. MR JUSTICE BUTCHER: I understand. MR EDELMAN: That is the only question I am asking the court to address. Because the court could say: well, Mr Edelman, if the Cambridge analysis on undercounting ratio is the best you have got, then for reasons A, B, C it's not good enough for a court to treat as sufficient evidence. So it is a very limited exercise. LORD JUSTICE FLAUX: It always being open to the insurer in any individual case to demonstrate, for whatever reason. the evidence is unreliable. MR EDELMAN: Yes. That is why -- perhaps it was a clumsy use of words, but we thought it was apposite; that is why we referred to it as a rebuttable presumption. That if the application of the undercounting ratio to the reported cases gives you a certain number, that is a rebuttable presumption as to what the number was, assuming you have produced the best evidence, but it is

MR EDELMAN: My Lord, those are the submissions I make on this topic. Obviously we seek declarations about this, but it may be that once the parties have got the court's ruling it will be easier to get the text of the declarations then, because then we can understand precisely what it is that you have said. LORD JUSTICE FLAUX: Okay. Is that a convenient moment then, Mr Edelman? q MR EDELMAN: Yes, of course. LORD JUSTICE FLAUX: We will break now until 5 past 2. MR EDELMAN: Then I will start with causation after that. LORD JUSTICE FLAUX: Okay. We probably need an hour off before causation. Mr Edelman. See you at 5 past 2. (1.06 pm) (The short adjournment) (2.05 pm)MR EDELMAN: My Lords, causation. Mr Kramer, who has done a huge amount of work on this, and for his assistance I am very grateful,

modestly did not want me to call this the

title and an appropriate way of introducing the topic, 91

agreement-centred approach to causation, because that

was the title of an article he wrote that was adopted by

Lord Hoffmann in The Achilleas, but it is an appropriate

because it is fundamental to what the court is being asked to decide. It is not being asked to decide how extra contractual rules of causation work in tort, or for breach of contract; it's not being asked to disapply, rule on or modify the rules of proximate or "but for" causation as they apply to the law of obligations. What it is being asked to do is rule on their application within the confines of specific BI insurance policies.

Of course, the causation test that you are going to be applying is a creature of those policies, it derives its vitality from them. It therefore must be shaped by construction of the parties' intended causation principles, as revealed by the language and the apparent commercial purpose of the policies.

The defendants don't seem to like this very much. Amongst other things, they refer to the doctrine of insurance being to hold harmless; I will come to what that means in due course. But they say that because the remedy is in damages for failing to hold harmless, you have to ask what the position would have been but for the breach. They submit, therefore, that proximate cause and other doctrines can cut down on the scope of recovery, but against the backdrop of the "but for" test having been satisfied. But that, with respect, does not

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resolve the questions that are before the court or limit the role of construction in this case.

The scope of the indemnity is determined by what loss or damage the indemnity protects against, against what is it that the insured is to who be held harmless. That is a question of construction. There is no magical additional principle of ascertaining the insured peril, although the insured peril may play a role in identifying the contractual intention; the talismanic term that they deploy, "insured peril", can't ward off the task of ascertaining from the words used what was intended both as to cover and as to causation.

Extra contractual principles of causation would only apply to the question of what loss was caused by the failure to hold harmless. In other words, the failure to hold harmless against the loss resulting from the interruption. But the nature of the indemnity doesn't mean that damages are at large for a failure to hold harmless. So we therefore submit that the lengthy discussion of non-insurance causation cases and principles , as they apply to the causation requirements for these BI policies , is something that misses the mark.

But there is a certain degree of common ground between the parties, because the defendants impress on

your Lordships that the principles of construction can be derived from the intentions of the parties to the contract, and they say that the commercial context is the key determinant of the causation question. We don't disagree. Common sense, which is often deployed in relation to causation, only comes into play once you have set the legal parameters for its operation by reference to the contract.

The obvious example of that is Stansbie v Troman, where ordinarily one might expect the intervening act of a third party burglar to break the chain of causation. But it didn't, because the contract was for the workman to exercise reasonable care, which included reasonable care in securing the premises when he left for the day. So the contractual context applied.

My Lords will have seen in the defendants' skeleton on this topic reference to what Lord Hoffmann said in the Environment Agency case. I can give you the reference to that, it is their paragraph 22. We agree. Causation involves setting the context in which the causation test is being applied. Primarily that is a legal context, but it is also a contractual context, and more importantly a contractual context when one is dealing with insurance.

I just want to deal for a moment with the concept of

an insured peril and what that all involves .

Now, my Lords will be familiar, section 3 of the Marine Insurance Act defines "maritime perils" as things like perils of the sea, fire, war risks. These are the perils that may cause loss of or damage to the vessel or cargo.

The purpose of a policy of insurance insuring against those perils is to indemnify the insured against economic loss caused by the loss of or damage to the vessel or cargo, caused by those perils.

What does "hold harmless" mean? Well, in my submission the most accurate summary of that is by Sir Peter Webster in Callaghan v Dominion, $\{K/82.1/4\}$ for the extract of that case.

This is what he said in the second column:

"In my respectful view His Honour Judge Kershaw misunderstood ...[As read]... or declining to apply the dictum of Lord Goff."

Then a few lines down he says:

"Expressions such as 'to ensure against' or 'save harmless from loss' may be capable of misleading. It seems to me that the best way to define an indemnity insurance is that it is an agreement by the insurer to confer on the insured a contractual right which prima facie comes into existence immediately when loss

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is suffered by the happening of the event insured against, to be put by the insurer into the same position in which the insured would have been had the event not occurred but in no better position."

That must be an economic position. The insurer is not rebuilding the vessel that is at the bottom of the ocean. The reinsurer is putting the insured in the same economic position in which he would have been had the loss not occurred. One can see an example of a peril-based cover, unusual as it is these days in these forms of policy, but it is in one of the RSA's policies . My Lords can see it at $\{B/17/17\}$, if that could be put up on the screen, please .

You will see that it says:

"We will indemnify you against damage to the property at the premises described in each item in this schedule caused by the following ... insured perils ..."

We will come back to these insured perils because how this all works and how it ties in with trends clauses is going to be an important part of the analysis.

Now, the defendants are very keen in their causation case to say that what one takes out for the purposes of the counterfactual is "the insured peril". Now, the public authority denial of access type clauses -- and

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I hope my Lords' reading is sufficient for me to use those shorthand references -- although they acknowledge and aver that the loss or interruption or interference, as the case may be, has to be caused by the combination of matters identified in the clause, they then cherry-pick the bit out of the clause that suits them to cherry-pick as being the insured peril, and leave the rest for the purposes of the counterfactual.

As I will demonstrate to you later on in my submissions, they are not always consistent in what they cherry-pick.

For reasons both of inferred contractual intention and law, we say that approach is wrong. You can't pick and choose. If the "insured peril" is the appropriate term to use and your appropriate reference point, and it is, we say, it is not an entirely inapposite label to use for these sorts of covers with composite elements, because one could say that the insured peril is just the interruption or interference from which the loss has to result. But if one is going to treat it as encompassing the cause of the interruption or the interference, it must cover, and have been intended to encompass, all of the ingredients, without being susceptible to insurers choosing which ingredients from the combination to leave behind for the purposes of a counterfactual.

As for the disease clauses, if this weren't a virtual hearing you would probably be able to see or hear those insurers with those clauses signifying their vigorous agreement to what I just said, with Mr Kealey perhaps grinning like a Cheshire cat, implying that of course in their cases the insured peril is the disease within the relevant policy area and therefore Mr Edelman has just confirmed for us that the counterfactual is the business not being in their area but being everywhere

LORD JUSTICE FLAUX: He could turn on his camera and we could see whether he is was laughing like a Cheshire Cat or not.

MR EDELMAN: I'm sure he was. He needs no encouragement.

Then again one asks, when one turns to those clauses, what are they insuring against? They are insuring against the risk of outbreaks of infectious and contagious diseases, and there are two aspects of the nature of the peril that they are insuring against.

Firstly, if you are dealing with something occurring not at the premises, but at some distance from the premises, whether it is one mile or 25 miles, you are necessarily not addressing something that would of itself directly affect the business or its premises. You are not talking about a contamination. Rather, you

must necessarily be contemplating something else happening, which does have an effect on the business, most obviously the reaction of the authorities, but it could of course also be the reaction of the public.

So we are talking about an insuring provision that is contemplating the indirect effects of the outbreak of the disease through its effects on the authorities or on third parties in terms of their reaction to it.

Furthermore, no restriction is placed on the geographical scope of such reaction. It doesn't have to say -- it doesn't say that the reaction has to be in any particular area, it is only the disease that has to be in the relevant policy area.

So there is nothing that requires or contemplates the reaction to be confined in its effect, only to the relevant policy area. And it must contemplate, at least potentially, a wider scope. That is a critical point for coverage purposes, because it is whether the disease affects the insured in the way contemplated and required by the policy. Because it is the outbreak of the disease causes something else to happen, this must be what the policy is contemplating, something 25 miles away or even a mile away. It's contemplating something else happening which then causes the interruption or loss to the insured.

Now, the second aspect of these clauses is the subject matter of them, which is disease and, invariably, notifiable disease. But that encompasses necessarily, obviously through the word "notifiable ", but even if "notifiable" is not used, if you are using a concept, as one does, of a human contagious, infectious disease. But I think they all refer to " notifiable ". You are talking about diseases including, potentially, some newly emerging disease against which there is no known vaccine and which is capable of causing an epidemic. Now, this is not the benefit of hindsight, because amongst the diseases on the list of notifiable diseases is SARS, made notifiable following its outbreak in the Far East; and of course we have had experience of new strains of flu which come and go, and sometimes can be serious, and we know from history that in the past there have been very serious outbreaks.

So that is the nature of the beast that these clauses are contemplating.

It leads on to the question: if that is the true nature of the insured peril, was it really the intention of the parties that causation should have the effect of allowing for a counterfactual where an epidemic of such a disease occurred everywhere in the country, except the relevant policy area? And where the reaction of the

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1	authorities to the epidemic is to be treated by this
2	counterfactual as if it was a reaction to the outbreak
3	everywhere other than the relevant policy area?
4	My Lord, I hope Mr Justice Butcher is all right.
5	I couldn't see him on the screen.
6	LORD JUSTICE FLAUX: He is just looking at something,
7	I think.
8	MR EDELMAN: I'm sorry.
9	So the question is: can that truly have been
10	intended to be the counterfactual, or is the purpose of
11	the relevant policy area merely to ensure that the
12	policy will only respond as long as the disease itself
13	was present in the relevant policy area, ie it doesn't
14	have to be exclusively , but as long as it is?
15	That then makes absolute commercial sense of the
16	choice that insurers have of the size of the relevant
17	policy area.
18	MR JUSTICE BUTCHER: Why would you want to say that,
19	Mr Edelman? If you are, as it were, covering something
20	which might be caused well outside that area, why would
21	you then want to say that there needs to be some
22	incidence within the area?
23	MR EDELMAN: This is exactly what I was going to say,
24	my Lord caught me in mid-sentence, because we are now
25	looking at a disease which has spread very quickly and
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1	very dramatically. That is on the spectrum of
2	possibilities .
3	But there is a whole range of lesser possibilities ,
4	and the choice that insurers have as to their commercial
5	risk is to how serious an outbreak they are prepared to
6	cover. The more extensive the relevant policy area, the
7	less severe the outbreak would need to be for the policy
8	to be triggered.
9	LORD JUSTICE FLAUX: I don't see how that works in the
10	question that my Lord posed to you, because if the truth
11	was that this was intended to cover epidemics or
12	pandemics or whatever, then the loss which the insured

suffers is the same, irrespective of whether there is an

incidence within 1 mile, 25 miles or whatever. What the

example is the loss he is going to suffer as a result of

epidemic disease in the country. So the 1 mile and the

MR EDELMAN: My Lord is misunderstanding my point and it may

government action closing his premises because of an

25-mile limits don't seem to me at least to make any

sense at all, if this was epidemic cover.

LORD JUSTICE FLAUX: Quite possibly, Mr Edelman.

MR EDELMAN: It may be my fault for not presenting it

insured would want to be protected against in that

When you are giving this cover, you are covering a range of possibilities , from minor local outbreaks of something like measles all the way up to some new unexpected disease, an epidemic. The fact that that is within the ambit of the insurance doesn't mean that that is, as it were, the vanilla risk that the insurance is covering.

I think it may be still up on the screen, let's look at the RSA policy. One of the perils is earthquake, the first one. Yes, there are some very minor earthquakes in the UK, often associated with mining activities, but the UK is not known for being at risk of earthquakes. But, of course, the insurers, by that language, do take the risk of some cataclysmic event, unexpected, which only with hindsight do the scientists realise will recur everyone million years, and it is just bad luck. It is like those who got caught out by the October 1987 and the January 1997 storms, 300-year return dates. That is within the scope of the risk, however unexpected it is.

Now, what my Lord was putting to me is this is epidemic cover. It's not designed as with this earthquake cover, it is not contemplating as the ordinary risk, the cataclysmic earthquake, but it is encompassing epidemics within its scope, and when you look at the relevant policy area that makes sense for

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the nature of diseases that would occur, as in the nature of the earthquakes that would occur.

And that means that if one has a one mile policy there is less risk for the insurer of being impacted by a disease which breaks out than if one has a 25-mile limit. But if one has a 25-mile limit, one is already contemplating that there could be something pretty serious, because for something in Maidenhead to affect a restaurant in Central London, which is the outer edge of a 25-mile radius from Central London, it must be something quite significant . It is not going to be an outbreak of measles or mumps, not going to be Legionnaires' disease, but of course having the one mile limit means that even if the insurer was insuring in Maidenhead, if there was an outbreak of Legionnaires disease there would be less chance of it affecting the one mile radius than it would if he had 25 miles.

So it is a relevant restriction for the nature of the risk, in that it does affect the extent of the risk that insurers are taking. But, and this is the critical point, it doesn't define it, because what they are insuring is the nature of the disease and the reaction to it. All they are doing is saying it must at least impact in your area, the disease must impact in your area for you to be covered.

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So if something happens in London and because politicians are said to be London-centric, they shut down the country when there is no incidence of the disease in Manchester, you have no cover. But if, as in this case, the disease is everywhere, it just so happens because of the severity of the epidemic that the period, that the distance requirement does not have the effect of protecting insurers.

So that's the essence of the point. If one has a severe epidemic and an insurer that is taking on the risk of notifiable diseases, which can include a new epidemic disease, why should one then have the counterfactual, which we would submit is a rather ludicrous and far-fetched one, that the serious epidemic that has affected the whole country is to be assumed not to have affected the relevant policy area, when a potential epidemic is within the ambit of the risks against which the insurer has provided cover?

I emphasise again, it is within the ambit. I am not saying this is there for epidemics, it is not there just for epidemics, but it does encompass it.

What we would submit is to apply insurers' counterfactual would defeat what was the apparent commercial purpose of the clause, namely to protect the insured against being caught up in the consequences of

a wide area disease which manifested itself amongst many locations, including the relevant policy area.

So what we really are faced with is insurers seeking to insert into the insuring clause the word "only", only within 1 mile, only within 25 miles, through the counterfactual, which is not there, and doesn't make any sense in the context of the nature of the risk.

So in our submission it all boils down to an analysis of the insured peril not just focusing on the words used, but its implications. One has to focus on what the implications of the language actually are that the disease is going to cause somebody else to act, and the nature of the disease may be anything from a localised outbreak like Legionnaires' disease or measles to a new epidemic that becomes notifiable. Only by understanding that, in our submission, can one then adopt a correct approach to causation.

Now I want to descend into a little bit more detail . That was very much sort of overview stuff , and I want to descend into a little more detail and start with some illustrations and the public authority action clauses . Let's have a look for that purpose, just for illustrative purposes, at Hiscox's skeleton . It is $\{1/13/111\}$. I seem to have the wrong page. Can I just check? Sorry , page 47. Sorry . We want to see the

clause first . It says:

"We will insure you against your financial losses

" Inability to use the insured premises following ..." and what I want to look at is not the one that we are concerned with but with (e), "vermin or pests at the insured premises."

Let's imagine a situation in which building works next to a restaurant disturb a colony of rats, which escape into the kitchen of the restaurant and scatter throughout the kitchen and elsewhere in the building, concealing themselves quite rapidly.

The owner, being the responsible person that he is, calls pest control at the local authority. The local authority shuts down the restaurant until they can be sure that the rats are eliminated. This takes two weeks. Hiscox asks whether the FCA's case is that it should recover the 40% reduction in takings after the two weeks' interruption. We say the answer is to look at the clause. It is asking the wrong question and it is not what they are getting at with this case.

The interruption caused by inability due to restrictions following vermin was for two weeks. The losses from that interruption are recoverable, not losses that do not result from that interruption,

whether after or before. So we say -- and this is insurers trying to paint our case differently from what it is -- we are just focusing on that two weeks.

Then the real question, because this is where insurers are coming from, is whether, given that this is an action following vermin clause, whether the parties intended that the recoverable losses should be reduced by reference to those losses which would have resulted from the vermin having been there, because that is what insurers' case is, plainly there would always have been losses due to vermin, the expressed underlying cause, even without public authority restrictions, given that the restaurant owner plainly was not indifferent to the presence of rats. The first thing he did was to phone the local authority when he discovered the rats. This is not the sort of restaurant owner who would say "Oh well, never mind I've got rats in my kitchen, maybe I will put those in one of the dishes and the customers won't notice ".

But any reasonable person would understand it to be intended that for the purposes of assessing the losses during the two weeks of the restriction, the vermin are to be excised from the counterfactual, rather than having to calculate the revenue that would have been earned with vermin in the restaurant during the period

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of restriction , but without the authority restriction .

That would render the cover entirely illusory .

But that is what the defendants' case is . They say: you have been shut down due to vermin in your restaurant . The counterfactual is that you have still

Now that is not -- and they say, well, Mr Edelman is treating vermin as the insured peril. It's not about treating vermin as the insured peril. That is their point about: well, after the restriction, if you are right, that means that you still get losses because you are treating vermin as the insured peril. So after the restriction is lifted, you still get compensated.

got vermin in your restaurant but you are not shut down.

No, I am not saying that at all . It is about construing what the parties must have intended about the operation of causation where there is, as here, an underlying cause capable of having led to its own losses had the specific trigger not occurred, but where there is the combination of the underlying cause, the vermin, and the restriction .

It is rather like, in a sense, the Stansbie case. In the abstract, the intervention of the burglar may be a dominant cause, but in the context of a duty that contemplates the possibility of burglars, where the duty is to protect against the burglars, the burglary is not

the dominant cause, the dominant cause is the decorator. You have got to ask what the purpose of the causation question is, what is the purpose of the policy, why are you asking it, and in what context.

The defendants are very keen on A plus B plus C plus D, and my maths was never very good but this is not a mathematical question; it is about construction and ascertaining the intention of the parties.

Let's take another public authority action example. Imagine there was a lorry spill of a toxic chemical qualifying for policies which cover a danger or emergency, and the police close the road. Insurers' counterfactual would be: well, all you subtract is the police action, and you are still left with the lorry spill. We don't insure against the lorry spill, we only insure against the police action, so you don't get any indemnity, or your indemnity is reduced to the extent that had there been no police action somebody might have still been able to get to your premises.

In terms of commercial intent and commercial purpose, it becomes nonsensical and the cover does genuinely become illusory.

Let's take an example of Ecclesiastical . They have given lots of examples of what they say would or wouldn't be covered in relation to churches. Their

clause covers prevention, hindrance of access or use by government action due to an emergency.

Their insureds include churches, and they have given some examples in relation to churches we have to assume there has been an interruption or interference as a result of a prevention or hindrance of access of use, we say from 16 March and they say the 23rd. So we say it includes loss of collections . People couldn't come to church so they didn't give money. But for the interruption or interference, would the collection have been received? But for the church being closed, they would have come to church. But when answering that question, do you take a counterfactual in which the church is not closed but there is still the emergency, which is one of the ingredients of the clause? Perhaps $\ensuremath{\text{I'}}\xspace$ I' $\ensuremath{\text{II}}\xspace$ give the reference for the skeleton, so you can see how they have expressed it; it is $\{1/12/63\}$. We will go through these examples in a moment.

So the collection, yes. Then they say the collections you want to ask: well, the church was closed but there would still have been an emergency. So they subtract the closure or they say the closure is the insured peril, but there would still have been the emergency which is an ingredient of the clause.

We say that is indistinguishable from my toxic spill

and from the vermin example. What you are doing is taking an ingredient of the clause and using that ingredient as a contemplated ingredient as a counterfactual. They give examples, and the first one they say:

"Monthly donation has been regularly received for several years ...[As read]... you have weekly services held via Zoom ..."

Was it caused by the insured $\ peril\ .$ We say that all depends on what prevented the donation.

The interruption or interference, that is the closure due to the emergency, was neither a "but for" nor a proximate cause of stopping the donation, so you don't get to a counterfactual.

That fails at the first hurdle, and we really don't understand what point it is that Ecclesiastical is trying to demonstrate with this case. What they are trying to do, perhaps, is paint our case as being an extreme one to knock it down. But they are just tilting at the wrong target.

Our case is, as with the vermin case, that they are telling us in that sort of case that we would either get no indemnity or a reduced indemnity, because you subtract the vermin, you leave the vermin in for a counterfactual, and you subtract only the local

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have already got.

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government action.

Then they say, I think it is on the next page $\{I/12/64\}$ -- can we move to the next page -- so they have mischaracterised and perhaps misunderstood our case, but the next page they say:

"From Early March ... the local group starts to see a marked downturn in the number of elderly people attending its events -- not least after the first UK deaths from COVID-19 are reported. The organisers decide to suspend their meetings before the government regulation in late March.

"The agreement between the local group and the church is informal and rent is paid week by week ... [As read] ... the local group leader on his daily walk ... shouts from a distance that he hopes they can start up again soon and the local group leader shouts back that even if the church was reopened he can see no hope of starting again in the foreseeable future, because several of the group have died and the others are shielding strictly."

Now that poses a straight causal question. It is not a simple counterfactual question, it is simply a question of "but for" the interruption or interference, would the rent payments have been received? And it is going to be a question of fact

where there is casual income like this, and the answer will depend on the facts. If the $16\ \text{March}$ order to stay at home and minimise travel and shield amounts to qualifying interference or interruption or interference, and the cancellation was after $16\ \text{March}$, then the loss may result from the interruption or interference, depending on the reasons of the group for cancelling.

If the 16 March order to stay at home and minimise travel was not interruption or interference, then the income stopped before any interruption or interference, it wasn't the result.

But this is the important point: going back to the collections, our vanilla case, the loss of collections because people can't come to church because the church is closed, what is being said is: ah well, because of the emergency they wouldn't have come to church anyway. So the closure, the added ingredient of the closure, didn't cause you any loss, because of that counterfactual.

That is where we part company from the defendants. That is where we say it is wrong in principle to start carving out an ingredient of the clause and using that as a counterfactual to reconstruct.

That, in essence, where you have got these composite clauses, that in essence is what our case is. We are

not trying to recover losses like the restaurant donation that you saw, that has nothing to do with the closure of the church. Other policyholders may want to argue that, the FCA is not. We are not precluding people from arguing it, but that is not the case that we are advancing.

We are simply advancing the argument that if people -- if you lose collections because there is closure of the church due to an emergency, you don't take out the closure and imagine the emergency, just as you don't take out the local authority restriction and imagine the rats are still there, and you don't take out the police closure and imagine that the toxic lorry spill is still there. That would just undo the value of the insurance from anybody's perspective. It is not reasonable expectation. That is just commercial purpose inferred from the clause. You are working that out not by reference to authorities, you are just asking what is the purpose of this.

MR JUSTICE BUTCHER: I understand, Mr Edelman, but I think one of the things which insurers say is in the sentence which you have just uttered, you assume that there has been a loss of the collections by reason of the church being closed as a result of advice or action. But I think one of the things which they say is because of

the emergency, you didn't lose it because of that, the people wouldn't have been going anyway. In other words, you haven't got through the initial causative door.

IR EDELMAN: But that is the same point, my Lord, as the

MR EDELMAN: But that is the same point, my Lord, as the lorry spill. Well, you say, the police closed off the area but that was 15 minutes after the lorry spill. You have got to prove what your loss would have been without the lorry spill. Because without the police cordon you would have still had the lorry spill. But of course the lorry spill is why you have got the cordon. That is the point I was making, that if you extract what they are saying is, well, you have got to take out the police cordon and then work out and prove that your loss or to what extent your loss is due to the added element of the police cordon, as opposed to the lorry spill which you

My vermin case, you have got to prove what your loss is by virtue of the public authority restriction in circumstances where you have already got rats in your kitchen, but the policy is contemplating that there is a package of things, and it is simply a question of, you know, it is a question of judgment as to what the commercial purpose of this is, but do you unpack that package?

What it is contemplating is that the church is only

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closed because there is an emergency. Do you assume: oh well, we will take the emergency; or do you say: right that is the package, and if you suffer a loss because an emergency causes the church to be closed, you ask what would the church's takings have been without that package?

Just as you have the package of the vermin and the local authority action, you take that package out. Now, that doesn't mean that you take the vermin out for all purposes. As soon as they cease to be a package, in other words, as soon as the local authority restrictions cease, then you only have the uninsured risk of the vermin alone. But when they are in combination, you don't dissect them for the purposes of a counterfactual.

I am sorry to use the word "dissect" in relation to rats, but it is appropriate. That is what insurers are doing, they are dissecting these clauses and taking what is meant to be a package insurance, and dealing with it.

If one looks, sometimes the simpler cases are the easiest. Police action due to a danger in the vicinity and you get a lorry spill. Is it really intended that you take-out the police action and leave the danger?

I am probably repeating myself, but if you start looking at it that way, although we are looking at these clauses in very unusual circumstances, it has huge

ramifications for the commercial value of these policies at all . If you are not going to cover the entire combination, I'm not saying that you then, by covering the combination you are covering each ingredient separately as though when it exists on its own, but you are covering the combination. If the insurers want to say the insured peril is everything, well that is why I went to the Marine Insurance Act, what is the insured peril; it is the cause of the loss.

Here you have two combining causes. You have the emergency causing the closure, the government action, the closure of the church. Those are the two causes which combine to create the loss .

MR JUSTICE BUTCHER: In your lorry spill case, and this is what you need to help me on, all the loss may be caused by the lorry spill , as it were, and the government action doesn't actually change things at all really .

MR EDELMAN: Well it does, in my submission, because what you then have got, if the church is closed, it is inaccessible. That is, you know, you can't say that, well, you could have had collections without the emergency. If you look at the two counterfactuals, the church is closed, that prevents the church collecting any money in the usual way at services. There are no services; it cannot collect.

What you are then saying is: why is the church in that situation? It is in that situation because it has been closed because there has been an emergency. That is what the policy is compensating you for. The simple question is: is the purpose of that cover or any cover to say, well, what would the position have been if you take out the closure? And in our submission it really does drive a coach and horses through the cover. In my restaurant example, the man does what he should do, he phones the local authority straightaway, and the insurers say: well, you had rats anyway. So although I know we say we will indemnify you if you are shut down because of rats, you would have had rats anyway. And the man would look at the policy and say: but your policy contemplates that I would have had rats anyway. They are not going to be instantaneous. The entire pre-supposition of the clause is that there are rats on my premises, and you promised me that if I am shut down because of the rats you will compensate me. LORD JUSTICE FLAUX: Will compensate you for the loss you have suffered as a result of the premises being shut down because of the rats. MR EDELMAN: Yes.

around the town that there are rats running all round $119 \label{eq:119}$

LORD JUSTICE FLAUX: But if there are just rats and word got

 $\begin{array}{ll} 1 & \quad \text{the street of that restaurant, he wouldn't have any} \\ 2 & \quad \text{cover, would he?} \end{array}$

MR EDELMAN: That would come in because the turnover would 4 have been --

5 LORD JUSTICE FLAUX: No, in my example he wouldn't have any 6 cover because it wasn't a closure, not because it is 7 closed but because word gets around the town, "Don't 8 bother going to Snooks Restaurant because he has rats 7 running around the place".

 $10 \quad \mathsf{MR} \; \mathsf{EDELMAN} \colon \; \mathsf{Yes}.$

occurred.

 $\begin{array}{ll} 11 & \mbox{LORD JUSTICE FLAUX: So it is the closure which is the} \\ 12 & \mbox{trigger} \; . \end{array}$

13 MR EDELMAN: The closure is one of the two required 14 ingredients .

15 LORD JUSTICE FLAUX: Yes, okay.

MR EDELMAN: But the example I gave was a situation where the rats have entered the premises and, you know, within an hour or two the phonecall has been made. As soon as it is discovered the phonecall is made. And yet the insurer is supposed to be able to say: oh, we contemplated you having rats in your premises and being closed down because of it, we are going to subtract from the counterfactual the fact that you have got rats in your premises, even though the insured combination has

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That may be the answer that my Lords come to, but it doesn't strike one as being the sort of result that one would expect when looking at this sort of policy. Of course, you know, if the restaurant had a reputation for having rats in it, it may be that its turnover in the historical past would have been affected by its reputation for having rats and it will lose its indemnity that way or have a reduced indemnity that way because of its prior turnover.

LORD JUSTICE FLAUX: It might have a nominal value.

MR EDELMAN: It might do. But in my example, what insurers are contemplating is even though that is not the situation, there has been a sudden escape, that suddenly they are able to take credit for by, through a counterfactual, the fact that you have got rats in the premises. That is what it is all about, isn't it? That is what the cover is all about.

Just with the church the cover is all about there being an emergency, which has caused the church to close. And the insurers then would have said: well, we will keep the emergency and we will say people wouldn't have gone to church anyway because of the emergency. Insurers would then say: well, people wouldn't have gone to your restaurant anyway, because there were rats there and you, being a genuine restaurateur, you would

probably have closed it anyway. But that is not being forced to close down.

I have taken that aspect as far as I can. Unless you have any more questions on that topic, I was going move on to the disease clauses.

The first issue is whether the interruption or interference can be said to have been caused by or follow the disease within a specified area. Can I just show you QBE's skeleton, that is $\{I/17/27\}$. My references are not very good, it should be $\{I/17/28\}$, I'm sorry, paragraph 62. Yes, that is better.

So they seem to be recognising that the disease, that what they are insuring, quite rightly recognising, that the nature of the diseases they are insuring are those which are capable of spreading over a wide area.

But the fact is they say that the worse the disease, the less your indemnity. What they go on to say is that is precisely what the relevant policy area part of the disease clause is sold to protect against: the damage caused by local occurrence of the disease, if it is so caused. It doesn't matter that the disease is also

present elsewhere. But it does matter if it is the fact that the disease being elsewhere rather than in the relevant policy area, that is the cause of the BI loss.

The critical words are "rather than", which is, perhaps one might say, a forensic sleight of hand, because the correct words are not "rather than", it is "as well as", which is actually what their case is. But of course it is obviously unattractive to say that. It is only "rather than" when you start with this artificial counterfactual. The truth is it is elsewhere as well as in the relevant policy area, and that is the cause of the BI loss.

Let's look at the example. It is a very lengthy example and I hope the page number is right . Page 5 of this tab, paragraph 4.

My Lords may in all the reading have remembered this rather convoluted example of numbers of different shops. There are four shops. You will note that they have chosen the one-mile clause.

Of course the FCA chose QBE 1 and 2, which had 25-mile clauses. QBE insisted on having a 1-mile clause, no doubt so they could put in this example which was entirely based on a 1-mile case. But we will cope with it; live with that. We will live with that forensic advantage being taken, or attempted to be

taken.

So Shop A. So we have got "not within 1 mile of any outbreak". Interesting that QBE refers to an "outbreak" rather than a single case. Quite right. But of course the cover is not triggered. That is the commercial advantage of having a policy with only a 1-mile radius. You have got more chance of any disease, whatever it is along the spectrum, not being in your relevant policy area.

That may give commercial purpose to the different radius widths. But as an illustration of facts all it proves is why some insureds have cover and some don't and why insurers' risk under a 1-mile clause is less than their risk under a 25-mile clause if there is a disease outbreak. There is less chance of a disease affecting someone in a 3.14 square mile area than there is in an area of 1,963 square miles. That is a lesser risk that insurers take.

But insurers also must recognise if there is some new disease, because you will see we have the clause at the top of the page, at 4, "Occurrence of a notifiable disease".

Of course insurers would recognise, as they must have done from SARS, that if a new disease comes along there will be a period before it becomes notifiable.

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1	Once it becomes notifiable it falls within the
2	clause but when it is not notifiable it doesn't.
3	When it is not notifiable the disease is not
4	covered. When it is notifiable the disease is covered.
5	Similarly, and Ms Mulcahy will deal with the law, in
6	The Silver Cloud the business would have suffered a loss
7	as a result of terrorist attacks, but the relevant
8	section of the cover responded where there had been
9	a State warning. If there was a warning applicable to
10	the business it was covered; if it wasn't it wasn't
11	covered. It was simply reflecting the terms of cover.
12	I think we have moved on. I think I wanted to be on
13	page 21 $\{I/17/21\}.\;\;I$ am sorry I am on the wrong page at
14	the moment. It is 27, sorry. I am all over the place
15	now. Can my Lords give me a moment?
16	LORD JUSTICE FLAUX: We started off on page 28. You showed
17	us paragraph 62 on page 28.
18	MR EDELMAN: Yes, I am sorry, my Lord, yes.
19	LORD JUSTICE FLAUX: Then you showed us something on page 5.
20	MR EDELMAN: I think we were going back to page 25. Let's
21	go back to page 5, the examples. Yes, $\{1/17/5\}$.
22	If we can then move forward to my Lords have seen
23	the other examples. There is Shop B, 100 yards away
24	from Shop A, just under one mile from a care home; Shop
25	C 100 yards away from Shop B, just under a mile from the

hospital , and Shops A and B just over a mile away from the hospital , and there is a patient admitted and Shop D visited by a Spanish national . Those were the facts . We go to the next page. $\{I/17/6\}$. We then go to 5.3. That is the period prior to 5 March. Not

Then they say whilst it was causing interruption , if it was causing interruption , not capable of being an insured peril . That is absolutely right . It then becomes notifiable and it qualifies under the policy . It doesn't create an insured peril , it just becomes a qualifying disease for the purposes of the insured peril .

a notifiable disease. Therefore no cover. Correct.

Now the next page, please . $\{1/17/7\}$. Then we have four propositions . The first is the extensions don't provide insurance against loss caused by a pandemic or a national / international government response or public feared pandemic. We submit why not. The clause is triggered . The cover responds. It is triggered by the disease acquiring the status of being a notifiable disease . It is present within 1 mile of the premises . And through the impact on the government action it has caused the interruption .

What they are getting at is that they say we are only insuring diseases within the 1 mile area. But

that, again we come back to the question of construction, presupposes what this policy is contemplating. If it is contemplating a disease which would include within its ambit a new pandemic then why shouldn't it be treated as providing insurance on that basis.

The second point, they do provide insurance against the occurrence of a notifiable disease. They have rephrased the wording but otherwise, yes.

The occurrence, which is required to be the cause of the BI, is the interruption that is the cause of the loss, and it is the interruption following the disease.

Let's move on to Shop B. We have got here the example of 23 March. If we go perhaps to the next page $\{1/17/8\}$, that example is based on 23 March. There were 11,000 confirmed cases. Care home, a case in a care home not diagnosed, someone dies, but what they overlook is that someone must have brought the virus into the care home. This is the Shop B example.

If you wanted to see that, that was back on page 5, to refresh your memory. If we go back to page $\{1/17/5\}$, Shop B is just over 1 mile from a care home. Subsequently a resident died. They don't actually look at the reality of how the person in the care home actually got the disease. It could have been

a relative, a care working going in, but anyway they agree it is within the one mile. But they want to support an argument that because this person's case wasn't known about until after 23 March this is somehow relevant to the answer.

But that is not a solution to their problem, because it is common ground between the parties that the Government did not know about all the COVID-19 cases that existed perhaps especially in care homes.

The Government action which caused the interruption was a reaction to cases both known and inferred, anticipated and feared; what I would call the known unknown. You know there is a lot more out there, you just don't know precisely where and how much, but you know there is a lot of it out there. It was a reaction to the known and the known unknown.

So the fact that someone did have it in a care home on 23 March, and inferentially must have got it from somebody on 23 March, is sufficient. It was part of the picture that caused the Government action, because of course you can subtract all of these cases, and this is the approach by the insurers. You subtract all of the cases and you end up with nothing. You end up with no COVID in the country at all, because every insurer has subtracted it on the counterfactual.

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1	LORD JUSTICE FLAUX: Is that a convenient moment to have
2	a break, Mr Edelman?
3	MR EDELMAN: Yes, my Lord.
4	LORD JUSTICE FLAUX: My clock says 17 minutes past, so if we
5	say 25 past.
6	(3.17 pm)
7	(Short break)
8	(3.31 pm)
9	LORD JUSTICE FLAUX: Okay, Mr Edelman.
10	MR EDELMAN: Right, I was going to show you $\{I/12/111\}$, if
11	this is the right page.
12	LORD JUSTICE FLAUX: There we are.
13	MR EDELMAN: Good. A preface to this, and of course we are
14	dealing with shop B where we have the case before 23
15	March, not known about until after, and a causation
16	question raised in relation to that, just as a reminder.
17	LORD JUSTICE FLAUX: Yes.
18	MR EDELMAN: It is common ground that the government didn't
19	know about all cases of COVID that existed, especially
20	in care homes, and the government action was a response
21	to COVID cases known, inferred, anticipated and feared.
22	This is how it is put in the skeleton. They posed this
23	hypothesis:
24	"Consideration was given at a relevant time and at a
25	relevant level of government, to a master spreadsheet
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setting out, line by line, the number of reported cases of COVID in different areas of the country ...

"The government decision to take action was based on the totality of what the spreadsheet showed, an apprehension about the national spread of the disease, and a concern to minimise spread for the sake of the public and the NHS.

"The question now being asked is: if a single line entry ... had not been there (being the entry for the relevant policy area as proved by the insured), would its absence have made any difference to the action taken by the government?"

Firstly , in (b) there is the recognition that it was the apprehension about the known unknown that was part of the government action, but there is then the question as to -- that that example of itself shows that each line in the spreadsheet is contributing to the overall picture. It is a national picture. We presented it as a jigsaw, each relevant policy area is a piece of the jigsaw. You can talk about it as lines on a spreadsheet, you can talk about it as pins in a map, although pins are a bit too small for most of the policy areas, which are 2,000 square miles almost. But I mean, this is in essence the point, the insurers want to say, and each of them say this for their own individual area:

well, subtract my area and you have still got all the rest. And they can have policyholders in two areas, and they can say to the one policyholder, "Well, but for the policyholder in the other area, but for the disease in your area you would still have had the restrictions because of the outbreak in the other area", and the policyholder in the other area, they can say the same. So nobody pays anything at all.

The way one can look at it, there's two ways: one can say this all represents just one indivisible outbreak of a disease, and every known and unknown case -- when I say "unknown", I meant it is the known unknown; you know it is out there but you just don't know where it is precisely when you are the government, you just know it is everywhere, and you are looking at a tip of the iceberg -- that is all contributing to a picture we have, hence we used the jigsaw example, you put all the pieces in the jigsaw together and you have got the picture. And the picture is of one indivisible epidemic. An alternative way of looking at it is you can say each relevant policy area is a concurrent cause; it's making its own contribution to the national picture.

Now, the critical question is: when you are applying these policies , do you go round the country and for

every relevant policy area you take out that jigsaw piece and say, "I can just about still see the picture without that jigsaw piece, so you lose"? So nobody wins, nobody gets paid out for the worst example of a notifiable disease.

So in other words, what these policies are insuring, according to the insurers, is a notifiable disease as long as it's not too bad a notifiable disease. If it is a really bad notifiable disease, which really impacts on your business, then we won't insure you. Because if it is a really, really bad disease, we have always got the "but for" causation test to fall back on.

They try to legitimise that on the basis, well, we are only providing for local outbreaks, providing insurance for local outbreaks. If that is what they wanted to restrict it to, then why not restrict it to diseases for which there are known vaccines or known treatments? We had a little debate about that at the second CMC, I know, my Lords. But they haven't. It covers notifiable diseases, including anything which becomes a notifiable disease because it emerges unknown, untreatable, no vaccine.

Their policies, they say, only are triggered when you can prove that a local case actually caused, itself, or a local combination of cases in your area actually

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caused, directly your business to be closed down. to themselves: well, if it is both within -- QBE think 2 They are dealing with -- someone said this, I think 2 "within" is a very strong word in their favour -- but it 3 QBE said this -- it is all about the locality; 3 is both within and without, you don't have cover? 4 a restaurant in Central London being closed down because 4 Because that means that an insurer can always point to 5 5 of an outbreak in Maidenhead. Is that really what this the disease without having a causative effect. 6 is about? Or by accepting that a restaurant in 6 MR JUSTICE BUTCHER: Of course I understand the force of 7 7 Central London may be closed down because of an outbreak your point, Mr Edelman, about the worse the disease, the 8 8 in Maidenhead, they are recognising that notifiable less the cover. I understand that argument. What I am q q diseases can come in all shapes and sizes, some can be still troubled by is what is the purpose of the 10 10 local, some can be very nasty. And they price it on the requirement that anyone should have got it within the 1 11 basis that the very nasty hopefully never will happen. 11 mile or the 25 miles? That would just be happenstance 12 As I said, the January 1987 storms taking out all of 12 in a sense. Because if there is cover for something. 13 13 south-east of England. for a notifiable disease which has an effect on the 14 LORD JUSTICE FLAUX: It was October 1987 and January 1990. 14 premises, what is the purpose of stipulating that 15 MR EDELMAN: It was the October 1987 which they said 15 someone should have got it within 1 mile or 25 miles? 16 16 a 300-year return date, took out the south of England. MR EDELMAN: My Lord, the distinction may be between these 17 and then in January 1990 took out --17 policies and someone like I think it is Arch, which just 18 LORD JUSTICE FLAUX: 1990 took out most of London. 18 has "government action following an emergency". They 19 19 MR EDELMAN: 1990 took out most of London and are exposed to a government action wherever the 20 Northern Europe as well. 20 emergency happens to be, as long as the action that is 21 21 LORD JUSTICE FLAUX: Yes. taken affects the insured's business. 22 22 MR EDELMAN: That is just insurance. Bad things happen and, They have conceded, Arch have conceded that the 23 you know, you get two 300-year return date storms within 23 emergency is the whole COVID situation in the nation. 24 24 LORD JUSTICE FLAUX: That identifies the nature of the two and a half years. less than two and a half years of 25 each other, the second even more devastating than the 25 difference between the Arch policy and the other 135

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2 LORD JUSTICE FLAUX: The whole LMX spirals, on one view at 3 least was triggered by a whole series of natural 4 disasters of one kind or another, all of which were said 5 to be once in 100 years. 6 MR EDELMAN: Yes, and it revealed to the insurance industry 7 the mistake they had made with the spiral market. 8 LORD JUSTICE FLAUX: Yes. 9

MR EDELMAN: And maybe, in retrospect, the insurers now realise or believe they have made a mistake with these policies. But they are not to be protected from the fact that a cataclysmic event has happened. That is just, you know, bad luck being an insurer.

Shop B is a line in the spreadsheet. The disease, the disease for shop B, that person in the care home is a line in the spreadsheet. And of course, you know, the care home, as I have said, the person in the care home must have got it from somebody, if they are bed-bound in a care home or confined to barracks in a care home, somebody has got to have communicated it to the person in the care home. So it is a pretty good bet that that was either a relative or someone working in the care home. Someone brought it in. So one has to be realistic about this as well.

Would anyone looking at these clauses really think

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policies that we are concerned with, but it doesn't actually answer the question that my Lord posed, which is a question that troubles me as well. If you are right, then the 1 mile and 25-mile point is completely otiose, because the reality is that -- I say it is not otiose, because it is in there, so it provides a restriction on the scope of cover, but it is completely meaningless, because the reality is that if it is everywhere, then the 1 mile/25 miles restriction is going to be satisfied in every case.

11 MR EDELMAN: It is on this epidemic, my Lord. That is the 12 important point. One must look at what this -- what is 13 the sort of as it were the bread and butter disease 14 outbreak.

LORD JUSTICE FLAUX: The bread and butter disease outbreak presumably is an outbreak of measles or mumps in the town which leads to the closure of the schools or the restaurants or whatever it happens to be.

19 MR EDELMAN: Exactly, yes. And the area where the disease 20 occurs in that sense is controlling the degree of the 21 insurers ' risk . Because you have got to be within 22 a certain -- even if you are affected by the action, the 23 government action or the local authority action, you 24 have to be within a certain distance of the disease for 25 you to have cover.

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So if there is precautionary action taken, let's say risk . 2 you have got a 1 mile clause and, you know, you are in 2 MR EDELMAN: It is, and they can choose 1 mile vicinity, 3 the City, and something happens in Piccadilly which 3 25 miles, that is the way that they protect themselves 4 causes restrictions in all of Central London, then there 4 against local outbreaks, because they protect themselves 5 is no cover if the outbreak, whatever it is, that 5 against local outbreaks with the 1 mile. 25 miles can 6 occurred in Central London was more than a mile away 6 be seen to be very generous. I quite accept that when 7 7 from your premises. It may be affecting you, but your it comes to a -- it is not once in a lifetime perhaps, 8 8 business interruption cover doesn't cover it, because because it is probably more than once in a lifetime, but q q the outbreak of the disease was more than a mile away. it may be. The last epidemic, really, really bad one, 10 10 It is a way of controlling the risk. was perhaps Spanish flu. LORD JUSTICE FLAUX: Not on your case, no. 11 11 LORD JUSTICE FLAUX: I think certainly in your lifetime and 12 MR EDELMAN: My Lord, it is. 12 my lifetime, but possibly not some of the other people 13 13 LORD JUSTICE FLAUX: If it is a sufficiently serious representing various parties, the 1957/58 Hong Kong --14 14 outbreak, then it is going to impact everywhere. I think was it the Hong Kong flu, one of them, that was 15 MR EDELMAN: My Lord, no. It depends what disease you are 15 actually very bad. MR EDELMAN: Yes, my Lord. 16 16 talking about. 17 LORD JUSTICE FLAUX: Lunderstand that point, Mr Edelman. 17 LORD JUSTICE FLAUX: I forget how many people. And the one 18 MR EDELMAN: Let's talk about an emergency. Let's take 18 in the late 1960s, something like 90,000 people are 19 disease out of the equation for the moment and talk 19 thought to have died in this country. 20 20 MR EDELMAN: Yes, and there was, of course, also a polio about something like what happened in Salisbury. You 21 might have a clause which talks about local authority or 21 outbreak. I think. 22 22 LORD JUSTICE FLAUX: That was also very bad. government action following an emergency within $1\ \mbox{mile}$ 23 23 of your premises. Now, if you are in the middle of MR EDELMAN: Certainly one which has had as dramatic an 24 Salisbury when the Novichok was discovered, I mean the 24 effect as this has, it is unprecedented, of course, but 25 danger of that is they didn't know where it was, and 25 that doesn't mean that it is not within the insurance 137 139 1 that was an emergency. If you are in the centre of 1 risk. And the fact that it is so serious and has 2 2 Salisbury you are covered. If you are on the outskirts provoked such serious consequences that in fact of Salisbury, I don't know how big Salisbury is, but on 3 protections that insurers built into their policies the outskirts, more than a mile away from the centre --4 don't work to make any difference, is just a product of LORD JUSTICE FLAUX: Far enough to be more than a mile away 5 the risk that the disease that has eventuated 6

3 4 5 6 from the centre, sure. 7 MR EDELMAN: -- then you don't have cover, even though the 8 whole area of Salisbury is closed down, if the clause is 9 an emergency within 1 mile. 10 One has to remember also there are sub-limits to 11 many of these clauses. So one can see this as a way of 12 insurers controlling their risk with $1\ \text{mile}$, but with 13 25 miles -- my Lord says: what is the purpose of that? 14 In a sense, with $25\ \text{miles}$ you are already covering 15 a regional risk. 25-mile radius is about 4% of England. 16 LORD JUSTICE FLAUX: It depends on where you are. Going 17 back to your example of Cornwall, and also I think one

of the insurers says with some force that quite a lot of the 25-mile radius, for example down pretty well the whole of the south coast, will actually be in the middle of the English Channel.

MR EDELMAN: Yes, absolutely.

LORD JUSTICE FLAUX: So it does depend on where you are.

But I have got your submission, I think we have got your

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But I have got your submission, I think we have got your submission, it is a way of insurers controlling their

It is really a question, it is almost, you know, sitting back and thinking about the purpose of this: are these restrictions really intended to eliminate coverage for the most serious type of notifiable disease, in circumstances where the clause is contemplating such a disease? It is in the definition of "Notifiable". One of the possible ingredients of what makes a notifiable disease notifiable is that it has the capacity for epidemic. That is not an exclusive one, it doesn't have to have an epidemic capacity, but it is one of the factors taken into account: is it an epidemic disease, contagious, infectious? So they are contemplating a new epidemic disease.

The question is: is this a way of excluding liability for the worst sort of disease or is it just actually a control mechanism for the day in and day out outbreaks, with the 25-milers actually offering generous cover for that?

I am reminded that if you want statistics on prior deaths, they are in $\{C/12/2\}$. It is 33,000 deaths in

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atrolling their 25 deaths, they are in $\{$

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1	1957/58 and 80,000 in 2968/69. It is just up on the	1	MR EDELMAN: No, no, I took you off because shop B led me on			
2	screen there, "Excess mortality".	2	to a major topic. So it was self-made digression.			
3	But of course the predictions, whether they were	3	We are on to shop C now, which is $\{1/17/8\}$. We have			
4	right or not, the predictions were that those figures	4	got this shop being a mile away from shop A. Remember,			
5	would have been dwarfed had the government not taken the	5	shop A had nobody within a mile. Shop C does have			
6	action it did.	6	somebody within a mile. What he says in 7.2 is he says:			
7	My Lord has gone on mute, I think.	7	"The critical"			
8	LORD JUSTICE FLAUX: That is a different issue, which	8	I see what the difference is now. I was working on			
9	mercifully we are not concerned with.	9	a version before references were added, and I worked on			
10	MR EDELMAN: No, no, but I think one can't compare the	10	those skeletons when they came, and the adding of			
11	mortalities	11	references has changed the formatting. So I apologise,			
12	LORD JUSTICE FLAUX: Absolutely not. But one was just	12	I tried to work out page numbers, but I will try and			
13	looking to see the scope of previous outbreaks. You are	13	work through it .			
14	absolutely right, the worst the Spanish flu was worse	14	Does it make any difference that shop C was within a			
15	than anything else .	15	mile of a person who was diagnosed?			
16	MR EDELMAN: Yes. The only reason I mention that is because	16	"The critical difficulty for the insured would be to			
17	it is said, or one of the arguments for the lockdown	17	establish that the occurrence had any causative effect			
18	across all of Europe, except of course insurers'	18	on the business.			
19	favourite place, which is Sweden, which may have been	19	"Any downturn due to general concern about the risk			
20	due to local constitutional reasons but we won't go into	20	of contracting government's advice, all of that			
21	that, was because the fear that if we didn't have	21	happened whether or not there was a diagnosed case in			
22	lockdown the volume of cases would be so great that	22	the hospital. Put simply, whilst the insured peril had			
23	hospitals wouldn't be able to treat people with it, and	23	occurred (disease) within the $1\ \text{mile}$, it had not caused			
24	the mortality rate would be far higher than firstly	24	BI loss ."			
25	the contagion rate would be far higher, and also the	25	To which the answer is the same as for shop B. Of			
	141		143			
1	mortality percentage would be higher because there would	1	course it caused the loss . It contributed, as every			
2	be inadequate hospital beds to help people through if	2	single reported case and every single actual case, which			
3	they were severely affected . So it was the double blow	3	was part of the known unknown, contributed to the			
4	of that, both much higher infection and much higher	4	picture that that government had of a national outbreak.			
5	mortality .	5	What are the ramifications of the insurers'			
6	So, yes of course we are looking at a very	6	approach? Let's take the Isle of Wight, which has			

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exceptional situation, but the question is: does the insurance apply to it? LORD JUSTICE FLAUX: Yes. MR EDELMAN: If it does, if it is, if one looks at it and

says, well, it can't be excluding that prospect; and if it is not excluding it, then does causation come to the rescue? Because that is actually what these insurers are saying. They are saying: well, we could have said "only" but we didn't. But we will try and -- I think one argument was "within" means "only", which it doesn't. But causation, like the white knight on a horse comes charging to the rescue to deliver insurers from the absence of any restriction in their policies .

This is not talking about -- I am not talking about a pandemic exclusion; I am talking about insuring risks of notifiable diseases.

My Lords, I should, after some digression, return to Mr Howard's wonderful shops.

LORD JUSTICE FLAUX: We diverted you somewhat, Mr Edelman.

a length of about 20 miles. Let's imagine that there was a disease, not this disease, a disease outbreak on the Isle of Wight which resulted in the Isle of Wight going into lockdown. Being an island, it could be cut off from the rest of the UK.

According to Mr Howard's logic, QBE's logic, not one of the businesses on the island would get a penny from their insurance under this form of QBE policy. Not one. Because in respect of each policyholder QBE could say "Ah, but for -- well, firstly the individual cases that occurred in your area did not cause the lockdown. That would have happened anyway because of all the other cases outside your one mile radius". So they would say that to policyholder A. Then policyholder B they would say exactly the same thing, including, in their counterfactual, the cases in the area of policyholder A. So neither A nor B nor anyone else gets paid a penny.

That is the effect of the counterfactual. The minute the disease spreads materially outside the

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relevant policy area, the policy ceases to apply, because you then cease to be able to prove that but for the outbreak in your area you wouldn't have suffered the loss.

Now, that may be the result my Lords say follows from the proper laws of causation, but before you get to that you would be asking yourself what the commercial purpose and intention of these covers actually was, and was it intended to operate that way. That drives the causation question.

All of us will spend many hours arguing it, but it really does boil down to that very simple question. What was the commercial purpose of this? What risk was it actually insuring? Because the causation rule can't be employed to undermine the risk that was being insured

I can give other examples, but take Wales. Let's say, you know, it is only 170 miles long; I know it is quite an irregular shape, so there might be quite a few 25 miles, but cases in Cardiff but a number of cases in Swansea, 50 miles away, further afield in Pembrokeshire and the north, nobody gets paid out. Even with a 25-mile radius policy nobody gets paid out, because the insurers can always say -- let's say there are four 25-mile radius areas for the sake of argument, that is

about the size of Wales but I know it's irregular, and some would be out to sea, so I take that into account, it is just hypothetical, but you can say, well, each area, but for your area there would still have been the three others, and they still would have locked down Wales, so no payment.

Of course there are, as I have already indicated, policies which have triggers which are triggered by an emergency likely to endanger life.

One sees that in Arch, Ecclesiastical , RSA2. Danger in Amlin and Zurich; threat or risk of damage or injury in Amlin 3; health reasons or concerns, RSA4; incident in some of the Hiscox policies and Amlin2.

For those QBE's examples are good examples of why there is cover: the national public authority responding to the spread of disease.

Perhaps before I leave the example we should perhaps go on to Shop D which is page 9 of I/17. $\{I/17/9\}$

COVID is brought into the shop three times by a Spanish visitor . What they say is the visit was unknown, didn't amount to an occurrence of a notifiable disease .

We say, yes it did, the man was actually in the shop and he had the disease. It was unknown. Yes, but that is what the government was reacting to. There is theoretically more --

2 LORD JUSTICE FLAUX: I think his point is that it was before 3 it became a notifiable disease in England. So it was on 4 5 March, wasn't it? So the visit on --

 $5\,$ $\,$ MR EDELMAN: It was the day after, my Lord, 6 March.

Notifiable on the 5th.

LORD JUSTICE FLAUX: But 6 March. I was looking at the first one.

10 LORD JUSTICE FLAUX: Yes.

11 MR EDELMAN: I think in his example he says "... visited on 12 the 1st, the 6th and the 10th". I agree on the 1st it 13 wasn't notifiable .

14 LORD JUSTICE FLAUX: No.

MR EDELMAN: But he had it. He was still in the area because he visited the shop on the 6th and the 10th. So there was an occurrence of the disease within the area, and it is just part of the tableau that was presenting itself country-wide.

I am trying to see if I can shoot forward. But if one looks at the 25-mile clauses and the spreadsheet example, one has got even fewer lines on the spreadsheet for 25 miles. I will not give a number because of course the coast is very irregular. But that demonstrates that even more clearly, because it can't

have been intended only for purely local outbreaks, not in the locality . That is, as I said, Central London and Maidenhead.

So that is necessarily contemplating something much broader. And then to expect that clause not to cover, spill over into other areas, for cover to go when you are already contemplating 2,000 square miles is we say wholly unrealistic.

So we say the answer to this case is to be found in the way in which one approaches causation. For a composite clause one excludes from the counterfactual the contemplated elements. For a disease clause you proceed on the premise that the parties contemplated a disease outbreak which might be part of a larger outbreak, hence the fact that it was related to notifiable diseases, but it was not the intention of the parties for causation to operate by treating the outbreak as a whole as part of a counterfactual. And the rationalisation in causation terms is that the outbreak would be a single indivisible cause or a current interdependent series of causes, all contributing to the same picture.

My Lords, can I just say a few words about the word "following ", because that is one of the causal connectors. It is a different topic. QBE and others

1	require language which says on the disease clauses that	1	MR EDELMAN: Yes.		
2	the interruption must follow or be a consequence of the	2			
3	disease. Hiscox and Zurich require that the public	3	Ms Mulcahy is going to deal in detail with Orient-Express and general causation.		
4	authority action follow the disease, or a danger, or	4	LORD JUSTICE FLAUX: Let's do that tomorrow because that i		
5	a disturbance in Zurich.	5	might a meaty topic, and speaking for myself, I would		
6	Hiscox says that "following " requires a causal nexus	6	quite like to be fresh for that.		
7	but looser than the other connectors in their wording	7	MR EDELMAN: I wasn't going to argue the law on that. She		
8	such as "resulting from", "due to", "whereby".	8	is going to do that tomorrow. I just wanted to make		
9	MR JUSTICE BUTCHER: This is where they have had a change of	9	a point on policy cover.		
10	heart in fact.	10	If my Lord could take another 15 or minutes or so, I		
11	MR EDELMAN: They did say it was purely chronological with	11	will just show you some policies and show how the		
12	no causal connotations because they thought that suited	12	application of Orient-Express causes problems.		
13	their counterfactual case better. But they have since	13	I want to show you RSA2, which is page 17,		
14	accepted that it does have some causal connotation. But	14	$\{B/17/17\}$, which is a page we looked at before.		
15	I don't think they backtracked from saying that it is	15	You will see that it is damage to property caused by		
16	a looser causal connection than proximate, as far as I'm	16	the following insured perils . We have amongst them		
17	aware. I have read all of this stuff once I am afraid,	17	explosion, storm, tempest or flood. That's 1 and 3.		
18	I have to confess. I have read it all once and not had	18	The BI section, if we move to page 35 {B/17/35}		
19	the opportunity to study it in great detail.	19	says:		
20	Zurich, RSA and Amlin say that it requires full	20	"In the event of damage to property used by you at		
21	proximate cause. We say on our argument we agree	21	the premises admitted liability causing		
22	with Hiscox's approach. There can be no argument that	22	interruption to the business which results in the		
23	a local disease being part of an aggregate pandemic that	23	reduction of gross profit we will pay you"		
24	causes national response satisfies the test of response	24	Then it says that is what is paid in the event of		
25	following the disease. But we would say even if it is	25	damage to property.		
	149		151		
1	proximate cause then in these particular cases it was	1	If we go back to the previous page $\{B/17/34\}$, you		
2	the proximate cause.	2	will see there is an adjustment:		
3	MR JUSTICE BUTCHER: So you agree with Hiscox's formulation,	3	" if the damage had not occurred."		
4	as you have put it, which is a causal, but not as	4	The question that I want to pose and it is one		
5	directly causal as a proximate cause. That is your	5	that I am happy to be able to send my Lords away to		
6	primary submission.	6	ponder over overnight is you have here a policy with		
7	MR EDELMAN: Yes. But I say it doesn't actually make any	7	a contemplated peril , the insured peril which insurers		
8	difference on the facts or to the counterfactual,	8	are so keen to have, to identify and say, well, that is		
9	because the counterfactual is all bound up with what the	9	what you take out of the counterfactual . What do you do		
10	commercial purpose of these clauses is discerned to be.	10	here.		
11	In trying to make up for some time I may be doing it	11	Let me take some examples which we will all know		
12	a bit more piecemeal than I would, but can I move on to	12	about. Buncefield, the explosion, covered by this		
13	one further topic. I have two more topics to go but	13	policy. Let's imagine, because in fact I think this is		
14	LORD JUSTICE FLAUX: How long do you think you need?	14	true, it caused damage to property including a warehouse		
15	MR EDELMAN: Yes.	15	800 metres away. What is the counterfactual for the		
16	LORD JUSTICE FLAUX: I am only asking because we lost time.	16	purposes of the business interruption claim. Do you		
17	MR EDELMAN: I have certainly got one topic in 10 or 15	17	remove the damage to property, but leave the explosion		
18	minutes.	18	and its effects everywhere as part of your		
19	LORD JUSTICE FLAUX: Why don't we try and finish that topic.	19	counterfactual even though explosion is an express and		
20	I don't know about Mr Justice Butcher, I should have	20	contemplated insured peril . So the more devastating the		
21	asked him, but I could sit until 4.30.	21	explosion the less the business interruption cover, even		
22	MR EDELMAN: Yes, I have noticed. Is that too much of an	22	though explosion is identified as an insured peril for		
23	indulgence?	23	the purposes of the property damage cover. We would say		

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not. We would say that where the policy contemplates

perils , which can comprise wide area events, then

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LORD JUSTICE FLAUX: No, because we lost 10 minutes with the

break of the feed. So let's go on.

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obviously when you are forming your counterfactual you 2 must take into account the insured peril that the policy 3 contemplates. 4 But then that leads you to the question with 5 Orient-Express. Does that mean, if that is right -- and 6 you may say I am wrong, it would be a curious result --7 but if that is right it would mean that an insured was worse off with an all risks policy than he is with one

like RSA2 confined to identified insured perils. MR JUSTICE BUTCHER: Just explain that for me, Mr Edelman. MR EDELMAN: Because what Mr Justice Hamblen was saying in Orient-Express is the hurricane is not an insured peril. He had an all risks policy. It is only the damage which is an insured peril. Where do I see in the policy that it says hurricane is an insured peril.

So here we have got explosion is an insured peril; it has caused the damage.

Now on a very strict black letter interpretation of the policy, the business interruption cover says: "In the event of damage we will pay you your business interruption as a result of damage", and the adjustment clause, results which would have been expected if the damage had not occurred.

But we do now have, you know, contrary to Orient-Express, a contemplated peril. We have the

explosion in the property damage insuring clause. It is why you are in the business interruption policy in the first place, because you have got damage caused by a qualifying peril.

If I am right, and the natural conclusion, the natural construction of this is you don't leave the explosion in for the counterfactual -- of course, you know, if after the building has been repaired there is then continuing loss that is when it is no longer related to the damage to the building. I am talking about while the building is in pieces on the floor. Do you say, "Well, terribly sorry your building was destroyed by an explosion. I know we agreed to insure it and the business interruption resulting from the destruction of it by an explosion specifically as an insured peril ..."

LORD JUSTICE FLAUX: That argument can't be right, in the example, because the property damage is caused by an insured peril, namely the explosion, you don't extract the explosion from your counterfactual analysis .

MR EDELMAN: That is right. I agree.

LORD JUSTICE FLAUX: But what you are trying to do is to say, "Aha, in that case Orient-Express can't be right because it is an all risks policy." But it is an all risks policy that didn't cover against hurricanes.

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MR EDELMAN: It did. You have bought a better policy than RSA2, because instead of being confined to specified perils you had an all risks policy and hurricanes were not excluded. But because you bought an all risks policy without, you know -- my Buncefield example, if this had been an all risks policy and there is no exclusion for explosion, you put the explosion in the counterfactual, because it is not an insured peril.

But if there is an insured peril, you have got a narrower policy, it only covers you for insured perils A, B and C, and one of those insured perils occurs, you do get cover because it is an insured peril.

It is utter nonsense. It is completely the wrong way round. You may say the answer is that you have got to put the explosion in the counterfactual even when it is an insured peril . But that is a coach and horses through the policy.

It doesn't seem to have been -- I don't know whether it was argued, but whether it was or wasn't doesn't really matter. This is just practical insurance. It is not law. It is just practicalities . Are you really worse off with an all risks policy. It is not what insurers sell all risk policies to be narrower than a specified peril, or to provide narrower cover than a specified peril, if a non-excluded insured peril

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occurs

Now that gives you the clue as to what both the counterfactual for -- firstly it gives you the clue as to the counterfactual for business interruption losses anyway, because you will see this clause, we are looking at it , let's go back to page 35 $\{B/17/35\}$, this clause doesn't mention the peril at all; it just mentions the damage. But it must contemplate encompassing within the damage the cause of the damage so that you don't create a counterfactual which doesn't have the cause.

If that is right then you wouldn't expect a clause which is purely addressing quantification, the trends clause, to be introducing it by the back door purely for quantification .

15 LORD JUSTICE FLAUX: How is damage defined in this policy? 16 Is it not defined by reference to damage which is 17 covered by the property damage sections?

18 MR EDELMAN: "Damage", the definition, my Lord, is on page 9 19 of this . $\{B/17/9\}$.

20 LORD JUSTICE FLAUX: Okav.

21 MR EDELMAN: If you go back to page $\{B/17/35\}$ it is:

> "Damage to property for which we have admitted liability under section 1.1

24 LORD JUSTICE FLAUX: Yes. Yes. So it is ...

25 MR EDELMAN: It is because it has been caused by an insured

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1	peril .	1	rely on, because that shows you the	danger of carving up	
2	LORD JUSTICE FLAUX: Yes. Yes, okay.	2	clauses and creating artificial co	unterfactuals .	
3	MR EDELMAN: So one can have other examples. I will just	3	My Lord, sorry, I have taken you all the way up to		
4	give you one more example which is another real life	4	4.30, but I hope that wasn't		
5	example: the floods in Cockermouth in Cumbria in 2009.	5	LORD JUSTICE FLAUX: That is absolutely fine. If that is		
6	If I could just have a few minutes, three or four	6	a convenient moment we will break.		
7	minutes to finish this example, and then I have finished	7	Presumably in logistical terms we get another Skype		
8	this point.	8	invitation tomorrow morning so we	=	
9	LORD JUSTICE FLAUX: Yes, okay.	9	rather than leaving it running all night.		
10	MR EDELMAN: Imagine a clothes shop has flooded. Imagine it	10	MR EDELMAN: I think my understanding is that it is the same		
11	is insured under this policy. It covers for flood. On	11	Skype invitation throughout.		
12	insurers' case, drawing an analogy with this case, it	12	LORD JUSTICE FLAUX: It is the same invitation, yes.		
13	cannot recover business interruption losses for this	13	MR EDELMAN: So you find the same invitation that you had		
14	broad flood of the town as vacants say, "Well, even if	14	before; not a separate one each day.		
	your property had not been flooded, the one property in	15	LORD JUSTICE FLAUX: Okay, that is fine.		
15 16		16	We will see you at 10.30 tomorrow morning. Thank		
	Cockermouth not to have been flooded, no one could have		· ·	row morning. Thank	
17	got to your property anyway because the rest of the town	17	you very much.		
18	was devastated. No business interruption loss for you."	18	(4.31 pm)	· - 1	
19	Whereas if there was a burst pipe or water main	19	(The hearing adjourned until 10.30	am on Tuesday	
20	which only flooded the premises you get full cover. So	20	21 July 2020)		
21	the worse the inundation with water the less your cover.	21			
22	Imagine a café flooded in Cockermouth. They are	22			
23	entitled to the counterfactual, according to insurers,	23			
24	that the café is undamaged and still open for business,	24			
25	but the rest of the town is flooded. So they are able	25			
	157		159		
1	to serve all the rescue workers and the repair workers	1	INDEX		
2	who have come in, and they have a complete monopoly, and	2		PAGE	
3	they can recover as their business interruption loss the	3	Housekeeping	1	
4	windfall profit they make from being the only café in	4	Submissions by MR EDELMAN	2	
5	Cockermouth, which is again wholly unrealistic .	5	Submissions by MS MULCAHY	6	
6	What we say is that when one is looking at these	6	Submissions by MR EDELMAN	62	
7	counterfactuals you need to take a rather more	7			
8	sophisticated approach. What you need to be doing is to	8			
9	look at what the policy is contemplating.	9			
10	If you decide that you don't want to say anything	10			
11	about Orient-Express and that all risks policy is just	11			
12	hard luck because it hasn't got insured peril, so be it.	12			
13	It seems commercially nonsensical but so be it . But	13			
14	when you do have perils, as we do, then those perils can	14			
15	not be diced up or subtracted for the purposes of the	15			
16	counterfactual . They have either happened or they	16			
17	haven't, and once they are there they are part of the	17			
18	causation test.	18			
19	LORD JUSTICE FLAUX: Yes.	19			
20	MR EDELMAN: That is the essential point, the central	20			
21	submission that I want to make.	21			
22	The last thing I will do tomorrow, which will take	22			
23	me only a few minutes, is just to point out to you a few	23			
23 24	inconsistencies in the ways in which the defendants have	23 24			
24 25	•	24 25			
ںے	cherry picked bits from the clauses that they want to	20			

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