

OPUS2

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

Day 2

July 21, 2020

Opus 2 - Official Court Reporters

Phone: +44 (0)20 3008 5900

Email: transcripts@opus2.com

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

1 Tuesday, 21 July 2020
2 (10.28 am)
3 Hearing via Skype for Business
4 Housekeeping
5 LORD JUSTICE FLAUX: Yes, Mr Edelman.
6 MR EDELMAN: Before I continue with my submissions, can
7 I just raise one point on timing, or two points on
8 timing actually.
9 LORD JUSTICE FLAUX: Yes, Mr Edelman.
10 MR EDELMAN: The first is that my recollection was that at
11 the CMC, and particularly in the light of the shorthand
12 breaks, we decided that the court said you would finish
13 at 4.30 rather than 4.15, bearing in mind we lose about
14 15 minutes for shorthand breaks, and I just wondered
15 whether the court is still able to do that or whether
16 you would prefer to finish at 4.15.
17 LORD JUSTICE FLAUX: Normally, Mr Edelman, I am perfectly
18 happy to continue until 4.30. It just so happens today
19 I can't, because I have a Zoom meeting with a French
20 judge at 4.30. I need to collect my thoughts before
21 that. So I think we will need to finish by about 4.20
22 this afternoon. On other days I would have thought,
23 subject to Mr Justice Butcher's views, we could sit
24 until 4.30 with no difficulty at all.
25 MR EDELMAN: I am grateful.

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1 LORD JUSTICE FLAUX: It may be, I don't know, I am entirely
2 in your hands, maybe we can make up a bit of time by
3 perhaps having ten minutes shorter at lunchtime. It
4 depends what people's commitments are. Ultimately if
5 one is working from home, rather than having to get
6 lunch in Central London, sometimes an hour is quite
7 generous. But on the other hand one also wants a bit of
8 a rest from staring at a screen all day. So we will
9 give you some extra time if we have to.
10 MR EDELMAN: I am grateful, my Lord.
11 The other issue arises on the interveners. We were
12 going to see whether we could fit them in our three day
13 allocation, but to be perfectly honest we are struggling
14 with 850 pages of written submissions to answer. We are
15 having to skate through the thing in any event. But
16 it is quite challenging.
17 So the question is whether the additional half an
18 hour that each of the two interveners require can be
19 accommodated by a 10 o'clock start tomorrow and
20 Thursday. Those would be the only days that an earlier
21 start would be required. Their extra time on the last
22 day hopefully we can accommodate within the normal time
23 period, but if just for tomorrow and Thursday to give
24 that extra half an hour for them. I am not saying that
25 they would be at 10 o'clock tomorrow and Thursday but it

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1 would just give that extra one hour to accommodate them,
2 which would probably take place at the end of Wednesday
3 and Thursday morning. So they would have the last half
4 an hour of Wednesday and the first half an hour of
5 Thursday morning.
6 LORD JUSTICE FLAUX: Have you discussed this with insurers'
7 counsel?
8 MR EDELMAN: No, I haven't, my Lord. We only reached
9 a conclusion on it last night but ...
10 LORD JUSTICE FLAUX: Again, subject to Mr Justice Butcher
11 having different views, I would be quite happy to sit at
12 10.00 am tomorrow and Thursday, provided that it is not
13 inconveniencing counsel in the case.
14 So perhaps during the course of the morning, if any
15 of the insurers' counsel have a problem with sitting
16 slightly earlier tomorrow and Thursday they could let my
17 clerk know and we will have to discuss it. But let's
18 not take up any more time on the matter now.
19 Submissions by MR EDELMAN (continued)
20 MR EDELMAN: Can I then move on to my last topic which
21 I didn't quite get to yesterday, which is where one has
22 these multi-component triggers, as in the sort of
23 emergency denial of access triggers, where one gets to
24 if one starts cherry-picking which element to treat as
25 the counterfactual. And what is illustrative of the

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1 difficulties that arise if one adopts that approach is
2 the inconsistency between the defendants as to what they
3 select because they can't agree on how to apply the
4 multi-component triggers; they simply engage in reverse
5 engineering to excise from the counterfactual the
6 element that seems to be most preferable to them.
7 So when they all glibly say you simply remove the
8 insured peril, it demonstrates that that is only
9 scratching the surface of the problem.
10 Can I give you some illustrations, my Lord. Firstly
11 can we start with the Hiscox skeleton {1/13/106} on the
12 screen, please. It is paragraph 330. In that paragraph
13 what they say is that:
14 "Hiscox submits that the proper counterfactual under
15 Hiscox 1-4 [whichever one one is considering] if one
16 assumes ... has actually occurred, the existence of
17 COVID in the UK, its impact on the economy and the
18 public confidence and the government measures falling
19 short of mandatory restrictions."
20 So they remove all national restrictions and then
21 pose the question as to what you have left. Let's be
22 clear on that, they are removing everything whether they
23 are restrictions that affect the premises or not.
24 MR JUSTICE BUTCHER: But the Hiscox wording actually says
25 restrictions in the trends clause, doesn't it?

4

1 MR EDELMAN: Yes. But the point is that they are not
 2 removing the national restrictions that apply to the
 3 premises. They are saying -- they are recognising
 4 realistically that it is all part of one set of
 5 restrictions and they are removing all manner of
 6 restrictions and leaving the disease.

7 LORD JUSTICE FLAUX: But the reason for that is explained in
 8 the next sentence. They may be right or may be wrong
 9 but the reason for that is explained in the last
 10 sentence of the paragraph, that the restrictions
 11 contained in the regulations are the only aspects of the
 12 government response which actually engage their clauses.
 13 That is their case.

14 MR EDELMAN: Yes, that is their case. What I want to show
 15 you is how the insurers approach it differently.

16 LORD JUSTICE FLAUX: I follow the point, Mr Edelman, and we
 17 spotted it for ourselves in the mounds of paper we have
 18 been asked to read.
 19 I am not discouraging you from making the point but
 20 it doesn't come as a surprise.

21 MR EDELMAN: No. But let me just show you anyway some other
 22 examples.
 23 We have then got Amlin at {1/12/160}. It is their
 24 paragraph 303.3. They say:
 25 "The only authority action to be reversed is the

1 defined action by the identified authorities having the
 2 effect of preventing access to the premises."

3 And then they identify which are the relevant bits
 4 of the legislation. But they only take out the action
 5 that relates to the premises leaving as part of the
 6 counterfactual all other restrictions on everything
 7 else. So they start dividing up the legislation into
 8 what affected the premises and what didn't.

9 There is similar approach in Arch and Zurich. Let
 10 me just take Zurich at {1/19/73}. It is paragraph
 11 174(b). It is (b) at the bottom of the page that you
 12 have in front of you {1/19/74}.

13 LORD JUSTICE FLAUX: Which subparagraph, (c)?

14 MR EDELMAN: It is (b), my Lord.

15 LORD JUSTICE FLAUX: Okay.

16 MR EDELMAN: "The only matter to be reversed out for the
 17 purposes of the counterfactual is such government
 18 measures as the court finds constituted action ...
 19 whereby access to the insured's premises was prevented."
 20 So they carve out again, as with Amlin, only that
 21 bit of the legislation which affected the premises.
 22 Nothing else.
 23 It rather becomes absurd because then one says why
 24 doesn't one just simply say, well, one leaves, if it was
 25 a church, one says, well assume that they restricted all

1 churches except yours. We will take out all churches;
 2 it could be all churches except yours; or all
 3 restrictions. But we have the variety between the
 4 insurers there.

5 Then on to RSA. We can look at {1/18/16}. Again
 6 the numbering may be out because I am afraid I had the
 7 bundle before references were added. So I will just
 8 check that that is the correct number. It should be ...

9 LORD JUSTICE FLAUX: This is Leicester.

10 MR EDELMAN: It is appendix 2, I am sorry. It is in
 11 appendix 2. Let me just explain to you -- I can give
 12 you the reference. It is appendix 2, paragraph 39.
 13 I am afraid bundles were arriving over the weekend while
 14 I was trying to prepare, which changed all the page
 15 numbers. There we go. No, it is appendix 1, I am
 16 afraid. So never mind.

17 What they say is that you subtract the emergency in
 18 the vicinity but not elsewhere. Here we are. {1/18/45}.

19 So what you do for them is they say you don't
 20 subtract -- their clause covers interruption or
 21 interference:
 22 "... caused by action or advice from the government
 23 due to an emergency likely to endanger life in
 24 a vicinity."
 25 So they don't excise the action or advice by the

1 government. They say you take out the emergency in the
 2 vicinity. Once you take out the emergency in the
 3 vicinity you have got all the emergencies elsewhere and
 4 all the government action elsewhere, and the government
 5 action on the property.

6 Ecclesiastical is {1/12/158}, I hope. It should be
 7 paragraph 298. The only matter to be reversed is the
 8 access to or use of the premises being prevented where
 9 it's occurred -- they say it has occurred for
 10 a specified reason. They go on to say at 299:
 11 "Specifically and importantly, "the emergency
 12 endangering life" to which the government action which
 13 caused prevention, et cetera, was a response is not to
 14 be reversed. That is not the [an] insured peril in its
 15 own right ... only the access prevention is to be
 16 reversed ..."

17 If one goes back to page 54 in this tab {1/12/54}
 18 and paragraph 76, the essence of the peril, here we have
 19 the words, "The essence of the [insured] peril is access
 20 prevention", et cetera. So they define for their own
 21 purposes what the essence of the peril is.
 22 If one goes over to the next page you will see they
 23 explain why it is the access peril that needs to be
 24 {1/12/55} subtracted.
 25 If one goes forward or back to page {1/12/158}

1 paragraph 299, once you have seen that, you can see that
 2 in 299 they describe the emergency as not an insured
 3 peril in its own right; the fourth line of 299.
 4 There is no explanation of how the access peril is
 5 to be treated as a peril in its own right or the essence
 6 of the peril, rather than being part of a qualification
 7 on what interruption or interference is covered.
 8 What you have in these policies is cover for
 9 business interruption or interference. In Hiscox's case
 10 it just says "interruption". We will come to that.
 11 The policy then goes on to say that interruption or
 12 interference in a certain set of circumstances only is
 13 covered. And the set of circumstances is a combination
 14 of circumstances. What we have here is insurers
 15 studiously avoiding the fundamental underlying problem
 16 or issue in all of these, setting its circumstance in
 17 all of these clauses, which is an emergency or
 18 a disease, they ignore that and they say something else
 19 is the essence of the peril. Then they define and
 20 redefine that.
 21 Our submission is that there is certainly no
 22 authority for this process and there is no rational
 23 justification for it either.
 24 One can't say that a set of circumstances, which is
 25 the set of circumstances in which an interruption or

1 interference with the business qualifies for indemnity,
 2 contains ingredients which can be selected and salami
 3 sliced out as being the essence of the peril.
 4 It is the combination. And if one is doing
 5 a counterfactual one takes out the entire combination,
 6 which includes the emergency and the disease, if it is
 7 reference to a disease.
 8 So that is our submission. Rather the inconsistency
 9 in the insurers' approach demonstrates the danger and
 10 the flaw in trying to identify something in
 11 a combination of events which are required as being the
 12 so-called essence of the peril or an insured peril in
 13 its own right.
 14 Prevention of access in Mr Kealey's example is not
 15 an insured peril in its own right because in its own
 16 right it isn't a qualifying interruption. It needs to
 17 be coupled with all the other factors. They either all
 18 come in or they all go out.
 19 My Lords, that was the additional topic that
 20 I wanted to cover. I can now hand over to, unless my
 21 Lords have any questions on that, Ms Mulcahy, who will
 22 address the law.
 23 LORD JUSTICE FLAUX: No, thank you very much, Mr Edelman.
 24 (10.47 am)
 25

1 Submissions by MS MULCAHY
 2 MS MULCAHY: My Lords, much of the defendants'
 3 self-described elementary exposition of the law of
 4 causation is in fact common ground, although there is
 5 some dispute in particular relating to the treatment of
 6 concurrent independent causes and the approach to the
 7 "but for" test, which is in dispute, and which I will
 8 come to.
 9 But as is so often the case, the issue is less about
 10 the principles; it is more about the application of
 11 those principles to the facts in question.
 12 As Mr Edelman has explained, it is common ground as
 13 to what the nature of a contract of insurance is, that
 14 it is an agreement to hold the insured harmless against
 15 loss or damage caused by the insured peril. And that is
 16 therefore a breach of contract when the occurrence of
 17 that loss or damage happens which gives rise to a claim
 18 for damages.
 19 The overriding compensatory principle, again dealt
 20 with in *Endurance Corporate Capital v Sartex Quilts* by
 21 Lord Justice Leggatt as he then was, is also accepted,
 22 that the general object of an award of damages for
 23 breach of contract is to put the claimant in the same
 24 position, as far as money can do it, as it would have
 25 been in had the breach not occurred. If a claimant

1 cannot show that they are worse off as a result of the
 2 breach then it has not had any causative effect.
 3 So that is not in dispute. But what it doesn't
 4 answer is the question of against what the insurer is to
 5 hold the insured harmless, and how. Simply positing
 6 that it is necessary to show that the "insured peril",
 7 quote/unquote, caused loss, doesn't again answer the
 8 question, as the inconsistency in the defendants'
 9 approach to what the insured peril is actually shows, as
 10 has just been explored by Mr Edelman.
 11 I am going to start by addressing proximate
 12 causation. I am going to tackle that first, even though
 13 it is applied in the legal test second. The reason I am
 14 doing that is because in the insurance context the cases
 15 on proximate cause influence the approach to the "but
 16 for" test, which is the main issue between the parties.
 17 Now it is trite law. We can look at it. It is
 18 section 55(1) of the Marine Insurance Act, which is at
 19 {K/1/27}. I will wait for that to come up on the
 20 screen. It makes it clear that, subject to the
 21 provisions of the Act, and this is important:
 22 "... and unless the policy otherwise provides the
 23 insurer is liable for any loss proximately caused by
 24 a peril insured against, but, subject as aforesaid, he
 25 is not liable for any loss which is not proximately

1 caused by a peril insured against."
 2 So the rule is subject to what the policy actually
 3 says, and the language may require something more, or
 4 less, or different to a proximate cause. You have seen
 5 the dispute between the parties regarding the causative
 6 requirement of the word "following", for example.

7 Everybody is agreed that as a matter of principle
 8 the proximate cause is the dominant effective or
 9 operative cause.

10 So the proximate cause question is whether the
 11 insured peril, which will need to be identified as
 12 a matter of construction of the policy, is the dominant
 13 effective or operative cause of the loss, or if the loss
 14 is severable of the loss in question.

15 That is a question of mixed fact and law. If the
 16 court was to decide that there is more than one
 17 proximate cause, then that brings in the cases and the
 18 law relating to concurrent causes, which I am going to
 19 deal with.

20 Another area that is common ground between the
 21 parties is that the proximity rule is based on presumed
 22 intention, the presumed intention of the parties. I am
 23 not going to take you to again what will be very
 24 familiar to the court, the Leyland Shipping case, the
 25 Becker Gray case, where it is clear that proximate cause

1 rules must be applied with good sense to give effect to
 2 and not to defeat the intention of the contracting
 3 parties.

4 So the approach to causation has to adapt to the
 5 apparent intentions of the parties. There are examples
 6 in law where there is adjustment to the law in this
 7 regard. Yesterday Mr Edelman referred to the case of
 8 Stansbie v Troman, which is a case where a third party
 9 wrongdoing didn't break the chain of causation because
 10 the scope of the defendant's duty extended to providing
 11 protection against it.

12 It is a short case. I will just go briefly to it.
 13 It is at {J/51/1}, if we can bring that up on the
 14 screen. It is a breach of contract case rather than an
 15 insurance case. A decorator failed to leave a house
 16 secure when he left it. It was broken into by a burglar
 17 who stole a number of things, including a diamond
 18 bracelet. There were two causes of the loss. There was
 19 the breach of contract and then there was the third
 20 party deliberate wrongdoing.

21 However, the latter didn't breach the chain of
 22 causation because the very purpose of the implied
 23 contractual duty, which was breached, was -- and we can
 24 see this on page {J/51/5} in the judgment of
 25 Lord Justice Tucker four lines down from the top -- the

1 purpose of the duty was to guard against the very thing
 2 that in fact happened.

3 Now that was about the scope of the contractual duty
 4 and what was intended by the contract. In the ordinary
 5 case one would say that the deliberate independent act
 6 of a wrongdoer would break the chain of causation from
 7 any earlier negligence by the defendant. That was what
 8 was argued here. We can see on page 3 it was argued
 9 that the intervention of the third party broke the chain
 10 of causation. We can see that in the middle of the
 11 case.

12 There was nothing expressed in the contract actually
 13 distinguishing between the two causes, but as a matter
 14 of construction it was determined that the purpose of
 15 the duty was to lock the door and to protect the house,
 16 including the diamond bracelet, against the burglar, and
 17 in that situation it can't have been intended that the
 18 burglar's actions would obliterate the responsibility of
 19 the decorator.

20 Now in an insurance context the role of construction
 21 is all the greater. We entirely agree with the
 22 defendants that the contractual context is the key
 23 determinant of the causation question. But the dispute
 24 between the parties is as to the application of
 25 causation to a specified perils policy where there are

1 various qualifications applied to the triggering peril,
 2 and what was intended by the indemnity against loss in
 3 those circumstances. In particular, it was intended
 4 that some of those components, despite being expressly
 5 or impliedly contemplated by the policy, should be
 6 separated out and treated as rival causes as against
 7 other components in the clause.

8 Can the effects of the disease, to the extent it is
 9 outside 25 miles, or if it had not been notifiable, for
 10 example, because obviously there would be disease before
 11 it is made notifiable in the case of a new emerging
 12 disease, or beyond the qualifying government action, do
 13 those provide rival proximate causes to the insured
 14 peril or are they to be seen as part of the insured
 15 peril and indivisible from it.

16 We say that is the same sort of construction
 17 question as was applied in Stansbie, but it needs
 18 applying to a particular policy. The answer will not
 19 always be the same for each situation and policy. It
 20 may depend on whether the underlying causes are express
 21 or implied; how they are expressed, in what terms they
 22 are expressed; and what they are likely and so
 23 contemplated to encompass in reality.

24 But the question of construction is of the same
 25 type. That must also affect the application of the "but

1 for" test. Because the question is "but for" what.
 2 What do you strip out for the purposes of the
 3 counterfactual? Is it just the interruption? Is it the
 4 prevention of access? Is it the government action
 5 preventing access? Is it the government action
 6 preventing access just to the insured premises or
 7 preventing access to all premises? Is it the emergency
 8 too? And so on.

9 Now the defendants take a narrower approach, as
 10 Mr Edelman has explained. It is not always consistent,
 11 but they take a narrower approach to what is the insured
 12 peril and then they contend that that is not the
 13 proximate cause of the loss.

14 The FCA's case, as you know, is that the parties
 15 didn't intend to shut out or reduce recovery by virtue
 16 of the matters also contemplated by the policy; where
 17 they have not been drafted in what we would say is the
 18 exclusionary way that insurers are now contending; they
 19 have not been drafted on the basis that loss only as
 20 a result of disease within 25 miles, or only as a result
 21 of government action. Those words don't appear in the
 22 policy. And we say that the results, if that is
 23 accepted, would give illusory cover on the insurers'
 24 construction.

25 The approach would also require, and some indeed

1 propose, a degree of red pen, for example, to make the
 2 geographical limitations exclusive ones.

3 So we say when you are asking "but for what" you
 4 strip out the set. But that is a matter of
 5 construction.

6 I am now going to turn to the case law, but on the
 7 basis that it needs to be approached knowing what
 8 question one is asking.

9 Before I do I would like to just illustrate what the
 10 defendants say are the other causes. I mean, if you
 11 find that there is a single proximate cause comprising
 12 the indivisible disease, or the indivisible disease and
 13 the public authority response to it, then the issue of
 14 concurring causes will not arise. But if you find that
 15 there is more than one cause then it is a matter of
 16 identifying what that other cause or causes might be.

17 Just to give you an example of how the defendants
 18 approach it, and they overlap in their approach but they
 19 are not again entirely consistent about it, let's take
 20 Zurich. It is paragraph 12 of their skeleton. It is at
 21 {1/19/9}. It is repeated at paragraph 165. But let's
 22 just look here:

23 "Zurich's position [three lines down] on causation
 24 of loss and application of the trends clauses may be
 25 summarised as follows:

1 "On any common sense view, most if not all of any
 2 business interruption loss suffered by Zurich
 3 policyholders was not caused by any such civil authority
 4 action ..."

5 This is a prevention of access clause; action of
 6 a competent authority:

7 "... as might be found by the court to have
 8 prevented access to an insured's premises, but rather by
 9 other and wider circumstances arising out of the
 10 COVID-19 pandemic, including the nationwide COVID-19
 11 pandemic, the response of the public at large to
 12 COVID-19...

13 "(3) The adverse effect of the above matters on
 14 economic activity, including deterrents of people who
 15 would otherwise have visited the UK from overseas and;

16 "(4) Government measures responding to the COVID-19
 17 pandemic other than those the court might find prevented
 18 access to premises."

19 So including the stay at home guidance and advice
 20 issued by the government, and regulation 6 of 26 March
 21 regulations, which dealt with movement restrictions.

22 So those are the alternative causes. We can see at
 23 paragraph 166, page 68 of the same bundle -- those
 24 matters are repeated later at 165 -- if we go to 166 we
 25 can see it is said that:

1 "Each of the above matters was and is an independent
 2 cause of policyholders' losses falling outside the scope of
 3 the cover provided by the act of competent authority
 4 extension. Loss caused by those matters would have been
 5 suffered by policyholders irrespective of the occurrence
 6 of the peril insured against [which they define as
 7 action] by a civil authority whereby access to the
 8 premises was prevented."

9 So Zurich's primary case on the counterfactual is
 10 that the court should reverse out only such regulations
 11 as might be found to prevent access to the premises. It
 12 is clear here that they are talking about prevention of
 13 access that the regulations imposed on all businesses,
 14 not merely the insured.

15 Other insurers raise similar arguments. For
 16 example, Argenta, it is {1/11/7} for disease, if we
 17 could go to that.

18 They say that policyholders' losses are attributable
 19 to other causes such as the global or national COVID
 20 pandemic; the advice given by the UK Government and
 21 other public authorities in response to that pandemic;
 22 the mandatory restrictions imposed by the government;
 23 the advice and restrictions imposed by foreign
 24 governments in response to the pandemic; and/or the
 25 public response to the pandemic, including the

1 significant reduction in consumer demand.
 2 So they are contending that you reverse out all of
 3 the governmental intervention as a result of the disease
 4 as well as the disease, even though these are notifiable
 5 diseases and so by definition action can be expected.
 6 As I said, the purpose is not to argue this at the
 7 moment; it is simply to look at what is being said. You
 8 will note the sheer number of alleged concurrent causes
 9 and the fact that there is overlap between them. For
 10 example, between the national pandemic and the public
 11 response to it; the fear of reduction in confidence,
 12 et cetera, which was said to be the impact of the
 13 pandemic.
 14 So they are said to be interrelated, but they are
 15 then asserted to be independent.
 16 Turning now to the law. I will go first of all to
 17 look at The Kos which is at {J/115/1} to look at how
 18 concurrent proximate causes are dealt with.
 19 This was a case where shipowners -- and I know your
 20 Lordships will be familiar with it -- withdrew
 21 a chartered vessel for a non-payment of hire. The
 22 charterers detained the vessel for 2.64 days discharging
 23 the cargo that they had loaded prior to the withdrawal,
 24 and the owners claimed remuneration and expenses for
 25 those 2.64 days as having resulted from the charterers

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1 orders to load.
 2 That raised an issue of causation as to whether the
 3 withdrawal of the vessel, which necessitated unloading,
 4 was an independent cause of the owners' loss breaking
 5 the chain of causation between the order to load the
 6 cargo and the detention of the vessel for unloading.
 7 The owners' appeal to the Supreme Court was allowed
 8 and the owners were entitled to recover their
 9 remuneration and expenses for that period.
 10 Their Lordships all agreed as to the result, but
 11 Lord Mance dissented as to the reasons. We can see if
 12 we go to paragraph 8 it concerned the scope of an
 13 indemnity. I have a different version of the thing at
 14 the moment. It should be at {J/115/10} paragraphs
 15 70-75. It is page 10 of this document.
 16 Let me just make the points because I know your
 17 Lordships will be familiar with the case. The question
 18 was about an indemnity and it was a broad indemnity
 19 against the consequences of charterers' orders.
 20 The question was one of construction of that
 21 indemnity. There we are, it is page 10.
 22 Lord Sumption at paragraph 12, which should be over
 23 the next page, {J/115/11} said:
 24 "The real question [towards the bottom, just below
 25 G] is whether the charterers' order was an effective

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1 cause of the owner having to bear a risk or costs of
 2 a kind which he had not contractually agreed to bear."
 3 He goes on in that paragraph to recite the trite
 4 law, that "but for" is necessary but not sufficient for
 5 a proximate cause.
 6 Now although this was an interdependent cause case
 7 there was no consideration of the independent concurrent
 8 "but for".
 9 At paragraph 13 we have the answer:
 10 "For present purposes the relevant order of the
 11 charterers was the order to load the parcel of cargo
 12 which was on board the vessel when it was withdrawn. In
 13 my judgment the loss claimed by owners was the
 14 consequences of that order. The need to discharge the
 15 cargo in the owners' time arose from the combination of
 16 two factors: namely that the cargo had been loaded, and
 17 that the purpose for which it had been loaded had come
 18 to an end with the termination of the charterparty. In
 19 other words, the cargo which charterers had ordered the
 20 vessel to load was still on board when the charterparty
 21 came to an end. On any realistic view that was because
 22 the charterers had put it there. The analysis would
 23 have been exactly the same if the charterparty had come
 24 to an end for any other reason with cargo still on
 25 board, for example, by frustration or expiry at the end

23

1 of the contractual term."
 2 Lord Clarke then addresses this at paragraphs 70 to
 3 75 at page 28 {J/115/28} of this document.
 4 Perhaps I could just ask your Lordships to have
 5 a read of that, but particularly to look at paragraphs
 6 73 and 74, if we could just go back a page to start at
 7 paragraph 70, rather than read it out to you. (Pause)
 8 LORD JUSTICE FLAUX: Can we go on to the next page, please?
 9 (Pause)
 10 (11.09 am)
 11 MS MULCAHY: So what is summarised there is that the
 12 authorities don't contain much discussion of the
 13 circumstances in which there can be two effective
 14 causes, but it is accepted that two effective causes can
 15 in principle exist by reference to Wayne Tank and The
 16 Miss Jay Jay and Midland Mainline.
 17 Then at paragraph 74 reference to The Miss Jay Jay
 18 principle that where there are two effective causes,
 19 neither of which is excluded but only one of which is
 20 insured, the insurers are liable, and that the question
 21 of proximate cause has to be determined by a broad
 22 common sense view of the whole position, and that by
 23 "proximate" is meant proximate in efficiency.
 24 You have seen the reference to the causes needing to
 25 be equal or nearly equal in efficiency. It is fair to

24

1 say that Lord Mance in that case, who dissented as to
 2 the reasoning, was not attracted to the two concurrent
 3 proximate cause analyses. We don't need to go to that;
 4 for your note it is paragraphs 40 to 43. What is
 5 interesting when one looks at authorities on proximate
 6 causes is that they only identify two concurrent
 7 proximate causes. It is clearly conceptually possible
 8 for there to be more than two, but the court should
 9 perhaps bear that in mind when considering the sheer
 10 number of concurrent causes that are being put forward
 11 by the insurers, are they really all being said to be
 12 concurrent proximate causes of equal or nearly equal
 13 efficiency.

14 Two related issues arise where there is more than
 15 one concurrent proximate cause. One is whether both
 16 causes are insured or whether one is insured and one is
 17 uninsured, or whether one is insured and one is
 18 excluded. And there is a second issue, which is whether
 19 there is a clear distinction between the interdependent
 20 causes, where both causes are necessary but not
 21 sufficient on their own to give rise to the loss, and
 22 independent causes, where each is sufficient on its own
 23 to give rise to the loss, in terms of the treatment of
 24 concurrent proximate causes for the purposes of saying
 25 whether or not they are covered.

1 Just dealing first of all with the first issue of
 2 whether the causes are insured, or one is insured and
 3 one is not, whether one is insured and one is excluded,
 4 as my Lord Mr Justice Butcher said in the insurance
 5 disputes book, your chapter on the insurance disputes
 6 book, it is at {K/204/10} at paragraph 7.18, if there
 7 are two interdependent causes and they are both insured
 8 perils, the insured can recover.

9 So, clearly, if they are both insured, they are both
 10 subject to recovery. But that was in the context of
 11 Wayne Tank and interdependent causes.

12 Equally, if you have one insured and one uninsured,
 13 the insured is entitled to recover under the policy, and
 14 that is the case we are all familiar with, that of
 15 Miss Jay Jay. If we could go to that for a moment to
 16 look at the principle in the case, it is {J/66/1}. As
 17 your Lordships know, there were two causes of damage
 18 suffered during a channel crossing to the hull of the
 19 claimants' luxury yacht and the proximate causes were
 20 both the unseaworthiness of the craft, due to
 21 a defective design, and the impact of an adverse sea
 22 upon the hull. The latter was within the insured peril
 23 if it was damage caused by external accidental means,
 24 and the former was not, in the circumstances, an
 25 accepted peril.

1 Lord Justice Lawton on page 37 of the transcript,
 2 let me just get you the reference. {J/66/6}. It's
 3 page 6 of the electronic bundle that deals with it. We
 4 can see the bit that is highlighted:

5 "What has to be decided in this case is whether on
 6 the evidence the unseaworthiness of the cruiser due to
 7 the design defects was such a dominant cause that a loss
 8 caused by the adverse sea could not fairly and on common
 9 sense principles be considered a proximate cause at all.
 10 In my judgment, the evidence did not establish anything
 11 of the kind. What it did establish was that but for a
 12 combination of unseaworthiness due to design defects and
 13 an adverse sea, the loss would not have been sustained.
 14 One without the other would not have caused the loss.
 15 In my judgment, both were proximate causes."

16 If we go forward to page {J/66/8} we have at the
 17 bottom of the second column Lord Justice Slade saying:

18 "In the light of findings (a) and (d) [which you can
 19 see above], the sea conditions encountered were markedly
 20 worse than the average, not so bad as to be exceptional.
 21 The vessel would have been able to survive the voyage if
 22 the sea conditions had been no worse than average.
 23 I think it is clear on any common sense view that the
 24 sea conditions at the relevant time must be regarded as
 25 at least a cause, whether or not the proximate cause of

1 the damage to the yacht. However, in light of findings
 2 (b) and (c), which is that the vehicle was in such a
 3 condition by reason of the defects in design and
 4 construction as to be unseaworthy and a boat of its size
 5 would, if properly designed and built, have made the
 6 relevant voyage in the conditions actually encountered
 7 without suffering damage."

8 He says:

9 "I think it is no less clear that the faulty design
 10 and construction of the boat must also be regarded as at
 11 least a cause, whether or not the proximate cause of the
 12 damage. On a common sense view of the facts, both of
 13 these two causes were, in my opinion, equal or at least
 14 nearly equal in their efficiency in bringing about the
 15 damage.

16 "In these circumstances if the policy had contained
 17 a relevant express exception which related to loss
 18 caused by the unseaworthiness of the vessel, the claim
 19 might well have been unsustainable."

20 Then we have a reference to Wayne Tank. Then at the
 21 bottom:

22 "However, since the instant policy contains no
 23 relevant exception relating to loss caused by
 24 unseaworthiness of the vessel, different principles
 25 apply."

1 Then there is a citation from Halsbury's Laws:
 2 "It seems that there may be more than one proximate
 3 (in the sense of effective or directive) cause of
 4 a loss. If one of these causes is insured against under
 5 the policy and none of the others is expressly excluded
 6 from the policy; the assured will be entitled to
 7 recover.'
 8 "No authority has been cited to us, which leads me
 9 to suppose that this passage incorrectly states the
 10 relevant law relating to marine insurance policies and,
 11 in my judgment, it incorporates the principle applicable
 12 to the present case."
 13 Then it is stated that:
 14 "The loss is treated as proximately caused by the
 15 cause insured against, notwithstanding the presence of
 16 a concurrent cause not covered by the policy."
 17 Then we see the same over the page at the top of the
 18 next page:
 19 "I therefore conclude that the loss in the present
 20 case is properly to be treated as having been
 21 proximately caused by a peril insured against (the
 22 impact of adverse weather conditions), even though the
 23 faulty design and construction of the yacht may have
 24 been of equal efficiency in bringing about the damage."
 25 So cover isn't lost where this another concurrent

1 cause of the loss, it is enough if the insured peril is
 2 a cause of the loss, and non-excluded causes are not
 3 treated as excluded.
 4 The position is different, as we know, and we don't
 5 need to go to it but per Wayne Tank, if one of the
 6 causes is insured and the other is excluded, the
 7 position is different. The parties are taken to have
 8 intended that the cover do not respond. Other
 9 jurisdictions have taken a different approach to Wayne
 10 Tank but that is the position in this country, subject
 11 to it being revisited.
 12 That is the position in relation to insurance in
 13 relation to concurrent causes. Just to look at the
 14 point about interdependency and independency, we fully
 15 accept that the causes were interdependent in Miss Jay
 16 Jay and in Wayne Tank for that matter. They were both
 17 necessary, neither were sufficient on their own. And it
 18 was enough if the insured peril was part of the
 19 combination that caused the loss, for the purposes of
 20 Miss Jay Jay if it was uninsured, if there was another
 21 uninsured cause it didn't prevent cover, if there was
 22 another excluded cause it did.
 23 But as we have seen, the legal proposition wasn't
 24 expressed in terms of only applying to interdependent
 25 causes in Miss Jay Jay. The passage from Halsbury's

1 Laws doesn't refer to it having to be only
 2 interdependent causes. We won't go back to it, but in
 3 The Kos, at paragraph 74, the principle is again
 4 expressed in terms; where there are two effective
 5 causes, neither of which is excluded but only one of
 6 which is insured, the insurers are liable. So they are
 7 put in general terms.
 8 Turning to independent causes, and I will come back
 9 to this issue when we get to Orient-Express, but I would
 10 like to go to The B Atlantic case, it is {J/130/10}, and
 11 pick up a dictum of Lord Justice Christopher Clarke in
 12 that case. It is at paragraph 26, where he states,
 13 having discussed the principle of concurrent causes:
 14 "Alternatively, both A and B may both be adjudged to
 15 be proximate causes. If so, it may be that in order for
 16 the event in question to have happened it was necessary
 17 for both A and B to occur."
 18 So that would be interdependent causes:
 19 "Or it may be that the event would have happened if
 20 either A or B had occurred, but on the facts both of
 21 them can be said to have caused it."
 22 That third sentence makes it clear he is considering
 23 independent concurrent causes expressly, although the
 24 situation did not in fact arise on the facts of that
 25 case. And our position is that there is no rule that an

1 insured cannot recover in respect of concurrent
 2 independent causes. It is all a question of
 3 construction and policy intention. If there is some
 4 completely unrelated independent concurrent cause it may
 5 well be right that an insured cannot recover on the
 6 basis that the loss would have occurred in any event,
 7 and the claimant cannot show that it is worse off as
 8 a result of the insured cause. But if there is
 9 a relationship or a commonality between the concurrent
 10 causes such that, per Lord Justice Christopher Clarke,
 11 both of them can be said to have caused it, the position
 12 is different, and it doesn't offend the compensatory
 13 principle for there to be recovery.
 14 Just in this regard, can I take you, again you may
 15 well be familiar with this case already but because it
 16 relates to independent causes I would like to refer you
 17 to the case of McCarthy v St Paul International
 18 Insurance Company. It is a decision of the Federal
 19 Court of Australia and it is at {J/100/1}. Whilst that
 20 is coming up, if I just explain the background to the
 21 case. It was a situation where a mortgage lending firm
 22 of solicitors faced 36 claims arising out of advice
 23 recommending investments to clients, and a large part
 24 but not all of the claims related to dishonest actions
 25 of an employee and it claimed under its defence costs

1 cover. The court looks at the interdependency of causes
2 and the Wayne Tank principle, and it was Justice Kiefel,
3 who is now Chief Justice of Australia, who deals with
4 this. It is at page 31 of the tab, paragraph 97 of the
5 judgment {J/100/31}.

6 We can see at the top of paragraph 97, having
7 discussed the cases relating to Wayne Tank in
8 particular, but other cases referred to in that
9 decision, she says:

10 "All of the cases referred to in Wayne Tank involved
11 factual circumstances in which two proximate causes were
12 concurrent and interdependent in the sense that neither
13 would have caused the loss without the other."

14 Then if we go forward to paragraph 103, which is at
15 the bottom of page 32 {J/100/32} she explains in the
16 middle of the paragraph:

17 "Other examples can be found in the cases where an
18 insured failed to recover in respect of a loss caused by
19 two causes, (one excluded, one covered) operating in an
20 interdependent way ... In each such case the solution
21 was seen as an application of the revealed contractual
22 intention of the parties. The scope of the insurance
23 cover is identified by reading the policy as a whole,
24 (insuring clause and exclusion, in particular) and
25 appreciating that loss caused in a particular way is

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1 excluded. Given that the two causes are interdependent
2 and that the loss would not have occurred without the
3 operative effect of the excluded clause, the
4 non-response of the policy can be comfortably and
5 logically accepted as the intended result of the
6 revealed agreement of the parties."

7 She then goes on to deal with independent causes at
8 paragraph 104:

9 "More difficulty may be encountered in circumstances
10 where a policy excludes one cause, includes another, and
11 the loss is occasioned by the two causes operating
12 concurrently, but independently, in the sense that each
13 would have caused the loss without the other. At the
14 outset, it may be doubted that the solution in any given
15 case is to be found in the application of any principle
16 of insurance law, other than one which states that the
17 rights of the parties to the policy are to be determined
18 by reference to the terms of the contract as found.
19 This was the principle applied by all three Lord
20 Justices in Wayne Tank. Thus, it is always essential to
21 pay close attention to the terms of any policy and the
22 commercial context in which it was made, for it is out
23 of these matters that the answer to the application of
24 the policy to the facts will be revealed."

25 Then after surveying various cases on exclusions,

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1 which she does at paragraph 109, which is on page 35 of
2 the tab, she in the first sentence points out these
3 cases are not resolved on the basis of the "but for"
4 test but on the basis of construing cover.

5 Then at paragraphs 118 to 119 on page {J/100/37}
6 through to {J/100/38}, and again I won't read it to you,
7 but they construed the indemnity as being intended to
8 cover defence costs that were caused in a "but for"
9 sense concurrently by dishonest and non-dishonest
10 claims, but they excluded those that were solely caused
11 by dishonest claims. At paragraph 120 it makes clear
12 that this is the construction that the parties intended
13 the indemnity to cover, ie how the "but for" test was to
14 be applied.

15 We have a comment on that decision by Colivaux
16 it is at {J/147/45}, towards the bottom of that page.
17 Having discussed that decision, it is stated that the
18 approach of Justice Kiefel means that the existence of
19 two causes, where one is excluded, is not necessarily
20 fatal to a claim if the causes are independent of one
21 another. Now, that is the Australian approach bringing
22 in excluded causes, and this is an Australian decision.
23 But the point I'd wish to emphasise --

24 LORD JUSTICE FLAUX: Is there any English case which reaches
25 the same conclusion? Because I thought this was an area

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1 where the law in Australia had parted from the law in
2 England.

3 MS MULCAHY: It has in relation to Wayne Tank, where it has
4 been concluded --

5 LORD JUSTICE FLAUX: Yes.

6 MS MULCAHY: Whereas here, if there is an excluded cause it
7 is held that the policy doesn't respond. In Australia
8 the approach being taken is that it is only if it is a
9 sole excluded cause that the policy doesn't respond.
10 So --

11 LORD JUSTICE FLAUX: As a matter of principle, you would
12 say, wouldn't you, does it matter whether they are
13 interdependent or independent? If there are two
14 effective causes, one of which is excluded and one of
15 which isn't, then normally the Wayne Tank principle
16 would dictate that the insured doesn't recover.

17 MS MULCAHY: Yes.

18 LORD JUSTICE FLAUX: The reason why the insured recovered in
19 The Miss Jay Jay is because in that particular policy
20 the relevant unseaworthiness wasn't excluded, although
21 it is in many other policies. But where you have got
22 two causes, neither of which on its own would have
23 caused the loss, so you have got interdependent causes,
24 then surely if one of them is excluded the insured can't
25 recover?

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1 MS MULCAHY: That would be English law on the basis of
 2 Wayne Tank.
 3 LORD JUSTICE FLAUX: So actually English law, the operation
 4 of an exclusion clause doesn't depend on whether the
 5 clauses are independent or interdependent. Is that
 6 right? I think so.
 7 MS MULCAHY: Where the causes are interdependent and one is
 8 excluded, Wayne Tank would say you don't recover.
 9 English law hasn't dealt with the situation where you
 10 have independent causes and one of them is excluded.
 11 It is not our situation here, because what we are
 12 looking at here is insured and uninsured. But the
 13 defendants are saying if they are independent concurrent
 14 causes The Miss Jay Jay principle doesn't apply. It is
 15 not that you recover because one of the causes is
 16 uninsured, you treat it as if it is excluded. That is
 17 the point I am trying to deal with here.
 18 What I would say is it is all a matter of
 19 construction. The fact that you have independent
 20 causes, one of which is insured and one of which is
 21 uninsured but not excluded, you look at the terms of the
 22 policy, you look at the commercial context in which it
 23 is made and what was intended by the parties as to the
 24 scope of the indemnity, and that is what Justice Kiefel
 25 said in -- sorry, I'm getting an echo.

1 MR JUSTICE BUTCHER: Clearly I understand you are going to
 2 develop that point, and it is critical, but has there
 3 been an English case in which something has been said to
 4 be a proximate cause, "the" proximate cause, when it is
 5 not the "but for", when the "but for" test isn't
 6 satisfied?
 7 MS MULCAHY: The case that I am going to take you to deals
 8 with what we would say is almost like a third category
 9 in between independent and interdependent, which is
 10 where causes are inextricably interlinked, and we rely
 11 on that here.
 12 MR JUSTICE BUTCHER: That is essentially what your argument
 13 is. You say that if it is truly, if the loss would have
 14 been suffered because of some separate matter, then
 15 there can't be a recovery. But you say that in relation
 16 to matters where there is a relationship --
 17 MS MULCAHY: Yes.
 18 MR JUSTICE BUTCHER: -- there may be; and the question of
 19 whether there is a sufficient relationship is going to
 20 depend on a construction of the policy.
 21 MS MULCAHY: My Lord, yes, that is our case.
 22 We are saying where the causes are interlinked,
 23 where there is a commonality, where there is
 24 a relationship, one looks at what was intended by the
 25 policy and in that circumstance one of the causes may

1 not be insured but it is not excluded, and if it is
 2 contemplated as a cause by the policy, then we say there
 3 is cover.
 4 That is as far as we need to go for these purposes,
 5 but that is our case.
 6 The defendants are relying on a case, again you will
 7 know it, *Carslogie v Royal Norwegian Government*, in
 8 support of the proposition that damages are not
 9 recoverable from a defendant at common law where there
 10 is a concurrent independent cause of the same loss for
 11 which the defendant is not liable.
 12 If we could go to the decision, it is {K/55/1}, and
 13 the reference in their causation skeleton is at
 14 paragraph 55.
 15 This is effectively a response to the challenge that
 16 we laid down to identify cases where causation was
 17 refused, where there are concurrent independent causes.
 18 But this isn't in fact a concurrent independent
 19 cause case. In *Carslogie*, the defendant's vessel
 20 negligently inflicted substantial damage on the
 21 claimant's ship. Temporary repairs restored the ship to
 22 seaworthiness and she set sail for the United States.
 23 The voyage to the United States would not have taken
 24 place but for the original collision, and that we can
 25 see on page {K/55/2}, it is in the middle of the page,

1 it states that instead of going to West Africa it was
 2 sent to the United States:
 3 "This change of voyage was made primarily in order
 4 that she might go to a port at which permanent repairs
 5 could be effected."
 6 Crossing the Atlantic, a heavy storm inflicted
 7 further damage on the ship, and on reaching the US the
 8 damage caused by the collision was repaired at the same
 9 time as the storm damage, and the total time for the
 10 repairs was 30 days. The collision damage alone would
 11 have taken ten days to repair.
 12 The House of Lords held that the claimant could not
 13 claim for the loss of use of the vessel for the ten days
 14 attributable to the collision damage because the ship
 15 was in any event out of use at that time for the storm
 16 damage repairs.
 17 The defendants weren't liable for the storm damage
 18 because this damage, if we could go to page {K/55/8} we
 19 can see at the beginning of the judgment Viscount Jowitt
 20 stated the facts and:
 21 "... held that the heavy weather damage was not in
 22 any sense a consequence of the collision and must be
 23 treated as a supervening event occurring in the course
 24 of a normal voyage, during which the [vessel] was on
 25 hire."

1 So the original collision here was clearly a "but
2 for" cause of the storm damage, in the sense that had
3 the collision not occurred the ship would not have been
4 on the particular voyage in which the storm damage
5 occurred, but the tort was merely part of the history of
6 events that placed the ship in that place at that time,
7 and this in itself was not a cause of harm that arises
8 from some independent mechanism. The storm damage
9 wasn't within the risk created by the defendant's
10 negligence in colliding with the ship.

11 So this isn't a two concurrent independent causes
12 case. There were two "but for" causes, yes, but only
13 one proximate cause, which was the storm damage. It was
14 a subsequent supervening non-tortious cause which broke
15 the chain of causation case.

16 We can see that is how it is explained by
17 Clerk & Lindsell at {J/146/4} paragraph 2-103. We don't
18 need to go to it.

19 As I said, we would say there is a third category
20 which is between interdependent and completely
21 independent cases, where the causes are inextricably
22 linked, as in *The Silver Cloud*, and where it wouldn't be
23 right to say that they are both necessary but not
24 sufficient on their own. We will come to this, I am
25 going to deal with *Silver Cloud* in detail, but just to

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1 foreshadow it, in *The Silver Cloud* and I know my Lord
2 Lord Justice Flaux will be intimately familiar with that
3 case having successfully acted for the ship owners in
4 that case, the 9/11 attacks and the losses resulting
5 from those attacks would have occurred anyway, even if
6 the State Department advisory warnings, which were the
7 insured peril, were interlinked with them, and they were
8 treated as a single cause in that case. But they
9 weren't described as interdependent in that case,
10 because there would clearly have been some loss flowing
11 from the 9/11 attacks anyway.

12 So the point of dispute or parting company with the
13 defendants is with the proposition which is set out at
14 paragraph 56 to the defendants' causation skeleton,
15 where they say this:

16 "Where the insured's loss is caused by two so-called
17 concurrent independent causes, only one of which is an
18 insured peril, the insured cannot recover."

19 We say that overstates the point. That may be the
20 outcome in a particular case, it may not. It is all
21 a question of what was intended by the policy, and there
22 is no general proposition of law to that effect.

23 Insofar as it is said that *Orient-Express Hotels* is
24 authority for that proposition, I am going to address
25 that when we get to it.

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1 To briefly deal with the "but for" test, we accept
2 that that is the normal rule, although it is not
3 obviously the test where, say, you have the word
4 "following", as you have in a number of the policies you
5 will be looking at.

6 But the "but for" test has not been invariably
7 applied to the single cause in question. Sometimes the
8 court aggregates the causes or the elements of a broader
9 cause and asks "but for" that set. The classic example
10 is the multiple wrongdoers situation, where you have the
11 two shooters, both shooting bullets into the victim and
12 causing the death, where one can say "but for my bullet
13 the victim would have died anyway" and the other can say
14 the same thing, or the two persons with lighted candles
15 going towards the source of a gas leak.

16 That is dealt with, as you know, in the
17 *Kuwait Airways Corporation v Iraqi Airways* case, which
18 is at {J/86/210}. It is quoted in *Orient-Express*, so
19 I just briefly draw your attention to it. At the end of
20 paragraph 73 it is stated, in the middle:

21 "In very many cases [this is the 'but for' test] the
22 test operates satisfactorily, but it is not always
23 a reliable guide. Academic writers have drawn attention
24 to its limitations ... Torts cover a wide field and may
25 be committed in an infinite variety of situations. Even

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1 the sophisticated variants of the 'but for' test cannot
2 be expected to set out a formula whose mechanical
3 application will provide infallible threshold guidance
4 on causal connection for every tort in every
5 circumstance. In particular the 'but for' test can be
6 over-exclusionary."

7 Then they go on to give the example where we have
8 the lighted candles case, where in effect both are
9 treated as causes.

10 Now, that deals with the multiple wrongdoer
11 situation and I am not suggesting we are in that
12 territory here, but what is applied is the "but for"
13 test is applied by reference to both wrongdoers
14 collectively, and the point that I do draw from this is
15 that where the application of the "but for" test
16 produces no cause, that is an absurd result. That is an
17 absurd result the courts don't countenance, and that is
18 of potentially wider application, you know, as is set
19 out in *Clerk & Lindsell*.

20 That is a tort -- the multiple wrongdoers case with
21 shooters and lighted candles is in tort, but the
22 proposition was applied to contract by
23 Mr Justice Coulson as he then was, in a case called
24 *Greenwich Millennium Village v Essex Services Group*, at
25 {J/119/1}. It was a situation where one of the floods,

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1 it was the flood to core 2 in a block of flats , was
 2 caused by what he said were two equally efficacious
 3 causes. There was a closed isolation valve and
 4 the wrong position of the non-return valve which
 5 prevented a water surge arrester from operating. They
 6 were independent causes and each was a "but for" cause.
 7 If we look at paragraphs 190 to 193 on page 49
 8 {J/119/49}, at paragraph 190, the authorities -- and
 9 I am going to go back to them in a moment. In fact,
 10 let's do that now, at 173 to 175. It is {J/119/42}
 11 onwards. Perhaps we can put up 43 and 44 on the screen.
 12 We have the discussion of the Kuwait Airways test.
 13 I think we have gone on to page 43. Then at 174:
 14 "One of the main deficiencies with the
 15 straightforward 'but for' test arises where there are
 16 two concurrent independent causes of the loss."
 17 Then we have a reference to Mr Justice Hamblen as he
 18 then was in Orient-Express, where he cited that there
 19 can be exceptions to the "but for" test. Then at 175:
 20 "I consider this approach is also borne out by the
 21 textbooks."
 22 Referring to Clerk & Lindsell:
 23 "Where there are two simultaneous independent
 24 events, each of which would have been sufficient to
 25 cause the damage, the 'but for' test produces the

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1 patently absurd conclusion that neither was the cause.
 2 The only sensible solution here is to say that both
 3 cause the damage."
 4 At 176:
 5 "A distinction should be drawn between cases where
 6 there are two concurrent independent causes of the loss
 7 and those cases where there are two co-operating
 8 causes."
 9 Then he gives some examples.
 10 Then going back to page 49, it was argued that those
 11 cases meant that both of the causes were causes of equal
 12 efficiency. And Mr Stansfield QC maintained:
 13 "... this is one of those rare cases where the 'but
 14 for' test would lead to the patently absurd conclusion
 15 that neither was the cause, and that instead the court
 16 should conclude that both ... were equal causes.
 17 "As part of HSE's alternative submissions,
 18 Mr Hargreaves QC also argued the same thing: that [they]
 19 were causes of equal efficiency."
 20 Then at 192:
 21 "It seems to me that, on this central issue of
 22 causation, Mr Stansfield's primary submission [and the
 23 alternative submission of everybody else] is to be
 24 preferred. On any sensible analysis of what happened
 25 here, there were two equally efficacious causes of the

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1 flooding. There were two obstructions that caused the
 2 vacuum and prevented the surge arrester in work working.
 3 As a matter of common sense, it simply cannot matter
 4 that it was the closed IV which might be said to have
 5 been the proximate cause of the vacuum, and the NRV
 6 which might equally be said to have been the proximate
 7 cause of the disabling of the surge arrester. They both
 8 cause the vacuum; they both caused the surge
 9 arrester not to work. They were there equally
 10 efficacious causes ..."
 11 Then he says:
 12 "Accordingly, based on this analysis, I depart from
 13 the 'but for' test, but only to adopt the well-known
 14 alternative approach set out in the authorities [which
 15 he had already referred to]. I conclude that the
 16 liability issues must be resolved on the basis that
 17 there were two equally efficacious causes of the
 18 flooding ..."
 19 That is a situation where there were independent
 20 causes and each was a "but for" cause, and the
 21 contractor was held -- he basically, as he said,
 22 departed from the "but for" test, adopting the approach
 23 that you regard them both as causes. There was an
 24 appeal in this case but this issue isn't affected by the
 25 appeal.

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1 The defendants say again this is a two wrongdoers
 2 situation, but nonetheless it is a situation occurring
 3 in contract where the "but for" test has been adapted in
 4 order to accommodate causation as being both causes.
 5 MR JUSTICE BUTCHER: Mr Justice Coulson there uses the
 6 language of proximate causation.
 7 MS MULCAHY: He does.
 8 MR JUSTICE BUTCHER: He uses it, as it were, in a simply
 9 contractual situation.
 10 MS MULCAHY: Yes, he does, with only two causes as well.
 11 What I am trying to do at the moment is to show you
 12 in the case law where it has become necessary to take an
 13 approach to the "but for" test that doesn't simply apply
 14 it to a single cause. As I said, multiple wrongdoers,
 15 whether in tort or contract, is one situation, because
 16 it produces the result otherwise that there is no cause
 17 of the loss, and yet the court regards it as appropriate
 18 for there to be a finding that both causes should be
 19 taken into account.
 20 There is a further situation which is conceded by
 21 the defendants, and it is paragraph 56.7 of their
 22 skeleton, it is {I/6/49}. They say that if you had two
 23 concurrent independent causes that were each separately
 24 insured, it would be absurd to hold that neither
 25 insurance responded. This would justify, as they put

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1 it, a departure from the "but for" test.
 2 Now, we would say that is not necessarily
 3 a departure from the test but rather an application of
 4 the "but for" test to both causes together; but for both
 5 causes, would the loss have resulted. That may be
 6 terminology. The key to this is the substance of the
 7 concession. We would say the same must surely follow if
 8 there was one policy insuring two perils, both of which
 9 concurrently and independently cause the interruption or
 10 loss, and each with their own insured peril.

11 So, for example, business interruption caused by
 12 damage to the insured property, and business
 13 interruption caused by damage to property in the
 14 vicinity. The peril would not satisfy the "but for"
 15 test as articulated by the insurers, but the policy
 16 would surely respond because both perils are intended to
 17 be covered, and each rival insuring peril cannot be
 18 intended to prevent cover under the other, such that
 19 neither responds. I am going to return to that when we
 20 get to Orient-Express.

21 I mean, another situation where the law again adapts
 22 is other insurance clauses. As you know, the courts do
 23 not allow the literal application of an other insurance
 24 clause to end up removing cover altogether.

25 My Lords, I imagine that that may be a convenient

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1 moment to have a shorthand break.

2 LORD JUSTICE FLAUX: Yes.

3 MS MULCAHY: Then I will continue with my submissions. Do
 4 you want five minutes?

5 LORD JUSTICE FLAUX: My clock says 11.48, so if we say 5 to
 6 12.

7 MS MULCAHY: Thank you.
 8 (11.48 am)

(Short break)

10 (11.55 am)

11 LORD JUSTICE FLAUX: Right, if you are ready.

12 MS MULCAHY: Yes, my Lord.

13 We addressed in our skeleton the need for realism in
 14 the counterfactual, as in looking at what would and
 15 could actually have happened. The purpose is to restore
 16 the insured to the world where the insured peril had not
 17 occurred, but not a world that could never have
 18 occurred. One of the criticisms of Orient-Express is
 19 that it posits a world that could never have happened,
 20 where the hurricane hit all of New Orleans and its
 21 surrounding area but miraculously spared the one hotel.
 22 Whilst it is clear the case, a counterfactual, is
 23 hypothetical, we would say it should reflect the
 24 situation that would actually have arisen assuming there
 25 was no breach of duty here, the failure to hold harmless

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1 against the loss insured.

2 We refer in the skeleton, and I am not going to go
 3 to it but just to remind you, by analogy to the minimum
 4 obligation rule, where the court has said that if
 5 somebody has not breached their duty it will assume that
 6 they will do the minimum that they were obliged to do.
 7 But they don't assume that the defendant would cut off
 8 his nose to spite his face, that would incur greater
 9 losses, in order to reduce his obligations to the
 10 claimant.

11 We also refer to the SAAMCO case, and a quotation
 12 there which is relating to the scope of duty question
 13 and the need to look at awarding damages on the basis of
 14 the most likely non-negligent performance of the duty
 15 out of all the non-negligent possibilities available,
 16 not the least onerous but the most likely.

17 I'll say no more about that, but we are saying the
 18 court has to approach counterfactuals bearing in mind
 19 the need for realism. What we rely on wasn't to do with
 20 the scope of duty question, it was to do with the
 21 counterfactual as to breach in relation to SAAMCO.

22 I am going to come very shortly to The Silver Cloud
 23 and Orient-Express decisions, because those are the key
 24 decisions that I know your Lordships have read in
 25 advance that we need to look at.

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1 There is a side dispute, which I am going to address
 2 briefly, as to burden of proof. It is accepted by the
 3 FCA that the legal burden falls on the claimant. The
 4 question is how this operates in cases of potentially
 5 concurrent independent causes. We set out our case in
 6 the skeleton at paragraphs 249 to 260, relying on the
 7 Dalmine case, which I am going briefly refer you to.

8 The defendants' case is in its causation skeleton at
 9 paragraph 26 and they rely on The Popi M, which was
 10 referred to yesterday. I'm not going to go to it, but
 11 that case, as your Lordships know, concerned a vessel
 12 which sank in mysterious circumstances, and the claimant
 13 had the burden of showing that those mysterious
 14 circumstances compromised perils of the sea as opposed
 15 to an uninsured cause. They advanced a theory of
 16 a collision with an unseen mysterious submarine, with no
 17 evidence, and the comment that is quoted in the
 18 defendants' causation skeleton, it is at {K/71/4},
 19 page 951B of the judgment, arose in this context, that
 20 the burden of proving on the balance of probabilities
 21 that the ship was lost by perils of the sea is, and
 22 remains throughout, on the shipowners.

23 But there was no evidence of the submarine. The
 24 claimant hadn't even discharged an evidential burden in
 25 relation to the submarine thesis. In those

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1 circumstances, the underwriters simply had nothing to
2 prove; the claimant had simply failed to discharge the
3 burden, legal and evidential .

4 The case that we rely on is the Dalmine, at
5 {J/89.1/1} of the bundle. The facts are summarised in
6 our skeleton , but just briefly : there was the failure of
7 a gas pipeline for which Dalmine had supplied the pipes.
8 The pipes were non-compliant with the applicable
9 standards, and the location where those pipes were used
10 were the only places where the pipeline had failed .
11 Dalmine accepted that it had fraudulently said that the
12 pipes were compliant with the standards and thereby
13 induced BHP Billiton to accept and use the pipes. But
14 Dalmine's case was to deny the pipes had caused the
15 failure , because they alleged the pipeline would have
16 failed in any event, even if compliant pipes had been
17 used. And BHP accepted it bore the burden of proving
18 the incorporation of the non-compliant pipes had caused
19 the pipeline to fail . But the Court of Appeal accepted
20 BHP's submission that it was Dalmine who bore the burden
21 of proving its positive case that the pipeline would
22 have failed even if made of entirely compliant pipes.
23 It wasn't for BHP to prove a negative, namely that but
24 for the non-compliant pipes it would not have suffered
25 a loss .

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1 The fact that this was a deceit case is irrelevant ;
2 the dispute was as to what had in fact caused the
3 pipeline failure . It wasn't about proving truth or
4 inducement or anything of that kind. The pipeline
5 failed only at the locations where the faulty pipes were
6 found, and it was Dalmine saying: well , they would have
7 failed in any event.

8 It is paragraphs 26 to 28 {J/89.1/7} of the report
9 and perhaps I can ask you to briefly look at them.
10 (Pause)

11 Again, rather than read them to you, may I just ask
12 your Lordships to have a brief look at 26 through to 28.
13 (Pause)

14 LORD JUSTICE FLAUX: Yes.

15 MS MULCAHY: This was a case where the claimant had
16 discharged the evidential burden of showing that but for
17 their alleged cause, the faulty pipes, the pipeline
18 would have failed . And the defendant asserted that due
19 to a rival cause the pipeline would have failed anyway.
20 It was held that it was for the defendants to then
21 evidence that, to displace the claimants' cause.

22 So what the claimant had done was to show by
23 evidence that on the balance of probabilities its cause,
24 the faulty pipes, appeared under absent any other
25 explanation , ie under normal events, to have caused the

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1 failure . What they did not have to do to satisfy the
2 "but for" test was to positively disprove all other
3 possible explanations , including the defendants'
4 explanation . It 's merely that, absent evidence from the
5 defendant, that rival explanation didn't outweigh the
6 evidence that the claimant had put forward.

7 To bring an example from the current case, if you
8 imagine a business is interrupted by being ordered to
9 close its door for two months, when previously it was
10 open, it satisfied the burden of proving that but for
11 the interruption it would have earned something like its
12 previous revenue, and but for the closure order it would
13 have been open. That is obvious.

14 MR JUSTICE BUTCHER: I mean, it is that extension of your
15 argument that things get much more tricky, isn't it?
16 Because supposing the business had already been
17 suffering before the closure order, then you might not
18 have satisfied the burden, even the evidential burden.

19 MS MULCAHY: What the defendants are saying is, "You would
20 have closed anyway", when we are talking about closure ,
21 or "No one might would have come to you even if you had
22 been open". And the defendants can say that . As
23 I said, I don't want to get into, at this point, how
24 that works, I am simply talking about who has the
25 burden. But we would say that --

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1 MR JUSTICE BUTCHER: I understand that. Dalmine was
2 a pretty clear case, wasn't it? There the pipe had
3 burst only at the points which were defective , defective
4 piping. So it is a pretty clear case of a case which
5 had to be answered.

6 MS MULCAHY: Yes. The point simply is this: here, where the
7 defendants are saying "You would have suffered the loss
8 anyway, as a result of X, Y or Z", it is incumbent on
9 the Defendants to provide enough evidence that the
10 burden shifts back to the claimant to disprove that.
11 That is the legal point identified in the list of issues
12 at paragraph 45.

13 QBE, for example, seems to accept that there is
14 a burden of proof on insurers in at least certain
15 circumstances, for example where QBE must prove a loss
16 is separable as between two causes, or it 's appropriate
17 to apply a trends clause.

18 LORD JUSTICE FLAUX: Ultimately, is anything going to turn
19 on the burden of proof? I mean, in a sense the
20 difficulty we have is that because this is a test case
21 on issues of principle , I mean we are not dealing with
22 any specific insured versus insurer dispute, where an
23 issue about where the burden of proof might lie would be
24 potentially important. But what I am really struggling
25 is to see why the burden of proof matters in relation to

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1 the issues of principle which we have to decide.
 2 MS MULCAHY: It matters --
 3 LORD JUSTICE FLAUX: Either you are right or you are wrong
 4 as to your case on causation, and if you are wrong then
 5 the insurers are right.
 6 MS MULCAHY: It matters in a practical sense, because it can
 7 be said that if the burden is on the insured to disprove
 8 all other possible causes of the loss, as advanced by
 9 the insurer, that it would be incumbent on them when
 10 making a claim, along with the financial information
 11 submitted, to have to submit, for example, academic
 12 papers at their own cost as to the impact of disease on
 13 consumer behaviour or the economy, with or without
 14 government intervention, on the responses of governments
 15 to diseases where a large island of immunity is found,
 16 or consumer behaviour in response to differential levels
 17 of disease in different locations, or else have their
 18 claim rejected.
 19 So the question is, and bearing in mind these can be
 20 very low sub-limits of cover, what is the burden on the
 21 insured to have to prove?
 22 I mean the defendants say even if the burden is on
 23 them, discharging it will be easy, and they rely on the
 24 experience of Sweden, where they say the fact is that
 25 Swedish businesses have incurred losses on a comparable

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1 scale to those seen in the UK, despite the absence of
 2 restrictions like those in the UK.
 3 It is not necessary to address the evidence in
 4 Sweden in any detail, but what is being put forward as a
 5 fact is in fact a mere submission. The only fact which
 6 is agreed is that many businesses in Sweden may have
 7 experienced business or trading losses, notwithstanding
 8 the absence of comparable measures. And Sweden is of
 9 course a different country, a different government, it
 10 has a constitution that doesn't entitle its government to
 11 declare a state of emergency in peace time.
 12 I think the importance of this is just being precise
 13 about the question. What are the defendants actually
 14 saying? Are they saying that but for the government
 15 action there would have been interruption? Are they
 16 really saying that but for being closed for three months
 17 you would still have been closed? Or are they saying
 18 that but for the interruption there would still have
 19 been some loss? Because that would be a quantification,
 20 not a cover point, you know, in relation to how much
 21 loss would have occurred in any event. And the position
 22 isn't clear.
 23 We say if it is going to be argued that the loss in
 24 any given case would have been solely caused by an
 25 alleged concurrent cause, it is for the insurers to

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1 argue and to put forward evidence in relation to that.
 2 If they say something else has caused it, it is for them
 3 to prove it.
 4 That is as far as it goes, but it just is important
 5 to raise as an issue you have to decide.
 6 I am going to come now to the Silver Cloud, which we
 7 say -- I know you will have read this in advance of the
 8 hearing, but it needs careful attention. We say it is
 9 the closest case to the present. It is closer than
 10 Orient-Express because it relates to a non-property
 11 damage trigger, and of course it is at a higher court
 12 level than Orient-Express.
 13 For present purposes I will highlight a few points.
 14 If we go to {J/90/1} the first instance decision first.
 15 As my Lords know, in this case a luxury cruise
 16 operator claimed after the 9/11 terrorist attacks under
 17 a BI policy under its A.ii cover, its cover for loss
 18 resulting from State Department advisory or similar
 19 warning by a competent authority regarding acts of war,
 20 armed conflict, terrorist activities (whether actual or
 21 threatened) that impact on future customer bookings or
 22 necessitate itinerary changes.
 23 The claim arose out of the US State Department
 24 warnings that were issued on 12 September and onwards
 25 through to the end of 2002. The A.ii cover had

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1 a \$5 million limit.
 2 The relevant issue is on page {J/90/2} of the
 3 bundle, page 218 of the judgment at the bottom of
 4 column 1. It was that the insurers argued, you can see
 5 just before the "Held by QBD":
 6 "The insurers ... argued that the loss was not
 7 covered by section A.ii of the policy as it had been
 8 proximately caused by the attacks on September 11 rather
 9 than by the warnings which followed them."
 10 If we go to paragraph 9, especially the first
 11 sentence, it is on page {J/90/11}, we see how
 12 Mr Justice Tomlinson as he then was dealt with this. He
 13 said:
 14 "There can in my judgment be no realistic argument
 15 with the proposition that Silversea's business was
 16 severely and prejudicially impacted BY the reaction of,
 17 principally, Americans but also travellers worldwide to
 18 the events of 11 September and to the warnings which
 19 followed as to the likelihood of further attacks on
 20 'western', specifically American interests and as to the
 21 need to exercise caution both at home and overseas and
 22 in particular to avoid when overseas conspicuous
 23 displays of western affluence. Although it was actively
 24 trying to increase its market share in [Europe] and no
 25 doubt elsewhere, it was from the United States that [it]

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1 derived the overwhelming majority of its passengers, or
2 'guests' as it prefers to call them. The response of
3 the American people to those events is too well
4 documented to require description by me. There can be
5 no doubt that the American response was conditioned not
6 just by the sheer scale and audacity of the attack,
7 unparalleled by anything hitherto seen anywhere in the
8 world, but also by the circumstances that the American
9 mainland has never been before subjected to a concerted
10 and co-ordinated attack which was remotely comparable."

11 Then if we go forward to paragraph 42, which is on
12 page {J/90/22}, it makes it clear, and I am just picking
13 up the point here that the peril under A.ii, towards the
14 bottom, it is about eight lines up:

15 "... is not the same as the relevant (ie war or
16 terrorist related) perils under section A.i ..."

17 So the peril under A.ii was expressly said not to be
18 the terrorism.

19 If we go to paragraph 67 on page {J/90/29}, 67 to
20 69, the insurers called experts, both parties called
21 experts to try to disentangle the causes. There was
22 Dr Gibbs, a visiting associate professor of management
23 science, and Dr Reddy, who was a clinical and
24 occupational psychologist.

25 These are presumably the sorts of experts that the

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1 defendants would contemplate having to be employed by
2 the insureds seeking to claim in the present case to
3 speak to counterfactuals.

4 The insurers were seeking to argue, with expert
5 support, that 80-90% of the losses would have occurred
6 in any event, and only the remainder were attributable
7 to the State Department warnings.

8 It was held, we can see at 68 towards the top:

9 "... I think the logic which compelled that
10 conclusion similarly compels the conclusion that it is
11 impossible to divorce the effect of the warnings from
12 the effect of the events which they so swiftly
13 followed."

14 At 69 he held that both the 9/11 attacks and the
15 warnings were concurrent causes of the downturn in
16 bookings, including cancellations.

17 MR JUSTICE BUTCHER: Of course I see that, and you would say
18 that a similar situation appertains here.

19 MS MULCAHY: Yes.

20 MR JUSTICE BUTCHER: But those were Mr Justice Tomlinson's
21 findings on the evidence presented to him, and although
22 you may say that is a sensible conclusion to reach, is
23 there any point of law which comes out of that?

24 MS MULCAHY: Yes, because it deals with the -- I mean,
25 I would like to come back to this having taken you to

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1 the Court of Appeal judgment.

2 MR JUSTICE BUTCHER: Yes, of course. But that is the
3 question which has occurred to me while I was reading
4 this before.

5 MS MULCAHY: Yes. Clearly there are issues of fact, but we
6 would say it is mixed law and fact, and in particular it
7 makes clear, we would say, as a matter of law, that the
8 boundaries of the peril do not need to be the boundaries
9 of what is subtracted for the purposes of the "but for"
10 test.

11 LORD JUSTICE FLAUX: That is because he found as a matter of
12 fact that there was an inextricable connection.

13 MS MULCAHY: Yes.

14 LORD JUSTICE FLAUX: I suppose you would say, is this right,
15 even if we can't decide any particular factual situation
16 in relation to any particular policy and any particular
17 policyholder, we could decide as a matter of principle,
18 if that were the conclusion that was reached, in other
19 words, the same conclusion as Mr Justice Tomlinson
20 reached, mutatis mutandis, then the principle of this
21 case should apply. That is essentially your position,
22 isn't it?

23 MS MULCAHY: That is our position, yes, my Lord.

24 LORD JUSTICE FLAUX: Yes, I follow. Yes, okay.

25 MS MULCAHY: Because it is being said as a matter of

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1 principle that is not open. But we say no, that is
2 wrong, and this decision is legal support for taking
3 account of inextricably linked causes and treating them
4 as a set.

5 If I can go to the appeal decision, it is {J/91/1}
6 and the issues on the appeal are identified at page 699,
7 page 4 of the electronic bundle {J/91/4}.

8 LORD JUSTICE FLAUX: I must confess to having forgotten
9 completely this part of the case until you reminded us
10 of it. My recollection of the case is really confined
11 to trying to convince the Court of Appeal that the 9/11
12 attacks were an act of war, an issue on which
13 Lord Justice Rix was very sympathetic during the course
14 of argument but not so sympathetic at the end of the
15 day.

16 MS MULCAHY: Yes, that was obviously going to the A.i cover,
17 where the argument didn't succeed.

18 Confining myself to the A.ii, cover, you will see at
19 (iv) on the second column towards the top of page 699,
20 the issue on appeal was:

21 "Were market losses due to 9/11 itself excluded,
22 even though also due to government warnings?"

23 So the insurers in that case didn't challenge on
24 appeal the finding that the 9/11 attacks caused losses
25 that were inextricably linked with the warnings, the

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1 losses caused by the warnings. But they raised
2 a different point, which was that the losses due to 9/11
3 were excluded. That wasn't a point that had been argued
4 at first instance.

5 Lord Justice Rix, it is paragraph 99, page
6 {J/91/21}, he held that it would seem, therefore, that
7 he found that the deterioration in Silversea's market
8 was inextricably caused both by the warnings and by the
9 events themselves.

10 LORD JUSTICE FLAUX: Give me a paragraph number again.

11 MS MULCAHY: Paragraph 99:

12 "It would seem therefore that he found that the
13 deterioration in Silversea's market was inextricably
14 caused directly both by the warnings and by the events
15 themselves."

16 That is the events of 9/11. This was the answer to
17 the factual and proximate cause case, and it wasn't
18 challenged on appeal, as we can see from paragraph 100.
19 They don't seek to go behind the judge's rejection of
20 their factual case on causation. They do, however, take
21 a further point of law.

22 The point I want to make is that Lord Justice Rix
23 expressed no doubts about the legal and factual
24 propriety of the approach which had been taken by
25 Mr Justice Tomlinson, and which the insurers obviously

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1 thought wasn't open to attack either. The judge could
2 have found that the dominant cause was the 9/11 attacks
3 and that that was a single proximate cause and
4 uninsured, but he didn't. And he hadn't said that the
5 causes were interdependent, that they were both
6 necessary but not sufficient. Instead he used the words
7 "inextricably linked" and did not divide out the loss.
8 All of the loss was recoverable as caused by the insured
9 peril, even though any loss relating to 9/11 was not of
10 itself caused by an insured peril.

11 So the new argument was the exclusion of relevant
12 losses unless as a direct result of an insured event,
13 and they contended that the loss wasn't directly caused
14 by the warnings.

15 If I just go back to paragraph 1, which is on page
16 {J/91/6}, there it was recognised that the impact of
17 9/11 was worldwide -- a few lines down -- and among the
18 commercial fallout was a reluctance by customers of
19 luxury cruises to travel, either to particular
20 destinations or at all. If we go forward to page
21 {J/91/9}, paragraphs 27 to 28, this is the exclusions
22 argument, the exclusion is quoted at 27. At 28:

23 "The underwriters also rely on this exclusion,
24 raising a new argument not addressed at trial, to the
25 effect it excludes any liability under the A.ii cover."

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1 Towards the bottom:

2 "The underwriters ... submit that, even if such
3 warnings have contributed to a cover A.ii loss of
4 market, the resultant losses are excluded if they have
5 also been caused by anything other than such warnings,
6 eg by terrorism itself."

7 Then if we go forward to paragraph 97 on page
8 {J/91/21}, and you will see the heading again:

9 "Are market losses due to 9/11 itself excluded, even
10 though also due to government warnings?"

11 Then paragraph 103 sets out the issue. So
12 {J/91/22}:

13 "Both parties, however, submit that the application
14 of these principles [this is having previously dealt
15 with The Demetra K and Wayne Tank] produces a result in
16 their favour respectively. Mr Swainston submits that
17 9/11 events themselves, because a direct cause of the
18 losses different from the 'insured event' under cover
19 A.ii, which has to be a warning, are excluded perils,
20 and that the losses caused by such perils are excluded
21 losses. Mr Flaux, however, submits that the events of
22 war or terrorism which lead to warnings are not excluded
23 perils but are perils covered elsewhere within the
24 policy and are a necessary pre-condition, actual or
25 threatened, of the warnings within cover A.ii itself."

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1 Then this is the key passage from the judgment,
2 Lord Justice Rix says:

3 "In my judgment Silversea is right about this. Cover
4 A.ii is premised on acts of war, armed conflict or
5 terrorist activities, actual or threatened, provided ...
6 that they generate the relevant warnings about them. If
7 they do, and those warnings cause loss of income as
8 their direct result, there is cover. The underlying
9 causes of the warnings are not excluded perils, it is
10 simply that they are not covered under cover A.ii as
11 perils in themselves. Something extra is required.
12 However, they are 'an insured event' for the purpose of
13 the contract as a whole. There is no intention under
14 this policy to exclude loss directly caused by a warning
15 concerning terrorist activities just because it can also
16 be said that the loss was also directly and concurrently
17 caused by the underlying terrorist activities
18 themselves."

19 There are a few elements to draw out of this
20 reasoning.

21 The cover was premised on the underlying causes, the
22 terrorist activities, even though not covered as perils
23 in themselves, the policy expressly contemplated them.
24 And the policy intention was not to exclude loss
25 directly caused by the warnings just because the loss

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1 was also directly and concurrently caused by the
2 underlying cause, the terrorist activities themselves.
3 All of the loss was recoverable, subject to proof of it,
4 not just a percentage of it. And the terrorist
5 activities weren't excluded. Indeed, they were insured
6 elsewhere, under cover A.i, albeit that it wasn't
7 possible to prove that that cover responded.

8 So the question here is the issue --
9 LORD JUSTICE FLAUX: Isn't that an obvious distinction from
10 the present case? I mean, the other elements, going
11 back to Mr Edelman's A plus B plus C plus D criticism of
12 the insurers' case yesterday, what will be said against
13 you is that B plus C plus D are not, as it were,
14 separate insured events under the policy. So that is
15 a ground of distinction from Silversea.

16 MS MULCAHY: The ground of distinction is -- it's the case
17 that they are contemplated by the policy. You have to
18 get through A plus B plus C plus D to get to cover. And
19 what is being said is that when you come to the
20 counterfactual you strip out B plus C plus D, or
21 whatever combination you pick. So having knocked down
22 the dominoes to get to cover, you then restore three of
23 them for the purposes of causation and the
24 counterfactual. And what we say The Silver Cloud is
25 authority for is that where you have this contemplated

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1 here underlying cause of the terrorist warnings, that
2 you don't exclude it for the purposes of causation.

3 Now, we haven't got a situation here where we can
4 say: well look, the terrorist activities were covered
5 under another section of the policy. They are simply
6 uninsured. They are not excluded; they may not be
7 insured elsewhere. So we are in a slightly different
8 situation. But we would then invoke Miss Jay Jay, the
9 principle in Miss Jay Jay. If they are uninsured
10 elsewhere, that doesn't mean that there is no cover, the
11 cover responds.

12 MR JUSTICE BUTCHER: Ms Mulcahy, I am not saying that
13 Silversea isn't of assistance to you in some ways, but
14 this particular passage really depended on the terms of
15 the exclusion, which was deterioration in market and/or
16 lack of support for any scheduled cruise unless as
17 a direct result of an insured event, and the Court of
18 Appeal was able to say: well, it is an insured event, it
19 is an insured event under a different part so it falls
20 within "insured event".

21 MS MULCAHY: Yes, this was a construction of an exclusion
22 clause and the meaning of "insured event". But that in
23 itself is not all that different from talking about an
24 insured peril. For example, QBE in its defence talks
25 about the need to take account in the counterfactual of

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1 the correct insured event or peril, which in their case
2 is said to be COVID-19 in a defined location.

3 But what is important here is that in construing the
4 exclusion clause Lord Justice Rix had to, and did,
5 consider what the indemnity was intended to respond to,
6 and he rightly gave substantial weight to the fact that
7 although the terrorist activities, the underlying cause,
8 were not of themselves a trigger for cover, they were
9 the express premise, and for that reason loss caused by
10 the other effects of the terrorism could not be intended
11 to prevent cover also arising from the warnings. That
12 is explicit. And this is in the context of the warnings
13 not being a "but for" cause of much of the loss. It was
14 agreed that that was inextricably linked and there was
15 an effect from 9/11.

16 We would say this comes from a judge highly
17 experienced in insurance law and well aware of the
18 issues of concurrent independent/interdependent and "but
19 for" and proximate causes.

20 So we say it is not something that can simply be
21 said to be on its facts, it has wider implications. It
22 has implications for the rare situation where parallel
23 effects of an expressly premised underlying cause are
24 being set up as a rival cause of the narrower trigger,
25 and that is like our case. Our case involves this kind

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1 of rare cover that is more intangible and which, by
2 definition, will lead to a range of possible events in
3 the causal history.

4 In those situations, the propriety of dealing with
5 independent concurrent but linked causes by holding that
6 they are inextricably linked, rather than applying the
7 "but for" test to each, even when one of them is the
8 defined insured peril, we would say is supported by this
9 case. And the need for questions of proximate cause and
10 "but for" causation to be determined by construction of
11 what the parties would have intended as to whether the
12 underlying cause prevents cover or reduces the indemnity
13 is also relevant.

14 The other practical effect is it demonstrates the
15 impracticality and undesirability of any construction
16 that requires the resolution of non-financial hypotheses
17 as to public or government behaviour, probably by
18 reference to varied expert reports in order to adjust
19 the claim.

20 LORD JUSTICE FLAUX: Going back to the point that I put to
21 you about what a court might find on the facts about
22 inextricable connection, if you like, between a series
23 of events in a chain, you can certainly rely upon this
24 case as an example of that, that's what the judge found
25 at first instance, and of a principle that would apply,

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1 because of the other cases in which it is recognised
 2 that where you have two causes, one insured and one not
 3 insured but not excluded, then there should be cover.
 4 That was the point that was being made in argument; it
 5 is a passage at the end of 103, where I had submitted
 6 the terrorist actions were a necessary pre-condition,
 7 actual or threatened, of the warnings within the cover.
 8 In other words, that is the point about inextricable
 9 connection. But as my Lord put to you --
 10 MS MULCAHY: Yes.
 11 LORD JUSTICE FLAUX: -- it is nonetheless the case that the
 12 reasoning, at least part of the reasoning in 104 is
 13 based upon the fact that the terrorists' acts were
 14 actually covered elsewhere in the policy, because they
 15 were an insured event.
 16 MS MULCAHY: I accept that that is --
 17 LORD JUSTICE FLAUX: I'm not sure how much you can really
 18 get out of this, to be honest.
 19 MS MULCAHY: That is a fortiori the current situation. But
 20 the point I rely upon is that it was held that the cover
 21 in A.ii was premised on terrorist activities provided
 22 they generate the relevant warnings about them. If they
 23 do and those warnings cause loss of income, there is
 24 cover.
 25 We would say here the cover is premised on the

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1 emergency or the disease, as well as what may be
 2 identified narrowly as the insured peril. For that
 3 reason, this is support. Something extra is required,
 4 but in this situation provided it can be shown, and to
 5 get to cover you have to show A plus B plus C plus D,
 6 then this is support for if A plus B plus C plus D, if
 7 three of them are uninsured but not excluded, we say
 8 that must be taken into account. You don't re-resurrect
 9 them as rival causes for the purposes of "but for" and
 10 causation. And this is support for the proposition that
 11 where you can show it is premised on the underlying
 12 cause, you don't subtract that when you are looking at
 13 causation.
 14 MR JUSTICE BUTCHER: I see that. Also, you could say that
 15 if one is premised on the other, then when the other
 16 happens they are, as it were, more likely to become
 17 inextricably linked and indistinguishable.
 18 MS MULCAHY: Exactly. That may be different from when you
 19 have got something wholly extraneous; that is
 20 a different situation. But here one looks at the policy
 21 intention and what was intended in terms of the
 22 commonality of the relationship. But as I said, here
 23 what is being said is, yes, you have to knock down the
 24 four dominoes but then you resurrect three of them for
 25 the purposes of causation, and you say the loss was

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1 caused by them instead. We would say that is wrong as a
 2 matter of principle, and this case is support for making
 3 clear that the boundaries of the insured peril need not
 4 be the boundaries of what is subtracted for the purposes
 5 of the "but for" test or to be treated as a proximate
 6 cause. And we say that is a mixed question of fact and
 7 law.
 8 The defendants keep well away from most of the
 9 statements of Lord Justice Rix in paragraph 104. They
 10 fail to explain why the finding that terrorism and
 11 warnings were inextricably linked is different to the
 12 link between COVID-19 and government action in the
 13 present case.
 14 What they say is they rhetorically ask: why has it
 15 not been cited more widely? But the fact is the point
 16 hasn't arisen in any other case, other than
 17 Orient-Express, until now.
 18 My Lords, can I take you now to Orient-Express,
 19 which is the key decision relied on by the defendants
 20 and which I need to address. Again, I know you will be
 21 very familiar with it, and have read it in full in
 22 advance of this hearing.
 23 Can I just say first of all about the status of the
 24 decision. We acknowledge the eminence of both the
 25 tribunal and the judge here, and the criticisms which we

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1 make of the judgment and of the approach are made with
 2 due respect, and recognising that the case falls to be
 3 revisited in a different context, albeit one that has
 4 some analogies. It is highly relevant that
 5 Mr Justice Hamblen as he then was recognised that there
 6 was a real prospect of success in challenging his
 7 decision, by himself granting permission to appeal. The
 8 case settled, I believe, the day before that appeal. So
 9 this is a first instance judge, that the judge accepted
 10 had a real prospect of being wrong as a matter of law.
 11 As Mr Edelman has already mentioned, the decision
 12 has attracted academic criticism; the leading book on
 13 business interruption insurance, Riley, suggests it was
 14 a decision which didn't accord with either insurers or
 15 insured's expectations. And although it was fully
 16 argued, Mr Justice Hamblen didn't have the benefit of
 17 the breadth and depth of the submissions made in the
 18 present claim, where a very large number of
 19 differently worded policies and examples and arguments
 20 are being considered.
 21 My Lords know that this case concerned the effects
 22 of Hurricanes Katrina and Rita which caused property
 23 damage to the hotel in New Orleans, and the claim was
 24 for losses as a result of the hotel being closed for
 25 just over two months. And it is {J/106/3}, paragraph 5.

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1 We can see there at paragraph 5 that the damage in
 2 the vicinity for these purposes was the surrounding area
 3 of New Orleans, the surrounding areas of New Orleans
 4 which were also devastated, and a state of emergency was
 5 imposed and a curfew from 27 August 2005 to the end
 6 of September 2005, the hotel itself being closed
 7 until November 2005.

8 Now, it concerned a BI property damage clause, as we
 9 know, it is paragraph 12 on page 3, and we can see there
 10 what the clause said. It was an all risks policy, so it
 11 didn't specify an insured event, damage due to storm or
 12 flood, et cetera. It was also, if we go forward to the
 13 next page, {J/106/4} paragraphs 14 to 16, the insurers
 14 had paid out on two extensions for prevention of access
 15 and loss of attraction.

16 There was also a trends clause in the policy;
 17 Mr Edelman is going to come back to that. I am dealing
 18 with the causation aspects at the moment, putting to one
 19 side the contractual requirements.

20 The insurers succeeded before the tribunal and again
 21 on appeal to the High Court.

22 The policy was held to provide cover in respect only
 23 of loss arising from the damage to the hotel, which
 24 would not have arisen had the damage to the hotel not
 25 occurred. So it was putting Orient-Express Hotels in

1 the position of an owner of an undamaged hotel in an
 2 otherwise undamaged city. It wasn't necessary or
 3 relevant to go behind the damage and to consider whether
 4 the event which caused the damage also caused damage to
 5 other property in the city.

6 The points of distinction from our case are these:
 7 it was an appeal under section 69 of the
 8 Arbitration Act, and so Orient-Express Hotels needed to
 9 show that the tribunal erred in law. So this was
 10 a review, it wasn't a first instance hearing, and it was
 11 necessary to show an error of law. As far as the
 12 tribunal award is concerned, we don't have that other
 13 than the parts that were quoted in this judgment.

14 The points argued on appeal had not been argued
 15 before the tribunal, and they involved questions of
 16 fact; we see that from paragraph 37 on page {J/106/9}.
 17 That was important, because it limited what was open to
 18 the judge to decide:

19 "OEH faces the difficulty that the issue has not
 20 been addressed by the tribunal and there are no findings
 21 made in relation to it. This is because ... this was
 22 not the way the case was put before the tribunal."

23 Again, it was accepted that that was an issue or
 24 relevant as an issue of fact.

25 It concerned a business interruption property damage

1 clause which was damage at the premises, as we saw when
 2 we looked at paragraph 12, in circumstances where the
 3 insurers had paid out on two extensions for prevention
 4 of access and loss of attraction.

5 The distinction between an at the premises event and
 6 an away from the premises event might be thought to be
 7 fundamental and to carry through some intention as to
 8 their relationship. Here we have non-damage clauses,
 9 which may or may not have a vicinity limit. So in our
 10 case the triggers necessarily and expressly consist of
 11 a wider event, and the concurrent causes, if any, are
 12 all non-premises events. So that opens the door to
 13 wider and more remote effects, and the insurers have
 14 protected themselves, as we have seen, by either low
 15 sub-limits or clauses that state that the premises have
 16 to be directly affected.

17 So it is very different from a traditional property
 18 specific damage analysis, and in our case we would say
 19 the case is more like The Silver Cloud non-damage BI.

20 The clauses in our case are not all risks; they
 21 refer to a number of components to get to cover,
 22 including disease, danger, emergency, et cetera. And
 23 you have our case on that, that it is more --

24 MR JUSTICE BUTCHER: Just remind me, does it say that it was
 25 an all risks cover?

1 MS MULCAHY: I think it doesn't use the words "all risks",
 2 but it is clear if you look at the clause that that is
 3 what it is. If we go back to paragraph 12, which is
 4 page {J/106/3} you will see at the bottom:

5 "In consideration of the insured ... paying the
 6 premium ... the insurers ... agree ... to indemnify the
 7 insured."

8 Then (a):

9 "Under the material damage and machinery breakdown
 10 sections against direct physical loss destruction or
 11 damage except as excluded herein to property as defined
 12 herein such loss destruction or damage being hereafter
 13 termed damage.

14 "(b) Under the business interruption section against
 15 loss due to interruption or interference with the
 16 business directly arising [over the page] from damage
 17 and as otherwise more specifically detailed herein."

18 Then the insuring clause:

19 "If any property owned used or otherwise the
 20 responsibility of the insured for the purpose of or in
 21 the course of the business suffers damage as defined or
 22 there occurs an event or circumstances as described
 23 elsewhere in this section of the policy and the business
 24 be in consequence thereof interrupted or interfered with
 25 the insurers will pay to the insured the amount of the

1 loss resulting from such interruption in accordance with
2 the provisions contained therein."

3 So you will see it was all risks. It wasn't
4 specifying a cause within the insuring clause; it was
5 insuring the damage regardless of the clause, the damage
6 to the property.

7 So those are the points of distinction from our
8 case, but we also go on and say that the decision is
9 wrong. As I said, at the moment I am dealing with the
10 case putting to one side the contractual requirement for
11 the "but for" test and the trends clause, and simply on
12 the basis that this case is said by the insurers to
13 represent and reflect the general law. I am going to
14 hand back to Mr Edelman who will address the trends
15 clause in this case, and the purpose and operation of
16 trends clauses more generally.

17 The key points I want to address relate to the
18 approach to the "but for" test. We can see at
19 paragraphs 8 to 10 on page 3, if we go back a page
20 {J/106/3}, the issue of concurrent causes being
21 summarised there. Perhaps I can ask you just to briefly
22 have a look at that. You may, having read it already,
23 be very familiar with it. (Pause)

24 If we go forward to paragraph 29 on page {J/106/8},
25 Orient-Express Hotels were arguing that it was

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1 sufficient that one of the causes was a peril insured,
2 provided that the other cause was not excluded, relying
3 on Miss Jay Jay:

4 "Whilst to date this has been a principle applied in
5 respect of concurrent interdependent causes, OEH submits
6 it should equally be applied to concurrent independent
7 clauses."

8 And derived support for that from The Silver Cloud.

9 The judge addressed that at paragraph 32:

10 "I agree with Generali that no great assistance can
11 be derived from this case, which largely turned on the
12 court's factual conclusions."

13 We say that is wrong, it goes beyond fact:

14 "In particular it does not address the specific
15 issue of two concurrent independent causes, nor the
16 applicability of the 'but for' causation test in such
17 a case. Further, there is an important difference
18 between a case involving two concurrent interdependent
19 causes and one involving two concurrent independent
20 causes. In the former case the 'but for' test will be
21 satisfied; in the latter it will not."

22 It's not clear what was argued in relation to The
23 Silver Cloud but we say, with respect, it didn't grapple
24 with the substance of that decision, because it was
25 implicit in that case that the "but for" issue arose as

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1 a result of concurrent causes. The causes were
2 independent in that much of the loss would have occurred
3 as a result of the 9/11 attacks on their own; that is
4 why they were described as "inextricably interlinked"
5 rather than "interdependent". Further, as we have seen,
6 The Silver Cloud dealt with the need to apply causation
7 by reference to construction and to consider the
8 significance of an underlying cause on which the trigger
9 was premised, and Mr Justice Hamblen did not engage with
10 that or consider the sort of construction exercise that
11 Lord Justice Rix set out or which was suggested by
12 Justice Kiefel in the McCarthy case. It may have been,
13 as mentioned earlier, that the point was thought less
14 important by Mr Justice Hamblen because he was dealing
15 with an all risks policy, whereas here the cause, due to
16 the emergency or due to the disease, is expressly
17 contemplated by the specified perils.

18 He recognised that "but for" was the normal rule,
19 and it is, but it is recognised that, and he expressly
20 recognised, that there can be a different approach if
21 the result is that there is no cause of the loss,
22 because as he says at paragraph 33, having cited at 22,
23 the purpose of the test is to exclude irrelevant causes
24 and it is recognised that its effect can be
25 over-exclusionary.

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1 We are not dealing with a multiple wrongdoer
2 situation, but we are dealing with a situation where
3 it is being said that there are concurrent independent
4 clauses which applying a "but for" analysis cancel each
5 other out, and it was regarded -- in that case the
6 result was held not to be absurd because, as we can see
7 from paragraph 28, where it is argued, page {J/106/7}:

8 "OEH submits the logical consequence of the
9 application of the 'but for' test in the present case
10 would be that it would recover neither under the main
11 insuring clause (because 'but for' the damage the loss
12 would still have occurred due to the vicinity damage or
13 its consequences), nor under the POA or LOA (because
14 'but for' the prevention of access and/or loss of
15 attraction the loss would still have occurred due to the
16 damage to the hotel).

17 The judge dealt with that at paragraph 39 on page
18 {J/106/9}. He said:

19 "It is not the case that the application of the 'but
20 for' test means there can be no recovery under either
21 the main insuring clause or the POA or LOA. If, for the
22 purpose of resisting the claim under the main insuring
23 clause, Generali asserts that the loss has not been
24 caused by the damage to the hotel because it would in
25 any event have resulted from the damage to the vicinity

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1 or its consequences, it has to accept the causal effect
2 of that damage for the POA or LOA, as indeed it has
3 done. It cannot have it both ways. The 'but for' test
4 does not, therefore, have the consequence that there is
5 no cause and no recoverable loss, but rather a different
6 (albeit, on the facts, more limited) recoverable loss."

7 Then at 60, it was held that the scheme of the
8 policy was that OEH had paid premium for recovery under
9 the loss of attraction and POA extensions, and that was
10 what it was entitled to recover. So it didn't produce
11 the result, as far as the judge was concerned, that
12 there was no cause of the loss and no cover.

13 However, the same "but for" issue arose in reverse
14 for those causes, because but for the damage in the
15 vicinity the same loss would have occurred as a result
16 of the damage to the hotel, as was pointed out. And,
17 with respect, this logical inconsistency wasn't
18 addressed, we would say, by the judge.

19 MR JUSTICE BUTCHER: You say: what if Generali hadn't
20 accepted that?

21 MS MULCAHY: Yes. I mean, this is a suggestion, in effect,
22 that insurers can elect between concurrent independent
23 causes, and we say that that is inadequate as a solution
24 to the issue and, with great respect, shows a real
25 weakness in his Lordship's reasoning.

1 It is not available in the current case, because
2 insurers rely on Orient-Express to say there is no loss
3 as a result of concurrent independent causes and no
4 cover at all. So we are in a different situation. But
5 the solution that was being put forward as a reason why
6 "but for" did not produce an absurd result simply can't
7 apply here. But in any event failed to deal with that
8 logical inconsistency that "but for" in fact cancelled
9 out losses under both covers.

10 Whilst it might be possible, if we go back to the
11 POA clause, which is on page {J/106/4} at paragraph 14,
12 RSA take the point that it responded because it applied
13 whether the property insured should be damaged or not,
14 if you look at the concluding words. But the same is
15 not true of the loss of attraction clause, which
16 extended to indemnify the insured in respect of
17 a reduction of revenue directly resulting from loss,
18 destruction or damage to property or land in the
19 vicinity of any premises owned and managed by the
20 insured, an insured under this policy.

21 So even if you can rationalise one, the logical
22 inconsistency point still applies to the other.

23 This point is effectively ducked by the insurers.
24 It is not referred to anywhere in the 82-page joint
25 skeleton on causation. They prefer to address the

1 situation of insurance triggered by two separate
2 policies, where they accept that the "but for" test
3 should not prevent cover under either.

4 A further absurdity or anomaly of this is that the
5 more widespread the damage is, and thus the risk of
6 depopulation, the less the prospect of recovery by the
7 insured, because it can be said with even more force
8 that the loss would have arisen anyway as a result of
9 the impact on the wider area.

10 So the greater the damage, the wider area damage, it
11 reduces the claim below the level that would have
12 resulted from the insured's damage taken alone, and
13 indeed on this analysis to nil; and that is a situation
14 which can also give rise to windfall profits, as
15 Mr Edelman suggested.

16 We would say in relation to The Miss Jay Jay
17 principle that the judge was wrong to reject that
18 application of The Miss Jay Jay principle to a situation
19 where you have an uninsured concurrent cause. This is
20 supported by Colinvaux and Merkin in terms of academic
21 criticism of this decision; it is at {J/148.1/1}. It
22 starts at page 11 and goes over to page 12. If I can go
23 across to page {J/148.1/12} they state -- let me just
24 find it. If we go to page 12, please -- thank you --
25 where they analyse this decision on the basis that The

1 Miss Jay Jay rule can be varied by express wording, so
2 that is to do with the trends clause, and they define
3 the concurrent causes as the hurricane State action.
4 But you will see at the bottom they say:

5 "There is indeed much to be said for the argument
6 that the problem raised in Orient-Express was straight
7 causation. The assured's loss was proximately caused by
8 hurricane, and further losses were inflicted by State
9 action. There were two causes of loss, albeit
10 consecutive rather than concurrent, and the usual rule
11 that an insured peril takes precedent over an uninsured
12 peril should have prevailed. Indeed the reasoning
13 renders the primary cover under BI policies of little
14 value where a catastrophic event has affected both the
15 assured's premises and the surrounding district."

16 We would respectfully agree and adopt that approach,
17 that The Miss Jay Jay principle, ie that there is cover
18 even if the concurrent cause is uninsured, should also
19 apply to concurrent uninsured independent causes, where
20 those are contemplated by the policy or they are
21 inextricably interlinked with the insured peril, which
22 is somewhere on the spectrum between interdependent and
23 independent. So independent in the sense that they are
24 sufficient on their own to cause the loss, but not
25 carrying with the independence in the sense of being

1 completely unrelated. They are related where they are
 2 contemplated as a matter of construction of the policy.
 3 So we say in summary the Orient-Express is wrong.
 4 It fails sufficiently to take account of the Silver
 5 Cloud and the need to construe party intention, where
 6 the rival cause is the underlying cause on which the
 7 policy trigger is premised; it fails to take account of
 8 the need for realistic counterfactuals to give effect to
 9 policy intentions; it produces an unintended windfall
 10 problem, and it fails to deal with the problem of
 11 concurrency as between the property damage clause on the
 12 one hand and the LOA/POA clauses on the other.
 13 As I said, much of this comes back to common sense,
 14 which we would say is not in conflict with intelligence,
 15 as QBE would suggest; it makes no sense to have to go
 16 through four sequential steps to get to cover, and once
 17 you have gone through all four you reverse up back
 18 through three of them and you use only one as the facts
 19 against which the counterfactual is to be tested. So
 20 you pretend they are not there for causation purposes,
 21 by subtracting them, even though they are required for
 22 cover purposes.
 23 My Lords, Mr Edelman is going to turn and address
 24 the trends clause issue. I am conscious it is 12:55pm,
 25 so I will leave it to you and him as to whether to start

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1 on that now, but it may be that he could do five
 2 minutes.
 3 LORD JUSTICE FLAUX: It's probably sensible if we break now
 4 and Mr Edelman comes back at, shall we say, 5 to 2.
 5 We have had an email from Mr Gaisman, on behalf of
 6 the insurers, about your request this morning in
 7 relation to the interveners, which I think in principle
 8 is accepting that we should sit for the additional two
 9 half hours, but on the basis that insurers have an
 10 additional two half hours themselves at some point,
 11 which I think is how it was put at the last case
 12 management conference and it would be difficult to
 13 resist.
 14 He also says on behalf of Mr Turner, I think, that
 15 could I think it's HIGA go first, because Mr Turner is
 16 going to be dealing with their submissions on Thursday
 17 and needs to be aware of what their points are, to the
 18 extent that they are developed from the skeleton.
 19 Again, that seems to me to be a perfectly reasonable
 20 request.
 21 If anybody has anything else to say about that,
 22 let's come back to it at 1:55pm. All right?
 23 MR EDELMAN: Agreed. 1:55pm.
 24 (12.57 pm)
 25 (The short adjournment)

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1 (1.55 pm)
 2 Submissions by MR EDELMAN
 3 LORD JUSTICE FLAUX: Are you ready, Mr Edelman?
 4 MR EDELMAN: Yes, I am.
 5 My Lord, firstly the order of interveners, as
 6 requested by Mr Turner, has been agreed.
 7 LORD JUSTICE FLAUX: Jolly good.
 8 MR EDELMAN: I don't want to be churlish about extra time
 9 for the defendants, but having put in 850 pages of
 10 written submissions it's difficult to see why they
 11 should need extra time. Obviously it is a matter for
 12 the court, it is only an hour, but it does reduce yet
 13 again our time for responding to what they say, but I am
 14 happy to be guided by the court on that.
 15 LORD JUSTICE FLAUX: Unless out of the kindness of our
 16 hearts, Mr Edelman, Mr Justice Butcher and I agree to
 17 sit for half an hour extra two mornings next week, in
 18 which case everybody will have the same amount of time
 19 and you won't have any of your reply time reduced.
 20 MR EDELMAN: Yes. If it is only two mornings, perhaps ...
 21 LORD JUSTICE FLAUX: We will see how we go.
 22 MR EDELMAN: One other point, a rider to what Ms Mulcahy was
 23 saying. My Lord raised with her facts about
 24 interlinking between disease and government action. Of
 25 course, the relevant facts on that are all agreed, and

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1 you have that in bundle C, Agreed Facts 1, 2 and 4.
 2 LORD JUSTICE FLAUX: Yes.
 3 MR EDELMAN: My Lords, moving now on to my topic, which is
 4 trends clauses.
 5 The headline of the FCA's case is that if it is
 6 right about how the causation tests are intended to
 7 apply at the primary causation level under these
 8 policies, then it would be rather surprising if a trends
 9 clause which was dealing merely with quantification of
 10 the loss should somehow subvert that causation test. So
 11 in a sense, and this may be where we agree with the
 12 defendants, but it is the primary causation test which
 13 is critical, because that must indicate how the
 14 quantification clause was intended to operate; and the
 15 quantification clause can't be seen, as I said, as being
 16 the knight in shining armour coming charging to the
 17 rescue of a failed causation case at the primary level.
 18 Now, in our written submissions we consider each
 19 wording separately and we analyse whether or not there
 20 are trends clauses and whether they apply to the cover
 21 question. It's not part of my submissions at this stage
 22 to address that issue, but rather the function of trends
 23 clauses more generally. That is going to be the focus
 24 of what I hope will be relatively short submissions.
 25 So can I start, my Lords, with an analysis of the

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1 issue in Orient-Express and identify where, in our
2 submission, there is a flaw in the reasoning, or at the
3 very least the case can be distinguished .

4 I am not sure where the trends clause was, but can
5 we start with {J/106/2}, where we have the issue
6 identified . It is paragraph 2, subparagraph (2) which
7 identifies the issue :

8 "Whether on the true construction of the policy , the
9 same event(s) which cause the damage to the insured
10 property which gives rise to the business interruption
11 loss are also capable of being or giving rise to
12 'special circumstances' for the purposes of allowing an
13 adjustment of the same business interruption loss within
14 the scope of the 'trends clause '."

15 Then if we go to the trends clause , one sees that on
16 page {J/106/4} at subparagraph (3) in the left column,
17 about the middle of the page:

18 "In respect of definitions under 3, 4, 5 and 6 above
19 for gross revenue and standard revenue adjustments shall
20 be made as may be necessary to provide for the trend of
21 the business and for variations in or special
22 circumstances affecting the business either before or
23 after the damage or which would have affected the
24 business had the damage not occurred so that the figures
25 thus adjusted shall represent as nearly as may be

1 reasonably practicable the results which but for the
2 damage would have been obtained during the relative
3 period after the damage."

4 If one was just reading that in the abstract , coming
5 at it afresh , without any of the baggage of
6 Orient-Express, one might have thought that this is the
7 sort of accountancy exercise clause and it is also to
8 deal with things like a restaurant which had a very
9 prominent chef; unbeknown to the owners of the
10 restaurant , the day before the fire the chef entered
11 into negotiations with another restaurant to join them
12 instead and had agreed to join them, and handed in his
13 notice the day after the fire , as he was always
14 intending to do. So that would be a special
15 circumstance which was affecting the business . That
16 typically is what one would have regard to, the fact
17 that that prominent chef leaving would then affect the
18 results of the business .

19 But what we have --

20 LORD JUSTICE FLAUX: You would still be looking though,
21 wouldn't you, at what the position would have been but
22 for the damage occurring?

23 MR EDELMAN: Yes, but the way in which this has been
24 construed in Orient-Express is the special circumstances
25 include the cause of the damage which, you know, when

1 one looks at the clause , particularly -- one only has to
2 look at what its title is, it is called a "trends
3 clause". One looks at it and one's instinctive reaction
4 is to say that it must be dealing with extraneous
5 matters which would have affected the business anyway.
6 Then to say that those extraneous matters include what
7 actually caused the damage in the first place is
8 surprising , to say the least .

9 Let's see how Mr Justice Hamblen got there. You can
10 see the question starts to be addressed on page
11 {J/106/9}. The question is expressed just above
12 paragraph 42. Then the insured submits that the clause
13 should be construed as not permitting an adjustment for
14 the consequences of the very same insured peril which
15 caused the damage.

16 There are two answers which Mr Justice Hamblen gives
17 to that, but it seems, in our respectful submission, as
18 though they are closely linked . If one goes to page
19 {J/106/10}, immediately above 47 at the end of the last
20 couple of sentences of 46, it says:

21 "The only assumption required by the clause is that
22 the damage has not occurred. It does not require any
23 assumption to be made as to the causes of that damage."

24 Then in answer to the submission, 47, that the
25 trends clause is dealing with the effects of real trend

1 variations or special circumstances, he says in the
2 second half of that paragraph:

3 "A hypothetical Rita or Katrina (ie one which is
4 assumed not to have caused damage to the hotel, but
5 which otherwise operated to its full extent) [this is
6 reciting the insured's submissions] is not a special
7 circumstance which would have affected the business had
8 there been no damage but an entirely fictional event.
9 However, the clause requires a single assumption to be
10 made and for the actual facts to be considered on the
11 basis of that assumption. That is what the tribunal
12 have done."

13 That is a very literalist construction . But he may
14 have gained comfort from it by what he says in
15 paragraph 52. If we could go to page {J/106/11} please.
16 You will see:

17 "Sixthly , OEH submits that Generali's approach
18 subverts first principles in that it involves seeking to
19 strip out from the claim for business interruption
20 losses caused by insured damage, not merely the
21 concurrent consequences of extraneous circumstances but
22 the concurrent consequences of the very peril that
23 caused the damage which was a proximate cause of the
24 business interruption loss in the first place."

25 What is Mr Justice Hamblen's answer to that? He

1 says:
 2 "However, the relevant insured peril is the damage;
 3 not the cause of that damage."
 4 What appears to have underlay his acceptance that
 5 this clause should be narrowly construed to apply just
 6 to the damage, and that that is what it says and that is
 7 what should be construed as being the entire ambit of
 8 it, was that the damage was the insured peril.
 9 I can see in one way one can say that with an all
 10 risks policy, which is what this was, all the insured
 11 has to prove is that the damage occurred. So in that
 12 sense one could say that it was an insured peril. But
 13 it is not actually what, for example, the
 14 Marine Insurance Act would regard as being the insured
 15 peril, which is the cause of the damage.
 16 Underlying all of this, and I apologise if I am
 17 harping back to a topic that I addressed yesterday, is,
 18 in our submission, a misunderstanding of what an all
 19 risks policy is doing.
 20 MR JUSTICE BUTCHER: Because you say if it had said "damage
 21 due to a hurricane" he wouldn't have said that. That is
 22 what you are suggesting.
 23 MR EDELMAN: Yes, yes.
 24 MR JUSTICE BUTCHER: But, you say, the most likely cause of
 25 damage to a hotel on the Gulf coast is a hurricane, in

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1 fact.
 2 MR EDELMAN: Yes.
 3 LORD JUSTICE FLAUX: Or fire, I suppose.
 4 MR EDELMAN: And the insurers didn't exclude it.
 5 LORD JUSTICE FLAUX: He is focusing on the business
 6 interruption section of the policy and he is saying the
 7 insured peril there is the damage, and that is all the
 8 insured has to show.
 9 MR EDELMAN: With respect, my Lord, the insured peril, if
 10 one is going down that route, the insured peril in the
 11 business interruption clause is the interruption, if one
 12 is saying that.
 13 LORD JUSTICE FLAUX: That is why I wonder whether -- because
 14 if that is what he is saying, that may be the trigger,
 15 but it's not really the insured peril, is it?
 16 MR EDELMAN: No, no.
 17 LORD JUSTICE FLAUX: It is a trigger in the sense that it is
 18 a necessary prerequisite, but it is not sufficient in
 19 itself.
 20 MR EDELMAN: Yes. And if one wants to identify in an all
 21 risks policy what the insured perils are that are
 22 covered, they are all things that might cause damage to
 23 a building, including a hurricane, insofar as not
 24 excluded.
 25 LORD JUSTICE FLAUX: They have got to be fortuitous events.

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1 MR EDELMAN: Yes, fortuitous events. All fortuitous events
 2 that can cause damage.
 3 So in our submission, what underlies this is
 4 a failure to grasp what the policy is actually doing.
 5 So when it doesn't say "the insured peril is
 6 a hurricane", therefore why is that relevant? But
 7 it is, it is the insured peril; the hurricane is the
 8 insured peril under an all risks policy. It is an
 9 insured peril because it is a peril that is capable of
 10 causing damage which is not excluded.
 11 It would be like, you know --
 12 LORD JUSTICE FLAUX: That goes back to your point about
 13 whichever RSA policy it was we were looking at
 14 yesterday, where there are enumerated perils which
 15 include storm or earthquake.
 16 MR EDELMAN: Yes, or explosion; the Buncefield example
 17 I gave.
 18 LORD JUSTICE FLAUX: Yes.
 19 MR EDELMAN: Would Mr Justice Hamblen's answer be the same
 20 if he was looking at that RSA policy and the Buncefield
 21 explosion? You know, if my Lords say yes, the answer
 22 would be the same, for whatever reason, then I lose,
 23 I have no problem with confessing that, on whether
 24 Orient-Express is rightly decided.
 25 But if you think well, is that really an answer to

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1 an insured whose warehouse is flattened by Buncefield,
 2 for the insurers to say: well, this trends clause says
 3 "but for the damage", and so we could say, well, but for
 4 the damage, you were 800 metres away from Buncefield so
 5 no one would have come to your warehouse anyway. And
 6 the man said: why have I got explosion covered then?
 7 What is the cover there for?
 8 LORD JUSTICE FLAUX: Yes.
 9 MR EDELMAN: If one is thinking about it in causation terms,
 10 from the insurance perspective, if his building is
 11 flattened by an explosion it doesn't really matter what
 12 is going on around, he can't use it, that's it. His
 13 source of income is over. That is the dominant cause,
 14 if one wants to look at it that way, of his loss.
 15 Running the counterfactuals, you then run into, as
 16 Ms Mulcahy rightly said, the counterfactual, let's say
 17 that you did have prevention of access cover, and they
 18 said all right, of course that would be sub-limited and
 19 be lower, or probably would be, but even let's say it is
 20 the same amount, and it covers prevention of access to
 21 your premises by damage to neighbouring property.
 22 Then they will say: "but for the damage", it works
 23 both ways, the damage in that case is the third party
 24 property, the damage in this case is your property, so
 25 you don't get anything under any clause. And that would

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1 be ridiculous again.
 2 So that, in a simple way of expressing it, is the
 3 flaw. And it is with the analysis of the insurance.
 4 MR JUSTICE BUTCHER: I know you say he buttressed that by
 5 paragraph 52, but the way in which he really got there
 6 was to focus too much on the word "damage" in the trends
 7 clause.
 8 MR EDELMAN: Yes. What he does is focuses on the word
 9 "damage", takes that literally, then he seems to test it
 10 against this argument well, that's leaving out of
 11 account the insured peril, and then reaches the wrong
 12 judgment about what the insured peril actually is.
 13 Because the insured peril was the hurricane,
 14 indubitably.
 15 LORD JUSTICE FLAUX: Putting it another way, even if he was
 16 right in his analysis up to this point, when he gets to
 17 OEH's sixth point he reaches the wrong answer, because
 18 the answer should have been: actually, the hurricane was
 19 the insured peril and therefore you don't strip it out.
 20 MR EDELMAN: Exactly.
 21 LORD JUSTICE FLAUX: Because he recognises the principle.
 22 He doesn't suggest that OEH's argument was misconceived.
 23 MR EDELMAN: No.
 24 LORD JUSTICE FLAUX: Because you should strip out the
 25 insured peril. What he is saying: well, the answer to

1 it is that that wasn't the insured peril. And he is
 2 wrong about that.
 3 MR EDELMAN: Exactly. Yes.
 4 LORD JUSTICE FLAUX: That is your point, yes.
 5 MR EDELMAN: Yes, he is wrong about that.
 6 One then has to go on and say: is Mr Edelman leading
 7 us up the garden path, leading us to an answer which has
 8 the most ridiculous results? Then one starts asking
 9 which has the more ridiculous results. And that is when
 10 you get to those American authorities where -- and it is
 11 referred to, if we go back to page {J/106/10}. I don't
 12 think I need to take you to the detail of it, because he
 13 sets out what the decision was, it's in paragraph 50,
 14 where the majority in the Prudential case simply aren't
 15 prepared to countenance a result which
 16 Mr Justice Hamblen's decision permits of the insured --
 17 not just, as in his case, the insured getting nothing
 18 under the main insuring provision, but in other
 19 circumstances an insured claiming a windfall profit,
 20 because that is what was happening in Prudential. The
 21 majority said: this cannot -- I accept their reasoning
 22 is thin; there is nothing in there that you can look at
 23 as a lawyer and say "That legal reasoning convinces me".
 24 That is why I am not going to take you to the reasoning
 25 in the case. It's not because it's not justifiable, but

1 it is not going to extend your learning.
 2 LORD JUSTICE FLAUX: What is it, Second Circuit?
 3 MR EDELMAN: Yes, it is Fifth Circuit. Court of Appeal
 4 though, Court of Appeal's Fifth Circuit.
 5 LORD JUSTICE FLAUX: Which is the Fifth Circuit, do you
 6 know?
 7 MR EDELMAN: I think that was Carolina.
 8 LORD JUSTICE FLAUX: Yes. It is not New York or California,
 9 that's for sure.
 10 MR EDELMAN: No, it is not.
 11 The point I want to make about that is that it's in
 12 fact Mr Justice Hamblen's result that leads to
 13 commercially absurd consequences, because his result,
 14 because he preferred the dissenting judge, the
 15 dissenting judge would have allowed the windfall profit
 16 of being the only place open.
 17 You just take out my damage, the hurricane had
 18 happened, I am the only place left standing. Now, you
 19 are the only hotel in town left standing. Now assume
 20 that actually there hadn't been a lockdown in that local
 21 region. Then you are entitled as the insured, according
 22 to the insurers, to claim the windfall profits of being
 23 the only hotel open in the region. As is every other
 24 single hotel. So insurers have to pay each hotel the
 25 windfall profits of being the only hotel in town, even

1 though they have all been flattened by the same
 2 hurricane.
 3 Is that the commercially sensible result? Or is the
 4 commercially sensible result simply to ignore the
 5 hurricane and say: well, you were making a profit of
 6 \$50,000 a month before, or your turnover was \$100,000
 7 a month before, you were shut for two months, we will
 8 compensate you as if the hurricane didn't occur, the
 9 damage to your property, in particular the hurricane
 10 didn't damage your property but we are taking the
 11 hurricane out as well, as if business had continued as
 12 usual. And isn't that what business interruption
 13 insurance is supposed to do?
 14 In my Buncefield example, shouldn't it simply be
 15 saying to the warehouse man: how were you doing before
 16 the Buncefield explosion? If you can shut for six
 17 months, we will compensate you for six months loss of
 18 earnings. Not: we will either compensate you for
 19 nothing or, if you are in a sort of business where you
 20 can claim a windfall, we will compensate you and
 21 everybody like you for a windfall.
 22 So in fact his result is the commercially
 23 nonsensical, I would submit, of the results. But he was
 24 driven to it by an incorrect analysis of what the
 25 insured peril actually was.

1 So reversing Orient-Express would in fact restore
 2 sanity, rather than creating mayhem, and restore these
 3 policies to function in exactly the way an insured such
 4 as the warehouse owner in my Buncefield example would
 5 expect them to operate.
 6 LORD JUSTICE FLAUX: I can't now remember, I will see if
 7 I can find it, does the judge set out anywhere what the
 8 tribunal had said about the transcript?
 9 MR EDELMAN: Yes, he does.
 10 LORD JUSTICE FLAUX: Where is that?
 11 MR EDELMAN: He has got the decision of the tribunal which
 12 starts at page 4, paragraph 17 {J/106/4}. That is where
 13 it all starts and they set it all out. The answer to
 14 the trends clause is at page {J/106/5} on the top of the
 15 second column. Having applied the "but for" test for
 16 primary causation, they say at the top of the second
 17 column, fourth line down:
 18 "But in any event the language of the trends clause
 19 is, the tribunal thinks, conclusive. This clause
 20 specifically requires the business interruption loss to
 21 be assessed by reference to the results which 'but for
 22 the damage' (ie the damage to the hotel) would have
 23 obtained during the relevant period. It is accordingly
 24 irrelevant whether there was a concurrent cause of any
 25 such losses."

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1 Now it was argued, it seems, very differently below,
 2 not by those who appeared for the claimant, very eminent
 3 counsel who appeared for the claimant.
 4 LORD JUSTICE FLAUX: Mr Schaff was parachuted in when the
 5 damage was already done.
 6 MR EDELMAN: Exactly, and Ms Sabben-Clare. The damage was
 7 already done in all senses.
 8 LORD JUSTICE FLAUX: He had what can only be described as an
 9 uphill struggle, as is apparent from the judgment,
 10 because it was, after all, a section 69 case and he was
 11 met by the fact that a lot of these points hadn't
 12 actually been argued.
 13 MR EDELMAN: Exactly.
 14 LORD JUSTICE FLAUX: If you look at what the tribunal says
 15 about that, which is really in 20 and 21 of the award,
 16 there is another passage towards the end, after they had
 17 dealt with the American case, right at the bottom of the
 18 right-hand column:
 19 "... the tribunal has no doubt that the policy in
 20 the present case permits recovery only for loss caused
 21 by the damage to the hotel itself."
 22 It doesn't seem to have been argued, so far as one
 23 can see, taking those passages together, the one you
 24 drew our attention to and that one, that in effect, in
 25 truth, it wasn't a case of two concurrent causes, there

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1 was only one cause.
 2 MR EDELMAN: Yes, absolutely.
 3 LORD JUSTICE FLAUX: The cause was the hurricane, and it was
 4 nothing to the point that it had caused damage to
 5 everything else in the city, because the answer that
 6 should have been reached is that you don't excise the
 7 insured peril.
 8 MR EDELMAN: Exactly. What they have done, there is another
 9 error in the approach, is to focus on the word "damage",
 10 because they are quite right it only says "damage" and
 11 it doesn't say "the cause of the damage", but what does
 12 it mean when it says "special circumstance"? All you
 13 will see in many of these policies, I don't think many
 14 or any of them use "special" but I am not relying on
 15 that, they use "circumstance". What is the sort of
 16 circumstance that this clause is contemplating? Does
 17 that circumstance encompass the peril against which
 18 there is insurance? I will use that rather than
 19 "insured peril" to avoid the confusion about whether
 20 it is all risks or defined peril cover. The peril
 21 against which there is insurance, which caused the
 22 damage. That is the simple point.
 23 Although they did argue that case, the meaning of
 24 "circumstance" is argued in Orient-Express by Mr Schaff,
 25 it doesn't appear to have been argued below, it is

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1 argued by Mr Schaff but is answered in the wrong way,
 2 because of the wrong definition of the peril.
 3 That means that when one is approaching all these
 4 trends clauses, one is excluding the cause of the
 5 damage.
 6 Now that also has -- and if one identifies that
 7 point from the trends clause, that also has a sort of
 8 cross-fertilisation point backwards. Because if that is
 9 the premise of the trends clause, should the primary
 10 causation argument on business interruption losses,
 11 shouldn't that operate in the same way?
 12 I have said one would expect the trends clause to
 13 follow causation. So I have said, well, you know, if
 14 you are against us on causation then you might well be
 15 against me on the trends clause because you have excised
 16 for all business interruption purposes the insured
 17 peril.
 18 But if the trends clause is only adjusting quantum
 19 by reference to things other than the cause of the loss,
 20 then you would not expect the yes or no answer to be
 21 answered by having a counterfactual which excludes all
 22 or part or any part of the cause of the loss.
 23 So it supports the argument we have been making
 24 earlier, that when you have a composite clause, as we do
 25 in these cases, you don't cherry-pick or salami slice

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1 the causes; and that would be inconsistent with both
 2 what the trends clause is doing and what, therefore, one
 3 is anticipating the causation test to be doing as well.
 4 So it is a bit of a bootstraps argument I know, but it
 5 does --
 6 MR JUSTICE BUTCHER: I must say I am less convinced by that
 7 bit, Mr Edelman. I am not sure you read back very
 8 convincingly.
 9 MR EDELMAN: All I would say is that if I am right about the
 10 trends clause, it would be surprising if one was
 11 quantifying the loss on a different basis from that on
 12 which one was assessing whether it was payable at all.
 13 MR JUSTICE BUTCHER: No, I agree with that, but that is
 14 really your first argument, isn't it?
 15 MR EDELMAN: It is. But if you are with me -- putting that
 16 argument aside, the primary causation argument aside, if
 17 you are with me that the analysis of the trends clause
 18 is incorrect and, sorry to use the phrase, it does what
 19 it says on the tin, it's all about the ordinary
 20 vicissitudes of life, extraneous factors, the sort of
 21 Jobling type thing, which the law has always regarded as
 22 an intervening factor which must be taken into account,
 23 the ordinary vicissitudes of life, if that is what it is
 24 about, if that is what you are doing at quantification
 25 stage, shouldn't that be consistent throughout the

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1 application of the business interruption cover? Should
 2 quantification be involving some different principle
 3 from the principle that is engaged with primary
 4 causation? I appreciate they are different creatures,
 5 but they are aiming at the same result; it is one
 6 overall exercise.
 7 That is why I submit that there is some relevance to
 8 the primary cause as to how trends clauses operate.
 9 That means that you do ring-fence your A plus B plus
 10 C plus D and you take all of that out, because it is not
 11 a qualifying circumstance for the purposes of the trends
 12 clause. It is looking at things that are extraneous to
 13 what it is that has, in those circumstances, combined to
 14 cause the loss.
 15 So you take all of those out for the trends clause.
 16 I suppose another way of expressing my point is that if
 17 you are taking it out for the trends clause, and that is
 18 the obvious and logical thing to do, and that is what
 19 the trends clause is contemplating you will do, because
 20 it's not a relevant circumstance, then why shouldn't you
 21 be doing that too for the purposes of the primary
 22 causation test? Why should the two be different?
 23 So the interruption, the primary causation test is
 24 asking: but for anything extraneous, is there anything
 25 extraneous outside the elements that are in the insuring

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1 clause which would have caused your interruption anyway?
 2 LORD JUSTICE FLAUX: The classic example, I suppose, it
 3 comes in somewhere in your skeleton I think, is the pub
 4 that is forced to close on 20 March, but in fact was
 5 going to close for the entire month of April in order to
 6 conduct refurbishment.
 7 MR EDELMAN: Exactly, yes. Precisely. Or the factory that
 8 has to close down. It may be that a factory is not
 9 a good example, because people have to work there. But
 10 some other peril, if there was some peril affecting the
 11 factory and there was a fire, let's say a fire affecting
 12 the factory is a better example, and they had a planned
 13 maintenance shut down anyway. As long as they can do
 14 the maintenance, if it's some part of the building which
 15 means it is not safe to go in but someone can go in and
 16 still maintain the machinery, and so they have their one
 17 week out for the machinery to be maintained at the same
 18 time that the building is being repaired, they are
 19 entitled to say: well, there was this extraneous thing,
 20 you wouldn't have been producing that week anyway; it's
 21 nothing to do with the fire.
 22 That is that sort of situation, and it covers it.
 23 My Lord is absolutely right, the pub that would have
 24 been closed, they had planned building works, renovation
 25 works, it would be a fraud on the insurance for them to

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1 say: well, we will have it for that entire period, even
 2 though we were going to be shut for a month anyway.
 3 That is what causation is about; "but for" the
 4 government's closure order was there some extraneous
 5 reason for which you would have been closed anyway? And
 6 it is the same test under the trends clause, and that's
 7 not surprising, that is what one would expect.
 8 When one goes to the clauses that one sees in this
 9 case, one sees that there are many with reference to
 10 trends, where they all talk about trend-adjusted. And
 11 if one is asking the reasonable reader -- let's take one
 12 example, let's go to QBE, {B/13/22}. Let me just make
 13 sure. I have two references and I want to check that
 14 I have got the right one. Page 22 anyway, if we start
 15 there.
 16 LORD JUSTICE FLAUX: That is the VAT clause.
 17 MR EDELMAN: No. Can I go to -- maybe 105 is what I am
 18 after. Actually, it is 27, sorry. I have completely
 19 written down the wrong number, which is ...
 20 LORD JUSTICE FLAUX: Yes. {B/13/27}
 21 MR EDELMAN: That is the main insuring clause:
 22 "We will indemnify you in accordance with each item
 23 of business interruption insurance described below ...
 24 resulting directly from damage to property ..."
 25 Then you get the usual mechanism: insurable gross

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1 profit ; rate of gross profit turnover; fall short of
 2 standard turnover; gross fees .
 3 Over the next page you have: gross revenue;
 4 increased cost of working.
 5 If one then goes forward just for an example to
 6 page {B/13/102} and this is true for all the revenue
 7 figures , it says "Standard gross revenue", 23.97, "Trend
 8 Adjusted". And you'll see "Standard turnover", you will
 9 see it says again "Trend Adjusted", which is a defined
 10 term which you will find on page {B/13/105}. It is
 11 23.117:
 12 "Trend Adjusted means adjustments will be made to
 13 figures as may be necessary to provide for the trend of
 14 the business and for variations in or circumstances
 15 affecting the business either before or after the damage
 16 or which would have affected the business had the damage
 17 not occurred, so that the figures thus adjusted will
 18 represent as nearly as may be reasonably practicable
 19 [note the words 'as may be reasonably practicable '] the
 20 results which but for the damage would have been
 21 obtained during the relative period after the damage."
 22 Just looking at that to the reasonable reader , this
 23 is not a reasonable expectation of the policyholder
 24 point, this is just the reasonable reader, all of that
 25 smacks of ordinary accounting adjustments, things that

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1 would have happened to the business anyway. And when it
 2 says "but for the damage", what does it mean, and what
 3 are "circumstances affecting the business"?
 4 In our submission, it flies in the face of what this
 5 is informing you of to suggest that the circumstances
 6 can include any part of what was contemplated by the
 7 insuring provision .
 8 LORD JUSTICE FLAUX: Well, in a sense, if one just focuses
 9 on the words "either before or after the damage", those
 10 can only be matters which have got nothing to do with
 11 the damage, by definition .
 12 MR EDELMAN: Exactly, yes.
 13 LORD JUSTICE FLAUX: The fact that it goes on to say "or
 14 which would have affected the business had the damage
 15 not occurred" doesn't suggest that you are then focusing
 16 on some broader range of circumstances but it's the same
 17 set of circumstances, isn't it? I mean, in my example
 18 of the pub, if the pub had already -- well, maybe that
 19 isn't a good example. I am trying to think of what
 20 "either before or after the damage" would cover, in an
 21 example like the pub or the restaurant or whatever.
 22 MR EDELMAN: The classic example of a restaurant would be
 23 the head chef had already given in his notice .
 24 LORD JUSTICE FLAUX: I see, yes.
 25 MR EDELMAN: He had already given in his notice but he was

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1 working out his notice when the fire happened, and then
 2 the insured presents to the insurer his turnover figures
 3 for the period up to the fire and says: look how well
 4 I was doing. But there had been a circumstance before
 5 the fire , the chef that was the main attraction , his
 6 reputation had spread far and wide, had just been
 7 poached by a Michelin star restaurant .
 8 LORD JUSTICE FLAUX: Yes, I follow.
 9 MR EDELMAN: And afterwards, the day after the chef gives in
 10 his notice, he says "I'm terribly sorry to let you down
 11 at this terrible moment, but I was always going to go,
 12 I had already been negotiating and I was going to go
 13 anyway". So the insurers are entitled to say: the
 14 minute the people heard about the fact that your head
 15 chef was going, your turnover would have decreased.
 16 Your past figures , in those circumstances, are no
 17 reliable guide to what your position would have been but
 18 for the fire .
 19 If I am right about that, then you have to excise
 20 from the counterfactual , under the trends clause and
 21 I would say it follows on the main causation test , what
 22 it is that is associated with what is insured .
 23 I have to put it that vaguely because we don't have,
 24 the insurers say -- we have put our arguments in
 25 writing , we may not develop them orally, I think they

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1 are sufficiently in writing as to why we say clauses
 2 which only refer to damage don't apply, but let's assume
 3 they do for the sake of this argument. One puts
 4 something in, and what the defendants want to put in,
 5 for example, is they say: let's put in -- and one of
 6 them puts it in explicitly , Hiscox says "but for the
 7 restriction " and they say: Aha, but for the restriction
 8 you would have still had all the other ingredients of
 9 the clause . You would have still had, in Hiscox, the
 10 occurrence of the disease . So that goes out.
 11 But what is the restriction for? What is the
 12 restriction referring to? Is it referring , just like
 13 this , to the damage, and you can carve out what causes
 14 the restriction ? Or when it refers to the restriction
 15 is it actually just identifying , as it were, what the
 16 immediate thing is?
 17 MR JUSTICE BUTCHER: If you are right about damage, and
 18 "damage" is a shorthand for the insured event causing
 19 the damage, then you are probably going to be right
 20 about restriction as well , that it's a shorthand as
 21 well .
 22 LORD JUSTICE FLAUX: Damage caused by a peril covered by the
 23 policy or whatever.
 24 MR EDELMAN: Yes. One can get there that way or just say
 25 that when one is looking at trend of the business

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1 variations or circumstances, those are excluding what
2 the policy has provided or is contemplating will be the
3 cause of what has happened. So you take that out. And
4 so when it says "so that the results will be as near as
5 possible but for the damage", it's the "but for the
6 damage" isn't the driving bit. The "but for the damage"
7 is telling you what you want to end up achieving; but
8 how you achieve it is only by adjusting for trends,
9 variations and circumstances, where circumstances does
10 not include the cause of the damage.

11 So there are two ways of construing the clause.

12 LORD JUSTICE FLAUX: You would say that the use of the word
13 "trends" is itself illuminating.

14 MR EDELMAN: Yes.

15 LORD JUSTICE FLAUX: Because the trends of the business, one
16 naturally would consider that that was looking at
17 matters extraneous to the insurance cover.

18 MR EDELMAN: Yes, exactly, my Lord, and therefore extraneous
19 to matters that one is contemplating causing the insured
20 to suffer loss.

21 That answers the composite clauses. Then, I think
22 for the reasons I explained, and Ms Mulcahy has
23 explained as well, in relation to the disease within
24 25-mile cases or 1 mile cases, the important point that
25 I emphasise is that they are insuring a notifiable

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1 disease.

2 So do you excise -- we say you do -- from this
3 exercise, from this, the notifiable disease, in
4 circumstances where it is contemplating that there will
5 be something which could be an epidemic? That is what
6 the clause is contemplating. That is the issue.

7 The defendants try to say it's plainly within that
8 provision. But that is begging the question - what were
9 they insuring? They were insuring against the risk of
10 a notifiable disease which, amongst the places it
11 manifested itself, was near to the insured's business.

12 So if the insured's business was shut down in the
13 south-east because of a disease in the north-west, you
14 are not going to recover if there is a vicinity limit.
15 But if it is everywhere, including the south-east, then
16 you get cover. Because the disease itself is not
17 a relevant circumstance; it is what the clause is
18 contemplating could happen. That was my point about the
19 significance of insuring notifiable diseases, because
20 that is the risk that you are imagining. Obviously they
21 would have hoped and expected there would be nothing as
22 serious and as dramatic as what has happened to the
23 country this year. But it is actually within the risk,
24 and it is just unfortunate for them that it is
25 everywhere, so that has negated the benefit that

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1 otherwise they would have had of more limited outbreaks,
2 even if they impacted their insured, they could say
3 "Well, it wasn't actually in your area. You have just
4 been caught up in the whirlwind of everything else".

5 That is what they can say if there is someone in the
6 Scilly Isles, where apparently there has been no case of
7 the disease at all, but they have been subject to the
8 restrictions. We are not asking what is the commercial
9 benefit of those restrictions. The Scilly Isles
10 demonstrates, because they can say is to the Scilly
11 Isles: you have had no cases, I am afraid you have been
12 caught up in the whirlwind of it but none of has
13 occurred within 1 mile or 25 miles of the Scilly Isles
14 so you don't get paid, even though you have suffered
15 a business interruption loss. But that is the
16 protection that the policy gives them. That is its
17 commercial purpose; that is serving its function. They
18 don't have to pay for the Scilly Isles.

19 If they can find some part of rural England where
20 a business is located where there is no cases within
21 a mile radius, they have got a 1 mile clause, then they
22 get away again, even if that business is subject to the
23 lockdown, if it is a 1 mile disease clause. But you
24 can't excise the disease under a circumstances clause,
25 under the circumstances provision in the trends clause.

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1 My Lord, that is enough on that topic. I don't know
2 if I can help any further on that aspect of it. It is
3 actually quite probably a very important point in the
4 case, but that is the analysis.

5 LORD JUSTICE FLAUX: It's a short point.

6 MR EDELMAN: It is. It is, and I have probably spent much
7 too long on it.

8 LORD JUSTICE FLAUX: I am not criticising, but it is a short
9 point and you would say that there are variations in how
10 these clauses are phrased, but essentially they all have
11 the same purpose and therefore we should construe them
12 in the same way.

13 MR EDELMAN: Yes, and construing them that way avoids the
14 extreme results of either no recovery or windfall, and
15 it just puts the business back in -- it just treats the
16 business as though nothing had happened, which is what
17 insurance should do.

18 It is not insuring against -- you know, if you have
19 got one of these complex clauses that has the
20 restrictions, it is not insuring against the disease
21 that resulted in the restrictions, that is a red herring
22 from insurers, because in order to get the cover you
23 have to have all of the ingredients, and if one of the
24 ingredients is missing you don't get the cover.

25 Once you have got all the ingredients, you are

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1 insuring the package. Ms Mulcahy's dominoes example, if
2 you put up all the dominoes, you can't take one away and
3 say there are still three standing so you don't get any
4 money. If you look at what the insuring provision is
5 contemplating, and if it is a disease case it's
6 contemplating a notifiable disease, you don't take out
7 the notifiable disease.

8 There is one short point before I finish this topic
9 that I wanted to cover on New World Harbourview. It is
10 quite an obscure point on the case, which again is
11 a point that wasn't actually argued but it is helpful on
12 this aspect. It is addressed in our skeleton at
13 {1/1/121}.

14 If you would give me a moment for me to get the page
15 out, it is easier as I have my marked up copy in front
16 of me.

17 This was the SARS outbreak in Hong Kong, and you
18 will see in paragraph 310, this is an issue that didn't
19 arise on appeal, that the court had to consider the
20 standard revenue. It was "the revenue realised during
21 the 12 months immediately preceding the date of the
22 damage appropriately adjusted where the loss period
23 exceeds 12 months":

24 "The insured wanted an earlier date to exclude from
25 the standard revenue the decrease in revenue prior to

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1 SARS becoming notifiable and the policy being triggered.
2 The relevant question for the court was ..."

3 Should the calculation exclude the effect which SARS
4 had on the revenue before it became notifiable.

5 If we go to the next page, [1/1/121] there wasn't an
6 issue about it applying because the definition of
7 "damage" applied to loss of use anyway, so there wasn't
8 an application issue there. But what actually the court
9 decided was that the relevant date for the calculation
10 was the date when the disease became notifiable.

11 That demonstrates how careful one has to be with
12 these trends clauses, because -- they didn't actually
13 argue whether you should then adjust those figures to
14 take out the disease, because if I had been arguing that
15 case that would have been my submission, that now you go
16 to the trends clause and if that is what the machinery
17 tells you, you have then got to take out that prior to
18 the notifiability element of depression of income in the
19 calculation. That is not to compensate you for the loss
20 prior to it being notifiable, because you can't. It
21 didn't have the status before that date. But for the
22 loss after notifiability, do you extract the effect of
23 the disease on your turnover before it became
24 notifiable?

25 This illustrates, in our submission, the point that

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1 I was making. When you insure, as those insurers did, a
2 notifiable disease, what are you insuring? Are you
3 insuring its notifiability or are you insuring a disease
4 which is a notifiable disease?

5 The approach of the judge in the case was perfectly
6 right as far as it went; he just applied rigorously the
7 turnover test, and the issue was what date it should be
8 from. We don't dissent at all from what the judge
9 actually decided in the case. But it is the next stage.
10 Because if the clause is contemplating insurance against
11 a notifiable disease, it must encompass within its
12 contemplation a disease which will emerge and will, as
13 quickly as the authorities can get round to it, be made
14 notifiable.

15 One of the complaints of the insured in that case
16 was by taking the date on which it became notifiable,
17 cover was determined by the speed at which the wheels of
18 administration turned round, and that was unfair.

19 Well, the courts quite rightly said that's just how
20 the policy works; until it is notifiable, it doesn't
21 trigger the cover. But one then has to ask the
22 commercial purpose question of: what is a clause that is
23 insuring against that disease designed to do? And then,
24 so when you are looking at the loss of revenue from
25 day 1 of it having been notifiable, do you take into

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1 account the fact: ah, day minus 1 the disease was there
2 and you were already losing money anyway, so we will
3 take that off.

4 Now, the mechanism provided for that. The question
5 is: do you actually then adjust, use the trends clause
6 to say: well, actually what we should be doing under the
7 trends clause is trying to match up what would have
8 happened but for the manifestation of a notifiable
9 disease, and that will include the emergence of the
10 disease in the period up to it becoming notifiable.

11 That is not giving retrospective cover; it is simply
12 putting the insured back in the position it would have
13 been in had the notifiable disease not emerged.

14 MR JUSTICE BUTCHER: This has to go hand-in-hand, even on
15 your submission it has to march hand-in-hand with what
16 the insured peril is.

17 MR EDELMAN: Yes. I agree.

18 MR JUSTICE BUTCHER: If you decide that there has been
19 interference with the business, being caused by
20 something without all the components of the insured
21 peril being present, then that may not be covered,
22 because there hasn't been the insured peril, and you
23 would expect the trends clause to reflect the same
24 effect, wouldn't you?

25 MR EDELMAN: That I have to concede. The only caveat

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1 I would add to that is that one has to take into account
 2 not just what is explicit in the clause, but what is
 3 implicit within it, what sort of situation it is
 4 contemplating. So it has to be realistic, is the
 5 qualification I would apply to that.
 6 So if the clause is obviously contemplating
 7 a certain type of situation, one has to be realistic
 8 about what that is actually contemplating.
 9 I am applying that to my Lord's example of a 25-mile
 10 disease clause. What is it contemplating? It is
 11 contemplating a notifiable disease which has epidemic
 12 capacity. So does one just look to the insured peril
 13 and say: ah well, it is only disease within 25 miles, so
 14 that is all I am going to excise, and there is disease
 15 outside the 25 miles so I take that into account as
 16 a circumstance? Or is this actually contemplating,
 17 potentially, not only but in its range of contemplation,
 18 an epidemic disease which may affect, which may occur
 19 also within the 25-mile area? And if it is
 20 contemplating an epidemic disease, then you don't take
 21 the epidemic disease out. I think that is the point
 22 where I would part -- I don't know whether that was what
 23 my Lord was getting at, but that is where I would say
 24 you have to be careful with these very esoteric insured
 25 perils. It is much easier with much simpler ones.

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1 MR JUSTICE BUTCHER: In fact, Mr Edelman, I was more
 2 thinking about the multi-component type clause, but
 3 I see what you say about the disease clauses.
 4 MR EDELMAN: Yes. Multi-component, yes, but a lot of those
 5 have as their original triggering cause something like
 6 an emergency likely to endanger life. That is going to
 7 cover -- once you take the "emergency" out, you haven't
 8 got COVID. So I am fine with that. You know, there is
 9 something else out there like, you know, you were going
 10 to have building works anyway, then I am content with
 11 it.
 12 My Lord, I think I have probably more than enough on
 13 trends clauses, unless I get any messages telling me
 14 that I have left something out, but we can always pick
 15 something up later if necessary.
 16 I was now going to move on to Hiscox. I am keeping
 17 an eye on the time for the shorthand writers, but would
 18 my Lords please alert me if I overrun.
 19 We now move on to the individual policies. Can
 20 I just preface my remarks with this, I have probably
 21 said this before but it is worth repeating. When we
 22 come to the policies, there is a lot in writing from
 23 both parties, and in their own individual ways they
 24 raise very confined issues of construction.
 25 The causation is a much more fundamental issue,

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1 which is why we spent a significant amount of time on
 2 it, but the policies say what they say or don't say what
 3 they don't say, and my Lords have the benefit of written
 4 submissions. So if we take things at a bit of a canter,
 5 I hope my Lords will understand that. It is going to be
 6 impossible for us to address every single example and
 7 illustration that the insurers have given, but we hope
 8 in our submissions to cover the principal issues that
 9 have been raised.
 10 If we can start with the Hiscox wordings. I am
 11 going to address first the public authority clause,
 12 firstly in the form in Hiscox 1-3. You will find that
 13 at {B/6/42}.
 14 LORD JUSTICE FLAUX: That's not right.
 15 MR EDELMAN: Obviously not. Let me see what ...
 16 LORD JUSTICE FLAUX: We have got it now, Mr Edelman.
 17 MR EDELMAN: I was right.
 18 LORD JUSTICE FLAUX: You were right. Okay.
 19 MR EDELMAN: I was just beginning to get into a state of
 20 more than mild panic that all my policy references would
 21 be wrong, but ...
 22 This is a form of words which you will see the
 23 public authority clause in the middle of the page, 13:
 24 "Your inability to use the insured premises due to
 25 restrictions imposed by a public authority during the

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1 period of insurance following ...
 2 "(b) an occurrence of any human infectious or human
 3 contagious disease, an outbreak of which must be
 4 notified to the local authority."
 5 The wording is the same in Hiscox 1, 2 and 3. It is
 6 the same in 4, subject to the addition of the words
 7 "within 1 mile of the premises". So what I am going to
 8 do is deal with all the common 1 to 4 issues first and
 9 then I will deal with the 1 mile issue afterwards.
 10 Just before I do that, I should actually show you on
 11 page {B/6/41}, the previous page, that the preamble to
 12 this is "solely and directly from an interruption to
 13 your activities", and the words "solely and directly"
 14 and the significance of "your activities" will also
 15 feature in the submissions.
 16 Going back to {B/6/42}, you have seen that "solely
 17 and directly" and "activities" element in the preamble.
 18 We then have got the words that are causing issues
 19 between the parties: "inability to use"; "restrictions
 20 imposed"; and "occurrence". Fortunately, there is no
 21 dispute about "public authority", so that is one to tick
 22 off the list.
 23 Here we say this is a classic case where the insured
 24 peril, if one wants to describe it as that, is the
 25 combination of all these events.

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1 So firstly , logically , we start with
 2 subparagraph (b) "an occurrence". I will come back to
 3 the other bits , I'm not missing them out, but it seemed
 4 to be a logical place to start . "An occurrence"; no
 5 vicinity limit on that. But Hiscox says that there has
 6 to be some requirement of locality . One has to read in
 7 a requirement of locality into that, even though it
 8 doesn't say anything about where the occurrence has to
 9 be. And we say that the required nexus is with the
 10 inability to use the insured premises.
 11 MR JUSTICE BUTCHER: I think you are right, Mr Edelman.
 12 I didn't understand Hiscox, or I don't recall that
 13 Hiscox said that the vicinity requirement is made out by
 14 the reference to "an outbreak of which must be notified
 15 to the local authority".
 16 MR EDELMAN: No, it is the occurrence.
 17 MR JUSTICE BUTCHER: Because "an outbreak of which must be
 18 notified to the local authority" is just identifying the
 19 type of disease, is that right?
 20 MR EDELMAN: Yes.
 21 MR JUSTICE BUTCHER: That is common ground, isn't it?
 22 MR EDELMAN: Yes, that is common ground as I understand it,
 23 because that is the mechanism. You notify. If
 24 a notifiable disease breaks out, even COVID, you have to
 25 notify it to the local authority .

1 So what they are saying is the concept of an
 2 occurrence, and they give some context to it , they say
 3 this all smacks of something local .
 4 LORD JUSTICE FLAUX: An occurrence.
 5 MR EDELMAN: An occurrence.
 6 LORD JUSTICE FLAUX: Not lots of occurrences, but an
 7 occurrence.
 8 MR EDELMAN: Yes.
 9 Even if one says it's an occurrence, the policy
 10 doesn't restrict the cover by reference to the
 11 geographical location of an occurrence. And it is
 12 interesting because it says "an occurrence ... an
 13 outbreak of which must be notified". So it is already
 14 contemplating that this is the sort of -- that an
 15 outbreak itself , we would submit an outbreak itself is
 16 an occurrence.
 17 And this is necessarily contemplating, as I have
 18 already indicated , that this could be an outbreak of
 19 a new epidemic disease. So we say that the word
 20 "occurrence", you know, it isn't confined to any single
 21 case. An occurrence, consistently with what it says in
 22 the (inaudible) can refer to an outbreak.
 23 That is contextually what it seems to be
 24 contemplating in relation to a disease; it is an
 25 occurrence of a disease , an outbreak of which must be

1 notified .
 2 Obviously, the more geographically distant the
 3 outbreaks of the disease are, the less likely they are
 4 to affect the ability to use the insured's premises. So
 5 the locality requirement, which is Hiscox's big point,
 6 the locality requirement is satisfied by the fact that
 7 it has to have the specified impact on the insured's
 8 premises.
 9 Ordinarily one would only expect a local outbreak to
 10 have such an effect . But they have written a policy
 11 which doesn't impose that, it doesn't specify that at
 12 all . It doesn't say "only has to be local"; they have
 13 written a policy which applies wherever the occurrence
 14 is .
 15 The fact that they have taken the calculated risk
 16 that only local occurrences will result in the inability
 17 to use is just their bad luck. Otherwise they actually
 18 are better off, they would say, than insurers who have
 19 imposed a 25-mile limit . But with absolute silence they
 20 have specified a requirement that it must be within some
 21 undefined, unspecified, perhaps unknowable -- the
 22 occurrence must be within some locality to the premises.
 23 If one goes or has a look at some of the other
 24 covers, or if one goes to {B/6/44} in my version, I hope
 25 it is 44. It is going to be {B/6/43}. I seem to be on

1 a different version .
 2 Cancellation and abandonment cover. You will see at
 3 (iii) of 19 at the bottom of the page, it has an
 4 exclusion for :
 5 "any action taken by any national or international
 6 body or agency directly or indirectly to control ,
 7 prevent or suppress any infectious disease ."
 8 So the draftsman had well in mind the fact that the
 9 control, prevention or suppression of infectious
 10 diseases could be the subject of national or
 11 international body intervention or agencies.
 12 Yet it suggests that an occurrence of the disease
 13 must be somehow local. We submit not.
 14 Now, they try in their submissions, and I won't take
 15 you to all the paragraphs, I don't think there is time
 16 to do that, but hopefully you have at least some
 17 recollection of what was in the Hiscox skeleton , but
 18 they go on a lengthy trawl through the policy provisions
 19 to try to demonstrate that the focus of the policy is on
 20 events affecting the premises .
 21 We don't disagree. Because if one goes back to
 22 page 42, this does have to affect the premises. There
 23 has to be inability to use due to restrictions imposed.
 24 That is the link to the premises.
 25 They say that they can't have been intended to cover

1 misfortune whose character is they may affect the whole
2 nation. But that is true of storm damage; one can have
3 big Atlantic storms coming across, we have had the Beast
4 from the East, we have floods affecting whole regions.
5 You can have these wide area matters which not only
6 affect the insured but affect the whole nation or
7 a whole region. That is what they have insured. As
8 long as it affects the insured premises through
9 a restriction making them unable to use the premises,
10 that is all satisfied.

11 Now, they are right to say the word of "occurrence"
12 is of course apt to cover a single case, but it is, as
13 I have said, also apt to cover a multitude of cases, an
14 outbreak.

15 There is one particular point that I have, a point
16 of law and construction that I need to address, and that
17 is something that is raised by Hiscox. I will get the
18 page reference for you. It is at paragraph 230, it is
19 {1/13/75}.

20 LORD JUSTICE FLAUX: Yes.

21 MR EDELMAN: There is a Latin tag, and as someone who went
22 to a school where Latin was not compulsory, and I don't
23 know a word of it, I always prefer to use English, which
24 is a phrase he used, particularly if we had people
25 watching who won't understand Latin either.

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1 LORD JUSTICE FLAUX: Where are we?

2 MR EDELMAN: At paragraph 230, there is a maxim he quotes,
3 whose English equivalent is: it is known from its
4 associates.

5 LORD JUSTICE FLAUX: Yes. "Noscitur a sociis". Yes.

6 MR EDELMAN: I wouldn't have had a clue how to pronounce it.
7 But that is utterly misplaced. As the authorities he
8 cites demonstrates, it is a principle which applies
9 where you have got a list of words, and there is
10 a clearly discernible intention as to what the words
11 mean, hence in the case he cites "linen" in the midst of
12 the words "stock-in-trade", "household furniture",
13 "linen", "wearing apparel" and "plate".

14 It didn't encompass a stock of piles of linen for
15 trade.

16 If one goes to --

17 LORD JUSTICE FLAUX: If there had been a separate clause
18 insuring against loss or damage to linen, you would say
19 that is not in a list which requires one to give it
20 a limited meaning.

21 MR EDELMAN: No. Exactly.

22 LORD JUSTICE FLAUX: And these are separate. They are not
23 interlinked, these heads of cover, they are separate
24 extensions.

25 MR EDELMAN: Exactly. Each insuring clause has its own

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1 subject matter and its own range. The common theme
2 I accept, we accept entirely, is that it has to have
3 some connection to the insured premises. What that
4 connection is varies from clause to clause. In this
5 case, it is satisfied by the fact that there is an
6 inability to use the premises. If there is not an
7 inability to use the premises, and we will come to what
8 that means, then you don't have insurance.

9 Perhaps if I just finish this point and then we can
10 take a break for the shorthand writers. If we go to
11 Lewison, this is a passage in Lewison, {K/202/57}. It
12 is paragraph 74 and he deals with the principles there.
13 I just want to show you where it all started, so
14 I wasn't taking it out of context.

15 The relevant passage is on the next page,
16 {K/202/58}. He discusses the cases that Mr Gaisman has
17 referred to, and the passage in the middle of the page:

18 "It is necessary to identify a common characteristic
19 of the surrounding words. As Lord Justice Diplock put
20 it ...

21 "The maxim ... is always a treacherous one unless
22 you know the societas to which the socii belong."

23 You need know what company the word -- what its
24 associates are. And of course you can know that if they
25 are in a list. But you simply can't know that on

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1 a trawl through disparate insuring clauses.

2 When you go through the insurance clauses, as my
3 Lords may have to, what you will discern is that they
4 are a hotchpotch of clauses covering various things
5 like, and I hope this is on page {B/6/41}. Yes, you
6 have got unspecified customers. There can be insured
7 damage to a customer based in the European Union or any
8 other specified -- and when you go to unspecified
9 suppliers, they can be based in the European Union.
10 Public utilities, operating and based in the
11 European Union.

12 What Mr Gaisman says, he says -- I won't take you to
13 the paragraph but I will quote his words -- that the
14 covers are either local or specific to the insured or
15 its business or the premises.

16 The public authority clause, going back to {B/6/42},
17 if we turn to page 42, please, is specific to the
18 premises, but says nothing about the locality of the
19 occurrence.

20 My Lord, shall I pause there and give the shorthand
21 writers a break? Then we will resume whenever is
22 convenient.

23 LORD JUSTICE FLAUX: Yes. If we start again at just before
24 3:25pm. Thank you.

25 MR EDELMAN: Okay.

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1 (3.15 pm)
 2 (Short break)
 3 (3.23 pm)
 4 LORD JUSTICE FLAUX: Right, Mr Edelman.
 5 MR EDELMAN: My Lords, there is some speculation in
 6 Mr Gaisman's skeleton at H4, with its 1 mile limit, was
 7 devised out of an abundance of caution rather than as
 8 reflecting the absence of any restriction in these
 9 policies. But in fact if you look at the dates of the
 10 policies, I won't trouble you with it now, but you can
 11 look at the dates at the bottom and you will find that
 12 the version of H4 and H2 is 1215 and H1 is 1217 and H3
 13 is 1218. So that doesn't seem to work either.
 14 He gives some example about somebody who goes from
 15 Alnwick to Ilfrcombe, and says this shows how far
 16 far-fetched our case is. But of course it is perfectly
 17 possible, if a person had recently travelled from one
 18 place to another, to spread the disease from one place
 19 to another, and unfortunately that is what has happened.
 20 The critical point, the critical answer to this, is
 21 that in order for there to be cover there has to be
 22 something that affects the premises, and that is the be
 23 all and end all of the requirement of locality in case.
 24 The occurrence can be anywhere. But obviously the
 25 further away the outbreak is from the premises, the less

1 likely it is to result in restrictions being imposed on
 2 the premises.
 3 H4 has the 1 mile requirement. And of course if
 4 there is some sort of locality requirement in H1 to H3,
 5 the same arguments would apply here to those policies,
 6 and for that we rely on our prevalence arguments.
 7 The only issue between the parties here as to the
 8 application of the clause is that Hiscox accepts only
 9 a scientifically verified incidence of the disease which
 10 must have been verified at the time before restrictions
 11 were imposed will suffice. That is paragraph 89 of the
 12 skeleton, for your reference. And all the clause says
 13 is "occurrences of disease", and we say "diagnosable" is
 14 sufficient. The whole premise of the restrictions that
 15 were imposed was not just the known but, as I said, the
 16 known unknown. And if the known unknown happened to be
 17 within 1 mile of one of Hiscox's insureds under H4,
 18 well, then they have cover.
 19 The next item, if we can go back to {B/6/42}, is the
 20 words "restrictions imposed".
 21 LORD JUSTICE FLAUX: There we are.
 22 MR EDELMAN: So the next words are "restrictions imposed",
 23 what's required there. No issue that the UK Government
 24 is a public authority. Common ground that businesses
 25 required to close or cease were capable of fulfilling

1 these requirements. And Hiscox doesn't dispute that
 2 regulations 6 and 7 of the 26 March regulations were
 3 restrictions.
 4 Just can I say that those concessions are and will
 5 be valuable for numerous businesses whose claims will
 6 benefit from clarification of that.
 7 There is a disputed issue about whether non-legally
 8 binding advice or guidance, as Hiscox would put it, and
 9 other measures were restrictions. Hiscox relies on the
 10 case of Dolan, which said that the closure of schools
 11 wasn't judicially reviewable because it wasn't legally
 12 enforceable.
 13 We have made our submissions, when we were
 14 discussing government action, about the status of
 15 government guidance, which was expressed in imperative
 16 terms. I am not going to repeat those submissions here,
 17 but the same applies here. Those were imposed. One has
 18 to apply a sensible meaning to that. And let's take the
 19 example of schools, because that is what the Dolan case
 20 was all about. Yes, the government didn't in fact find
 21 it necessary to pass regulations to close schools,
 22 because they told schools to close and they did. It is
 23 quite plain that the government would have used its
 24 statutory powers had there been a body of schools who
 25 weren't prepared to accept what the government was

1 telling them to do.
 2 No issue between us that they didn't in fact pass
 3 those regulations. No issue that there was not,
 4 therefore, a legally binding, enforceable obligation on
 5 schools to close. But to say that in the current
 6 circumstances, in this particular context, that
 7 restrictions were not imposed is to, we submit, fly in
 8 the face of reality. These have been very unusual
 9 circumstances, they have thrown up unusual events, and
 10 one has to apply the policy in a sensible way.
 11 The next topic is "following". The restrictions
 12 imposed have to be following an occurrence. I think it
 13 is common ground that that is a weak test of causation
 14 and I have dealt with that.
 15 The only point is if Hiscox's argument is accepted
 16 that the occurrence requires a local event or if one is
 17 dealing with Hiscox 4 and one has got an occurrence
 18 within 1 mile, one then is back to the causation
 19 question of the local instance of the outbreak, the
 20 local manifestation of the outbreak, being part of the
 21 cause of the restrictions that were imposed.
 22 We have dealt with that, and I am not going to deal
 23 with it again. In essence, it's the single indivisible
 24 outbreak, it's just part of the national outbreak, or
 25 alternatively each one is a line in the spreadsheet

1 making it -- each making its concurrent contribution to
 2 the cause.
 3 I then move on to --
 4 MR JUSTICE BUTCHER: But the word "following" does at least
 5 suggest a temporal requirement as well.
 6 MR EDELMAN: Yes. Quite, absolutely. Temporal and causal.
 7 So if you haven't got an outbreak in your locality,
 8 1 mile, whatever is required, when the restrictions are
 9 imposed, if you can't show by any evidential means that
 10 we were discussing, by the underreporting ratio, there
 11 is no -- it all comes to zero, for example you are in
 12 the Scilly Isles and a case doesn't -- they do have
 13 cases, let's say, I am not sure whether they have or
 14 haven't, but let's say they don't have their first case
 15 until April or May, then you haven't got the causation.
 16 I accept that.
 17 MR JUSTICE BUTCHER: And any interference that there has
 18 been up to that point will not be covered.
 19 MR EDELMAN: That is right.
 20 MR GAISMAN: May I just correct something that Mr Edelman
 21 said on [draft] page 135 at lines 8 to 10 of the
 22 transcript, when he was describing the common ground?
 23 He said Hiscox does not dispute that regulations 6
 24 and 7 of 26 March were restrictions for the purposes of
 25 this clause. We do, and I will be developing that, but

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1 we make that plain in paragraph 189 of our skeleton.
 2 Thank you.
 3 MR EDELMAN: My understanding was that they didn't dispute
 4 that they were restrictions, but disputed whether they
 5 caused an inability to use, which is where I thought the
 6 debate was. But if we have misunderstood that in the
 7 134 pages which Mr Gaisman managed to deliver, almost
 8 half the length of our submissions dealing with all the
 9 insurers, and a major contribution to the 850 pages we
 10 received, I apologise.
 11 LORD JUSTICE FLAUX: Now, now.
 12 MR EDELMAN: Well, it took a long time to read.
 13 LORD JUSTICE FLAUX: Mr Gaisman has made his submissions,
 14 Mr Edelman, he is just putting down a marker and he will
 15 develop his submissions, and you will have an
 16 opportunity to reply, if it is necessary.
 17 MR EDELMAN: I will try.
 18 LORD JUSTICE FLAUX: If he has to come back again, I hope he
 19 can do it without making a wailing noise.
 20 MR EDELMAN: "Inability to use". I think I had finished --
 21 I was interrupted, so I am not sure where I had got to,
 22 but I think that is where I had got to.
 23 The issue between the parties is whether there has
 24 to be a total inability to use or whether partial
 25 inability to use is sufficient.

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1 In particular, does your inability to use encompass
 2 the prevention of customers from travelling to the
 3 premises, either due to regulations 6 or 7 or due to
 4 guidance, for any non-essential purposes?
 5 We agree that ultimately whether or not there has
 6 been an inability to use will depend on the facts of
 7 each case, but there are some important questions of
 8 principle which we would ask the court to consider and,
 9 if possible, to decide.
 10 The first one is: does inability to use have to be
 11 total or is partial inability to use sufficient?
 12 Hiscox, as we understand it, seeks to apply an
 13 absolutist test. If any part of the business actually
 14 remains open, even if for a highly restricted purpose,
 15 for which you can use the premises, there is no
 16 inability to use the premises.
 17 Our submission is this is a wholly uncommercial
 18 construction of those words in their context. Take, for
 19 example, if one goes to {1/13/55}, that is part of
 20 Mr Gaisman's submissions, I think it should in fact be
 21 page {1/13/56}, one has the second half of
 22 paragraph 173, a Chinese restaurant, they say 80% of
 23 whose business is take-away. One can take whatever
 24 percentage, but let's say a restaurant is 50% of its
 25 business is take-away and 50% is eat-in in the

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1 restaurant. As a result of the restrictions it has to
 2 close the restaurant area for restaurant use, it can't
 3 use the restaurant area as a restaurant. Is there an
 4 inability to use the premises? Mr Gaisman would say no,
 5 because you can still use the kitchen to cook take-away
 6 meals and you can still use the restaurant area as
 7 a place for people who have come to collect their
 8 take-away meals to sit and wait for their take-away.
 9 LORD JUSTICE FLAUX: I don't think you can, actually.
 10 I don't think you were allowed to do that.
 11 MR EDELMAN: No, you can't.
 12 LORD JUSTICE FLAUX: I think you had to stand outside.
 13 MR EDELMAN: Right. I think my Lord is right.
 14 LORD JUSTICE FLAUX: Certainly where I live you had to stand
 15 outside.
 16 MR EDELMAN: If people can come in. So I suppose he would
 17 say you can use it if people can come in to collect
 18 their take-away meals. So you are using the restaurant
 19 area for people to come in and collect.
 20 LORD JUSTICE FLAUX: Yes.
 21 MR EDELMAN: It is a matter of impression, really, but is it
 22 really the case that this policy only applies where you
 23 are unable to use every single inch of your premises,
 24 and if you can use part of it then there is no cover,
 25 but if you can't use, if you are simply unable to use,

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1 for example, in this case the restaurant area as
 2 a restaurant, which it is designed for, is it truly
 3 saying that that is not an inability to use the
 4 premises?
 5 It must be, if one goes back to {B/6/41}, an
 6 interruption to your activities caused by your inability
 7 to use the premises. Your activities as a restaurant,
 8 not as a take-away, your activities as a restaurant have
 9 been interrupted -- we will come to that as well --
 10 because you are unable to use the restaurant area.

11 We submit that this is --

12 MR JUSTICE BUTCHER: It is very difficult though, isn't it,
 13 Mr Edelman? One can imagine things on the spectrum
 14 which present difficult questions.

15 MR EDELMAN: Yes. Difficult questions of fact, I agree.
 16 That is why I prefaced this subject by saying that there
 17 is an issue of principle between us, because --

18 LORD JUSTICE FLAUX: The issue of principle is whether
 19 inability means partial or total.

20 MR EDELMAN: Exactly.

21 LORD JUSTICE FLAUX: Or, put the other way round, whether it
 22 means total.

23 MR EDELMAN: Yes.

24 LORD JUSTICE FLAUX: If it doesn't mean total, then what
 25 constitutes inability in any given case will be

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1 a question of fact.

2 MR EDELMAN: Yes, quite.

3 What we would say to support our construction is if
 4 you go to {B/6/23} under the heading "Rent" you will see
 5 it talks about -- there is a definition of "Rent":

6 "For the insured premises that you must legally pay
 7 while the insured premises or any part of it is
 8 unusable" so it actually recognises that you can have an
 9 unusable part. That is not the complete answer, it is
 10 just an illustration of the point. But that does help.

11 There is one matter that is raised by Hiscox, it is
 12 going back to B/6/56, paragraph 174.

13 LORD JUSTICE FLAUX: No, not B6.

14 MR EDELMAN: Sorry, {1/13/56}. Paragraph 174.

15 LORD JUSTICE FLAUX: You were right when you said that maths
 16 is not your strong point.

17 MR EDELMAN: Some people think it is, but it's not really.

18 He talks about, at the bottom of the paragraph,
 19 being able to claim the costs, not being punished for
 20 starting a take-away service. If a dine-in restaurant
 21 started a take-away service, it wouldn't be punished
 22 because it could claim the cost of doing so from Hiscox.

23 Well, the problem is if you then start your
 24 business, your take-away business, which you hadn't done
 25 before, if Mr Gaisman is right it's total inability to

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1 use. Whilst he would say, yes, thank you very much,
 2 here is your compensation for your costs of setting up
 3 the take-away business, but the fact that you have only
 4 recovered 25% of your turnover is just hard luck,
 5 because now you are no longer unable to use your
 6 premises, because now you are using your kitchen again.

7 So you gain the costs of setting up your take-away
 8 service at the price of losing your business
 9 interruption cover. It is totally uncommercial and
 10 can't be what was intended.

11 Now, the next point is Hiscox says that there is no
 12 inability to use due to restrictions. It may be that
 13 Mr Gaisman was at cross-purposes, because all I said was
 14 he accepted that regulation 6 imposed restrictions, and
 15 that is I think all I said. But his point is, and this
 16 is how I understood his point, that although it might
 17 impose restrictions, it doesn't impose relevant
 18 restrictions if it only applies to customers visiting
 19 the premises. They are not relevant restrictions.

20 Our submission on this is quite simple. Your
 21 inability to use must mean for its intended aim or
 22 purpose, which is the insured business activities; and
 23 if the restriction is one which prevents customers from
 24 entering or, let's say, dining in your property, then
 25 even if your restaurant had not been ordered to close

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1 and the government had just passed some regulation
 2 saying people must now not go to a restaurant, you are
 3 unable to use your premises because your customers
 4 cannot get there, they cannot enter.

5 If I can give a school analogy. The fact that Zoom
 6 meetings, Zoom lessons can be given by teachers and that
 7 a teacher may, for example, because they didn't have the
 8 necessary resources at home, go into school to give the
 9 Zoom lesson, and use the school facilities to give
 10 a Zoom lesson to children, that doesn't mean that you
 11 are using the school for its intended purpose. Its
 12 intended purpose was to be used as a school, and without
 13 the children it's not much of a school. If the children
 14 can't come to the school, that is an inability to use
 15 the school as a school.

16 So we submit that preventing customers from visiting
 17 the premises is sufficient, and so restrictions on that
 18 are relevant.

19 If it is any comfort, that was the decision that the
 20 Paris Commercial Court reached when a French decree
 21 required restaurants no longer to welcome the public.

22 Now, the other point that Mr Gaisman makes is in
 23 relation to those within category 5, for example us
 24 lawyers, accountants, et cetera, people providing
 25 services.

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1 Now, the fact that the majority of professional
2 people are not continuing to work from their offices
3 but, like all of us, are working from home, using online
4 platforms, demonstrates the point, we submit, that they
5 are unable to use the premises as they normally would
6 have done. Our working at home may reduce or even
7 eliminate our loss, but that is a question of quantum
8 and not coverage. Otherwise this cover would be totally
9 illusory for professional people. Every insurer would
10 be able to say: the fact that the government has
11 forbidden you from going into work because you can work
12 at home doesn't mean you are unable to use the premises.
13 It doesn't prevent you from visiting the premises, for
14 example to collect papers and so on, so you are able to
15 use the premises.
16 LORD JUSTICE FLAUX: If you are right that even in the case
17 of category 5 businesses there were restrictions
18 imposed, and as I think it was either you or Ms Mulcahy
19 told us yesterday, however one phrases it, the advice,
20 instruction, whatever it is to stay at home and to work
21 from home where possible, and if that is a restriction
22 that has been imposed, then the inability to use the
23 premises must follow from that, mustn't it?
24 MR EDELMAN: Exactly, my Lord, yes.
25 LORD JUSTICE FLAUX: The fact that you might be able to, you

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1 know, in the case of your instructing solicitors, that
2 people are able to go into the office to do photocopying
3 or to pick up papers or whatever, is neither here nor
4 there, because they are all in fact working remotely.
5 MR EDELMAN: But for Mr Gaisman's purposes you are still
6 able to use the premises for something; the
7 photocopying, having papers delivered to you, going
8 backwards and forwards, you are able to use the
9 premises. We submit that this must --
10 LORD JUSTICE FLAUX: Not for the business for which they are
11 intended. Herbert Smith Freehills is not Kall Kwik.
12 MR EDELMAN: Yes, exactly. That is our answer.
13 If you have a restaurant take-away business, you can
14 say: well, you can't use it as a restaurant, you are
15 unable to use it for one of your business purposes.
16 That is sufficient.
17 As I said, it is a question of fact that there is
18 some fundamental difference, and it was illustrated by
19 one of the declinature letters that we referred to,
20 which is that there was a café that also sold cakes to
21 passers by. Obviously they wanted to serve cakes to
22 people who were having tea and other food in the café,
23 but they had cakes which people could pop into and still
24 buy. And because cake is a food, it was something that
25 they were still permitted to sell.

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1 According to Hiscox, there was no inability to use
2 the premises because they could still sell cakes even
3 though they were unable to use it as a café. And that
4 is the point. That is one of the road blocks that the
5 FCA seeks to remove.
6 Then once you get into that, you are then into
7 a question of fact, I quite agree, and we are not asking
8 the court to look at the nuances of it. But just
9 simply, you know, does it have to be total?
10 MR JUSTICE BUTCHER: Is there going to be much of a question
11 of fact there, Mr Edelman? If you are right that, as it
12 were, any professional offices, their usage will have
13 been significantly affected by the restrictions, because
14 of the restrictions posed on the workers, not on the
15 premises, then that will mean that they all
16 potentially --
17 MR EDELMAN: Yes.
18 MR JUSTICE BUTCHER: Won't it? Would there actually then be
19 much of a question of fact available or around?
20 MR EDELMAN: No. Where there may be is if there is
21 a reduction in business because of restrictions, and
22 then there is a question whether there is an element of
23 inability to use or whatever. I am just trying to be
24 fair on insurers, more than anything else. We don't
25 actually see this as very difficult if one applies it

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1 commercially and realistically.
2 LORD JUSTICE FLAUX: I suppose the example of the Chinese
3 take-away, that is essentially a take-away that has two
4 tables there and you can eat in the take-away if you
5 choose to, so it is, you know, 10% of its business or
6 something of that kind, then you would say the intended
7 use of the premises is the Chinese take-away, and there
8 isn't, in that example, a restriction imposed on the
9 intended use of the premises.
10 MR EDELMAN: Well, except for the 10%.
11 LORD JUSTICE FLAUX: Well, that may be where questions of
12 fact come into it. I follow your point when you say,
13 well, if you are right about this, then these issues are
14 really issues of quantification of loss as opposed to --
15 MR EDELMAN: Yes.
16 LORD JUSTICE FLAUX: -- threshold issues of cover.
17 MR EDELMAN: Exactly. But that 10% who do sit there and
18 eat, that might be very important to the bottom line of
19 the Chinese take-away.
20 LORD JUSTICE FLAUX: I understand that point.
21 MR EDELMAN: So it is not to be dismissed, even that 10%.
22 LORD JUSTICE FLAUX: No.
23 MR EDELMAN: If you can't use it, and I would say even that
24 10% would be an inability to use the premises for one of
25 your activities, and that is sufficient. It doesn't

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1 have to be an inability to use for every single
2 activity . If you are unable to use it for one defined
3 separable activity , then that is sufficient . That is
4 where the question of fact may come in as to whether it
5 is really that they are all separate activities or it is
6 all one activity and you are just doing a bit less of
7 it .

8 LORD JUSTICE FLAUX: Yes.

9 MR EDELMAN: The next topic is the same sort of issue,
10 because the next topic is interruption of your activity .
11 Because, again, it is interruption of your activities ,
12 in the clause if we go back to {B/6/41}, because Hiscox
13 argues that a restriction in flow is not enough; a total
14 cessation or stop is required .

15 The difference between the parties is that Hiscox,
16 we say extraordinarily , argues that cessation must be of
17 all business activities and not merely some operational
18 part of them. He has not really answered that --

19 LORD JUSTICE FLAUX: That can't be right in relation to some
20 of these heads of cover. If you take the example of
21 specified customers "ensure damage arising at the
22 premises of any specified customer".

23 MR EDELMAN: Right.

24 LORD JUSTICE FLAUX: So if the business has got 10 specified
25 customers, one of whom has damages at his premises, so

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1 you can only deal with nine of them, then unless
2 "interruption to your activities " means disruption as
3 opposed to complete cessation , that cover is completely
4 meaningless.

5 MR EDELMAN: And let's take a case that we cited. Even
6 under the primary cover, the most important one of the
7 lot , insured damage to property, if you have five
8 production lines and three of them are damaged by
9 a flood, fire , whatever, no business interruption
10 indemnity while those three production lines are out of
11 action because you have still got the other two, your
12 business is still going. That really cannot have been
13 what this was intended to do.

14 Now, Mr Gaisman may say we use the word
15 "interruption " and not "interference ", and there may be
16 greater flexibility with the word "interference ", we
17 don't dispute that, but he is taking the word
18 "interruption " much too far. He is right maybe that
19 there has to be some sort of cessation of normal
20 operational activity , but what is left over after that
21 doesn't have to be nothing. We would say, for example,
22 it would mean that if normally you would have
23 20 customers in every half an hour, but due to social
24 distancing requirements you had to have people queuing
25 up outside and you could only take in three or four

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1 customers per half an hour, your normal activities have
2 been interrupted . Your normal way of doing business is
3 simply at an end. You have got to invent a whole new
4 way of doing business , people queuing up outside , lines
5 in the store to keep people apart , maximum number of
6 people in the store at any one time, and you are just
7 having to devise a whole new method of operation.

8 But my Lords don't have to decide that factual
9 question . What we need to know the answer to is whether
10 "interruption " has the extreme meaning for which
11 Mr Gaisman contends.

12 We would say a relevant cessation can involve any
13 aspect of the normal operations of the business . One
14 production line going down. One sales channel being
15 lost . My Lords have seen it is suppliers and customers.

16 Whilst, as I said, we accept that "interference " is
17 a marginally wider term, it would include merely making
18 an operation more expensive than normal, a little bit
19 more difficult than normal, and it will be a question of
20 degree as to why that difference or difficulty is mere
21 interference or is so extreme that you can say there has
22 been an interruption of normal activity , normal activity
23 has ceased.

24 But we have all been into shops, for example, if we
25 have had to buy necessities , or a pharmacy, and seen

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1 that life inside is not normal. It is wholly abnormal,
2 and the shops have had to devise fundamentally different
3 ways of operating .

4 So we would say that it is potentially -- I only say
5 "potentially ", because it is a question of fact --
6 satisfied by closure of the premises in whole or in
7 part, restrictions on the modes of business that can be
8 carried on, an inability to deal with customers or
9 a material element of the customer base. And I would
10 invite Hiscox perhaps to reflect on the extremity of the
11 position they have adopted, because if there is this
12 restriction on their cover through the word
13 "interruption ", it really undermines the commercial
14 purpose of it , and one wonders what cover it actually
15 provides for any category 5 businesses , because they
16 could never suffer an interruption , as Hiscox would have
17 it , because some work could always be done from another
18 location . That is the nature of a service industry .

19 We pray in aid the reference that Lord Justice Rix
20 made in The Silver Cloud to "operational impact". He
21 was talking about both interruption and interference ,
22 but that is what one has to focus on, we submit, the
23 practical effects on the business of the restrictions ,
24 what are its practical effects . And that would include
25 partial cessation of the normal operations .

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1 Now just one final point on this topic. I think
2 it is final, it may be. When people say "final" they
3 always mean there is about three more, and I think that
4 is probably true for me as well.

5 If I can just invite your attention to what
6 Mr Gaisman says about some authorities at {1/13/95}. He
7 refers to two Canadian cases there. The first case.
8 No, sorry, it is {1/13/96}. Again, the copy I have been
9 working on, the layout has been changed because the
10 reference has been added. I am terribly sorry, I had to
11 work on the first version.

12 The first case, EFP Holdings you will see there,
13 refers to in the third line of the quotation "a break in
14 the continuity of the business". We don't actually
15 disagree with that, because that is what interruption is
16 all about; it is a break in the continuity of what you
17 have been doing, and it has to be something which is
18 sufficient to amount to a break in continuity.

19 But what has happened, and where presumably Hiscox
20 has got this argument from, is the second case, which in
21 fact we understand is on appeal, is the Le Treport
22 Wedding and Convention v Co-op. It is where the judge
23 there says it looks at the dictionary and decides that
24 it must cease operating. In fact, apart from the fact
25 that it is on appeal, it wasn't necessary for the judge

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1 to reach that conclusion in order to decide the case.

2 What it was about was a hotel that had -- sorry,
3 a venue, I should say, that had suffered damage during
4 a rain storm, and its business was to host wedding
5 receptions and functions at the premises. They decided
6 not to close for repair, but then had a lower level of
7 business than they alleged would otherwise have been the
8 case.

9 As far as I could tell from the report, there was no
10 suggestion that they couldn't have coped with more
11 business or that there was any impediment to them taking
12 the business, but what appears to have happened is that
13 the damage may have caused them to suffer a loss of
14 attraction.

15 Now, I can understand in those circumstances the
16 judge saying: well, you were continuing to do everything
17 you did before in the same way as before, it is just you
18 weren't attracting as much business, and that is not
19 interruption. And that I wouldn't disagree with.

20 So it was unnecessary for the judge to go as far as
21 he did to decide the case, but in any event we submit
22 that insofar as it was necessary for him to go that far,
23 he went too far. He has applied a dictionary definition
24 without regard to the commercial purpose of a policy.
25 Let's say they had --

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1 MR JUSTICE BUTCHER: Mr Edelman, could you just remind me of
2 the page of the Hiscox cover that you were just looking
3 at?

4 MR EDELMAN: Yes, it is {B/6/42}. No {B/6/41} is the
5 interruption.

6 MR JUSTICE BUTCHER: If we get that up.

7 MR EDELMAN: {B/6/41}

8 MR JUSTICE BUTCHER: Because the Hiscox cover has a loss of
9 attraction.

10 MR EDELMAN: Yes.

11 MR JUSTICE BUTCHER: Where that envisages that a shortfall
12 in your expected income for more than two consecutive
13 days will be covered, and that doesn't amount to --
14 well, that does amount to an interruption.

15 MR EDELMAN: Yes, it does. I was just looking at what the
16 judge was saying. But if you look at the context of the
17 Hiscox policy, it obviously is encompassing that. But
18 they would say it looks like that's only -- they would
19 say it is only if it causes a complete cessation of your
20 business.

21 MR JUSTICE BUTCHER: I mean that can't be right, because it
22 says "shortfall".

23 MR EDELMAN: Yes. I am simply addressing the argument that
24 we are confronting. I don't know what the terms were in
25 the other policy. But it's just an outlandish -- we

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1 submit, I am afraid, I don't want to insult Mr Gaisman,
2 but it is an outlandish submission. But they have been
3 declining claims on this basis.

4 LORD JUSTICE FLAUX: The provision that my Lord has just
5 drawn your attention to, on the face of it, if I try and
6 think of an example, if you take the wedding venue and
7 the wedding venue is in the vicinity of a factory which
8 suffers a fire or an explosion, which leads to noxious
9 smells in the area, so people start cancelling their
10 wedding reception so the business suffers a shortfall,
11 it can't be right that what is required is a complete
12 cessation of the business, because otherwise, as my Lord
13 says, it wouldn't be a shortfall, it would be
14 a cessation of all your income.

15 MR EDELMAN: I suppose Mr Gaisman would say a shortfall can
16 be a shortfall down from 100 down to zero.

17 LORD JUSTICE FLAUX: It is not the natural meaning of the
18 word, I wouldn't have thought, but anyway.

19 MR EDELMAN: No, but I am sure that is what Mr Gaisman will
20 probably say. But it is unrealistic, utterly
21 unrealistic in the commercial context.

22 The judge in Le Treport has gone to a dictionary,
23 but one has to construe this in the context in which it
24 appears. Even without that loss of attraction cover his
25 argument didn't make much sense.

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1 One irony about this whole argument is Mr Gaisman
 2 says: ah look, we didn't say "interference" and
 3 everybody else does. So he is referring, which he
 4 criticises us for doing, he is referring to other
 5 policies to construe his. But it doesn't help him.
 6 Can I just check, I think I have probably covered
 7 enough on that.
 8 I will come back to the "solely and directly" in
 9 a moment. I think I only have ten minutes left, but
 10 I will see if I can try and cover the non-damage denial
 11 of access clause, which is in the Hiscox 1 wording.
 12 I think it is on page {B/6/41}, we have it up on the
 13 screen.
 14 This is an alternative round of making a claim under
 15 the Hiscox policies. Our primary one we advance is
 16 public authority; we also advance this one as well:
 17 "An incident occurring during the period of
 18 insurance with a 1-mile radius ... which results in a
 19 denial of access or hindrance in access to the insured
 20 premises, imposed by any civil or statutory authority or
 21 by order of the government ..."
 22 So the first word is "incident", not defined. We
 23 say, given its ordinary natural meaning, which is an
 24 occurrence or an event, it can be small or it can be
 25 large scale, it is not qualified. And provided it, we

1 say, fits in within the required range, the 1 mile
 2 radius, it qualifies. One could say the Great Fire of
 3 London was an incident, occurring on a wide scale, and
 4 if access to the insured's premises in the suburbs was
 5 hindered by authority responses to such an incident, the
 6 policy would provide cover provided that the fire
 7 encroached within 1 mile of the insured's premises. The
 8 fact that there was a preponderance of the fire outside
 9 the 1 mile zone would be irrelevant, because the
 10 incident itself can be local, regional or national,
 11 provided its occurrence encompasses the applicable
 12 radius.
 13 Alternatively, we say that there are incidents, as
 14 required by the clause, by virtue of the occurrence of
 15 COVID within the relevant radius, and that is our
 16 prevalence argument.
 17 There is a variant of this in some of the Hiscox 2
 18 policies. I don't think I need to turn them up, because
 19 they just use the word "vicinity" instead of 1 mile; and
 20 we say that should be construed as areas surrounding or
 21 adjacent to the insured premises in which events that
 22 occur would be reasonably expected to have an impact on
 23 the insured or its business. We take that from
 24 a definition of "vicinity" in RSA4, but we will come to
 25 that when I come to RSA4.

1 Then what does it have to do? It has to result in
 2 a denial of access or hindrance in access to the insured
 3 premises.
 4 The lowest bar is the hindrance in access, so I will
 5 just deal with that. We say regulations 6 and 7 clearly
 6 result in a hindrance to customers' access to the
 7 premises. Only a narrow range of permitted excuses for
 8 accessing many businesses are provided for by the
 9 regulations. Access is therefore hindered by the
 10 regulations.
 11 But the difference between the parties is that
 12 Hiscox argues that access is a physical or legal
 13 inability to access only. They admit that the inability
 14 to use the premises in the disease clause that's -- is
 15 in the absence of -- under the inability of use clause,
 16 they accept that inability of use should be for the
 17 purposes of the business, and we say the same applies to
 18 access. If you are talking about using for the purposes
 19 of the business, your activities, it must be access for
 20 the purposes of your business.
 21 But Hiscox says as long as there is no physical or
 22 legal impediment to access, it wasn't hindered. We say
 23 that government action, about which you have heard, did
 24 hinder access to businesses that were not closed, and it
 25 hindered it by deterring or preventing customers or

1 employees from visiting the premises other than within
 2 the permitted exceptions. We say that is sufficient.
 3 My Lord, "following", I think I have probably dealt
 4 with. I will just review my notes overnight and make
 5 sure there is nothing else I have missed out.
 6 In the five minutes I think I have, can I just deal
 7 with "solely and directly", because that is quite an
 8 important topic. The question is: what does "solely and
 9 directly" apply to?
 10 In its defence, Hiscox correctly identifies that
 11 that the loss must arise solely and directly from an
 12 interruption. And to be a qualifying interruption, the
 13 interruption has to be caused by, looking at the public
 14 authority clause on page {B/6/42}, your inability to use
 15 the premises. That has to follow the occurrence of
 16 a disease.
 17 Now, in its skeleton it produces a newly formulated
 18 case which seems to be suggesting that "solely and
 19 directly" applies at each stage of the causal chain. So
 20 the inability to use has to be solely and directly due
 21 to public authority restrictions, and presumably the
 22 restrictions have to solely and directly follow the
 23 occurrence of disease, whatever that may mean.
 24 We submit that that argument is hopeless. The
 25 drafters included specific words linking the various

1 elements; you have got "caused by", "due to" and
 2 " following ".
 3 The FCA agrees that "solely and directly " is
 4 deliberately narrower than the other causal
 5 restrictions , but each link in the chain has its own
 6 causal connector. So one is not looking to whether any
 7 link in the chain was solely and directly caused by the
 8 other. You are looking at whether you have a qualifying
 9 interruption , applying the causal tests for the purposes
 10 of, for example, the public authority clause there
 11 stipulated , "caused by", "due to", " following ", and if
 12 one does, one then asks whether the loss , the monetary
 13 loss that the insured is claiming, is solely and
 14 directly due to that interruption .
 15 Then, you will see in Mr Gaisman's skeleton there is
 16 a reference to the PMB Australia case. We can address
 17 that in the reply if necessary, but our submission
 18 briefly is that Hiscox is misapplying the case. They
 19 didn't supplant the words "solely and directly " and
 20 replace them for "in consequence of". All they held was
 21 "in consequence of" meant proximate cause in that
 22 context, but not solely and directly .
 23 So we submit that as a matter of plain construction
 24 of the clause, the solely and directly only looks to
 25 whether the loss that has been claimed is solely and

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1 directly caused by a qualifying interruption , and in
 2 order to be a qualifying interruption the qualification
 3 criteria have their own separate causal requirements.
 4 My Lord, I think that is now time up, virtually .
 5 LORD JUSTICE FLAUX: Yes, I think that is probably
 6 sufficient for today, Mr Edelman.
 7 MR EDELMAN: I have nearly finished Hiscox, so I will only
 8 be a short time tomorrow.
 9 LORD JUSTICE FLAUX: All right. So we are 10.00 am tomorrow
 10 morning.
 11 MR EDELMAN: Yes, my Lord.
 12 LORD JUSTICE FLAUX: Very well. We will see you at
 13 10 o'clock tomorrow.
 14 MR EDELMAN: I'm grateful.
 15 (4.20 pm)
 16 (The hearing adjourned until 10.00 am on Wednesday,
 17 22 July 2020)
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