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

Day 2

July 21, 2020

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Housekeeping

LORD JUSTICE FLAUX: Yes, Mr Edelman.

MR EDELMAN: Before I continue with my submissions, can I just raise one point on timing, or two points on timing actually.

LORD JUSTICE FLAUX: Yes, Mr Edelman.

MR EDELMAN: The first is that my recollection was that at the CMC, and particularly in the light of the shorthand breaks, we decided that the court said you would finish at 4.30 rather than 4.15, bearing in mind we lose about 15 minutes for shorthand breaks, and I just wondered whether the court is still able to do that or whether you would prefer to finish at 4.15.

LORD JUSTICE FLAUX: Normally, Mr Edelman, I am perfectly happy to continue until 4.30. It just so happens today I can't, because I have a Zoom meeting with a French judge at 4.30. I need to collect my thoughts before that. So I think we will need to finish by about 4.20 this afternoon. On other days I would have thought, subject to Mr Justice Butcher's views, we could sit until 4.30 with no difficulty at all.

MR EDELMAN: I am grateful.

LORD JUSTICE FLAUX: It may be, I don't know, I am entirely in your hands, maybe we can make up a bit of time by perhaps having ten minutes shorter at lunchtime. It depends what people's commitments are. Ultimately if one is working from home, rather than having to get lunch in Central London, sometimes an hour is quite generous. But on the other hand one also wants a bit of a rest from staring at a screen all day. So we will give you some extra time if we have to.

MR EDELMAN: I am grateful, my Lord.

The other issue arises on the interveners. We were going to see whether we could fit them in our three day allocation, but to be perfectly honest we are struggling with 850 pages of written submissions to answer. We are having to skate through the thing in any event. But it is quite challenging.

So the question is whether the additional half an hour that each of the two interveners require can be accommodated by a 10 o'clock start tomorrow and Thursday. Those would be the only days that an earlier start would be required. Their extra time on the last day hopefully we can accommodate within the normal time period, but if just for tomorrow and Thursday to give that extra half an hour for them. I am not saying that they would be at 10 o'clock tomorrow and Thursday but it

would just give that extra one hour to accommodate them, which would probably take place at the end of Wednesday and Thursday morning. So they would have the last half an hour of Wednesday and the first half an hour of Thursday morning.

LORD JUSTICE FLAUX: Have you discussed this with insurers' counsel?

MR EDELMAN: No, I haven't, my Lord. We only reached a conclusion on it last night but ...

LORD JUSTICE FLAUX: Again, subject to Mr Justice Butcher having different views, I would be quite happy to sit at 10.00 am tomorrow and Thursday, provided that it is not inconveniencing counsel in the case.

So perhaps during the course of the morning, if any of the insurers' counsel have a problem with sitting slightly earlier tomorrow and Thursday they could let my clerk know and we will have to discuss it. But let's not take up any more time on the matter now.

Submissions by MR EDELMAN (continued)

MR EDELMAN: Can I then move on to my last topic which I didn't quite get to yesterday, which is where one has these multi-component triggers, as in the sort of emergency denial of access triggers, where one gets to if one starts cherry-picking which element to treat as the counterfactual. And what is illustrative of the

difficulties that arise if one adopts that approach is the inconsistency between the defendants as to what they select because they can't agree on how to apply the multi-component triggers; they simply engage in reverse engineering to excise from the counterfactual the element that seems to be most preferable to them.

So when they all glibly say you simply remove the insured peril, it demonstrates that that is only scratching the surface of the problem.

Can I give you some illustrations, my Lord. Firstly can we start with the Hiscox skeleton {I/13/106} on the screen, please. It is paragraph 330. In that paragraph what they say is that:

"Hiscox submits that the proper counterfactual under Hiscox 1-4 [whichever one one is considering] if one assumes ... has actually occurred, the existence of COVID in the UK, its impact on the economy and the public confidence and the government measures falling short of mandatory restrictions."

So they remove all national restrictions and then pose the question as to what you have left. Let's be clear on that, they are removing everything whether they are restrictions that affect the premises or not.

MR JUSTICE BUTCHER: But the Hiscox wording actually says restrictions in the trends clause, doesn't it?

MR EDELMAN: Yes. But the point is that they are not removing the national restrictions that apply to the premises. They are saying -- they are recognising realistically that it is all part of one set of restrictions and they are removing all manner of restrictions and leaving the disease.
LORD JUSTICE FLAUX: But the reason for that is explained in the next sentence. They may be right or may be wrong but the reason for that is explained in the last sentence of the paragraph, that the restrictions contained in the regulations are the only aspects of the government response which actually engage their clauses. That is their case.
MR EDELMAN: Yes, that is their case. What I want to show you is how the insurers approach it differently.
LORD JUSTICE FLAUX: I follow the point, Mr Edelman, and we spotted it for ourselves in the mounds of paper we have been asked to read.
I am not discouraging you from making the point but it doesn't come as a surprise.
MR EDELMAN: No. But let me just show you anyway some other examples.
We have then got Amlin at {I/12/160}. It is their paragraph 303.3. They say:
"The only authority action to be reversed is the

defined action by the identified authorities having the effect of preventing access to the premises."
And then they identify which are the relevant bits of the legislation. But they only take out the action that relates to the premises leaving as part of the counterfactual all other restrictions on everything else. So they start dividing up the legislation into what affected the premises and what didn't.
There is similar approach in Arch and Zurich. Let me just take Zurich at {I/19/73}. It is paragraph 174(b). It is (b) at the bottom of the page that you have in front of you {I/19/74}.
LORD JUSTICE FLAUX: Which subparagraph, (c)?
MR EDELMAN: It is (b), my Lord.
LORD JUSTICE FLAUX: Okay.
MR EDELMAN: "The only matter to be reversed out for the purposes of the counterfactual is such government measures as the court finds constituted action ... whereby access to the insured's premises was prevented."
So they carve out again, as with Amlin, only that bit of the legislation which affected the premises. Nothing else.
It rather becomes absurd because then one says why doesn't one just simply say, well, one leaves, if it was a church, one says, well assume that they restricted all

churches except yours. We will take out all churches; it could be all churches except yours; or all restrictions. But we have the variety between the insurers there.
Then on to RSA. We can look at {I/18/16}. Again the numbering may be out because I am afraid I had the bundle before references were added. So I will just check that that is the correct number. It should be ...
LORD JUSTICE FLAUX: This is Leicester.
MR EDELMAN: It is appendix 2, I am sorry. It is in appendix 2. Let me just explain to you -- I can give you the reference. It is appendix 2, paragraph 39. I am afraid bundles were arriving over the weekend while I was trying to prepare, which changed all the page numbers. There we go. No, it is appendix 1, I am afraid. So never mind.
What they say is that you subtract the emergency in the vicinity but not elsewhere. Here we are. {I/18/45}.
So what you do for them is they say you don't subtract -- their clause covers interruption or interference:
"... caused by action or advice from the government due to an emergency likely to endanger life in a vicinity."
So they don't excise the action or advice by the

government. They say you take out the emergency in the vicinity. Once you take out the emergency in the vicinity you have got all the emergencies elsewhere and all the government action elsewhere, and the government action on the property.
Ecclesiastical is {I/12/158}, I hope. It should be paragraph 298. The only matter to be reversed is the access to or use of the premises being prevented where it's occurred -- they say it has occurred for a specified reason. They go on to say at 299:
"Specifically and importantly, "the emergency endangering life" to which the government action which caused prevention, et cetera, was a response is not to be reversed. That is not the [an] insured peril in its own right ... only the access prevention is to be reversed ..."
If one goes back to page 54 in this tab {I/12/54} and paragraph 76, the essence of the peril, here we have the words, "The essence of the [insured] peril is access prevention", et cetera. So they define for their own purposes what the essence of the peril is.
If one goes over to the next page you will see they explain why it is the access peril that needs to be {I/12/55} subtracted.
If one goes forward or back to page {I/12/158}

paragraph 299, once you have seen that, you can see that in 299 they describe the emergency as not an insured peril in its own right; the fourth line of 299.

There is no explanation of how the access peril is to be treated as a peril in its own right or the essence of the peril, rather than being part of a qualification on what interruption or interference is covered.

What you have in these policies is cover for business interruption or interference. In Hiscox's case it just says "interruption". We will come to that.

The policy then goes on to say that interruption or interference in a certain set of circumstances only is covered. And the set of circumstances is a combination of circumstances. What we have here is insurers studiously avoiding the fundamental underlying problem or issue in all of these, setting its circumstance in all of these clauses, which is an emergency or a disease, they ignore that and they say something else is the essence of the peril. Then they define and redefine that.

Our submission is that there is certainly no authority for this process and there is no rational justification for it either.

One can't say that a set of circumstances, which is the set of circumstances in which an interruption or

interference with the business qualifies for indemnity, contains ingredients which can be selected and salami sliced out as being the essence of the peril.

It is the combination. And if one is doing a counterfactual one takes out the entire combination, which includes the emergency and the disease, if it is reference to a disease.

So that is our submission. Rather the inconsistency in the insurers' approach demonstrates the danger and the flaw in trying to identify something in a combination of events which are required as being the so-called essence of the peril or an insured peril in its own right.

Prevention of access in Mr Kealey's example is not an insured peril in its own right because in its own right it isn't a qualifying interruption. It needs to be coupled with all the other factors. They either all come in or they all go out.

My Lords, that was the additional topic that I wanted to cover. I can now hand over to, unless my Lords have any questions on that, Ms Mulcahy, who will address the law.

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

(10.47 am)

Submissions by MS MULCAHY

MS MULCAHY: My Lords, much of the defendants' self-described elementary exposition of the law of causation is in fact common ground, although there is some dispute in particular relating to the treatment of concurrent independent causes and the approach to the "but for" test, which is in dispute, and which I will come to.

But as is so often the case, the issue is less about the principles; it is more about the application of those principles to the facts in question.

As Mr Edelman has explained, it is common ground as to what the nature of a contract of insurance is, that it is an agreement to hold the insured harmless against loss or damage caused by the insured peril. And that is therefore a breach of contract when the occurrence of that loss or damage happens which gives rise to a claim for damages.

The overriding compensatory principle, again dealt with in Endurance Corporate Capital v Sartex Quilts by Lord Justice Leggatt as he then was, is also accepted, that the general object of an award of damages for breach of contract is to put the claimant in the same position, as far as money can do it, as it would have been in had the breach not occurred. If a claimant

cannot show that they are worse off as a result of the breach then it has not had any causative effect.

So that is not in dispute. But what it doesn't answer is the question of against what the insurer is to hold the insured harmless, and how. Simply positing that it is necessary to show that the "insured peril", quote/unquote, caused loss, doesn't again answer the question, as the inconsistency in the defendants' approach to what the insured peril is actually shows, as has just been explored by Mr Edelman.

I am going to start by addressing proximate causation. I am going to tackle that first, even though it is applied in the legal test second. The reason I am doing that is because in the insurance context the cases on proximate cause influence the approach to the "but for" test, which is the main issue between the parties.

Now it is trite law. We can look at it. It is section 55(1) of the Marine Insurance Act, which is at {K/1/27}. I will wait for that to come up on the screen. It makes it clear that, subject to the provisions of the Act, and this is important:

"... and unless the policy otherwise provides the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately

caused by a peril insured against."

So the rule is subject to what the policy actually says, and the language may require something more, or less, or different to a proximate cause. You have seen the dispute between the parties regarding the causative requirement of the word "following", for example.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The approach would also require, and some indeed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

significant reduction in consumer demand.

So they are contending that you reverse out all of the governmental intervention as a result of the disease as well as the disease, even though these are notifiable diseases and so by definition action can be expected.

As I said, the purpose is not to argue this at the moment; it is simply to look at what is being said. You will note the sheer number of alleged concurrent causes and the fact that there is overlap between them. For example, between the national pandemic and the public response to it; the fear of reduction in confidence, et cetera, which was said to be the impact of the pandemic.

So they are said to be interrelated, but they are then asserted to be independent.

Turning now to the law. I will go first of all to look at The Kos which is at {J/115/1} to look at how concurrent proximate causes are dealt with.

This was a case where shipowners -- and I know your Lordships will be familiar with it -- withdrew a chartered vessel for a non-payment of hire. The charterers detained the vessel for 2.64 days discharging the cargo that they had loaded prior to the withdrawal, and the owners claimed remuneration and expenses for those 2.64 days as having resulted from the charterers

orders to load.

That raised an issue of causation as to whether the withdrawal of the vessel, which necessitated unloading, was an independent cause of the owners' loss breaking the chain of causation between the order to load the cargo and the detention of the vessel for unloading.

The owners' appeal to the Supreme Court was allowed and the owners were entitled to recover their remuneration and expenses for that period.

Their Lordships all agreed as to the result, but Lord Mance dissented as to the reasons. We can see if we go to paragraph 8 it concerned the scope of an indemnity. I have a different version of the thing at the moment. It should be at {J/115/10} paragraphs 70-75. It is page 10 of this document.

Let me just make the points because I know your Lordships will be familiar with the case. The question was about an indemnity and it was a broad indemnity against the consequences of charterers' orders.

The question was one of construction of that indemnity. There we are, it is page 10.

Lord Sumption at paragraph 12, which should be over the next page, {J/115/11} said:

"The real question [towards the bottom, just below G] is whether the charterers' order was an effective

cause of the owner having to bear a risk or costs of a kind which he had not contractually agreed to bear."

He goes on in that paragraph to recite the trite law, that "but for" is necessary but not sufficient for a proximate cause.

Now although this was an interdependent cause case there was no consideration of the independent concurrent "but for".

At paragraph 13 we have the answer:

"For present purposes the relevant order of the charterers was the order to load the parcel of cargo which was on board the vessel when it was withdrawn. In my judgment the loss claimed by owners was the consequences of that order. The need to discharge the cargo in the owners' time arose from the combination of two factors: namely that the cargo had been loaded, and that the purpose for which it had been loaded had come to an end with the termination of the charterparty. In other words, the cargo which charterers had ordered the vessel to load was still on board when the charterparty came to an end. On any realistic view that was because the charterers had put it there. The analysis would have been exactly the same if the charterparty had come to an end for any other reason with cargo still on board, for example, by frustration or expiry at the end

of the contractual term."

Lord Clarke then addresses this at paragraphs 70 to 75 at page 28 {J/115/28} of this document.

Perhaps I could just ask your Lordships to have a read of that, but particularly to look at paragraphs 73 and 74, if we could just go back a page to start at paragraph 70, rather than read it out to you. (Pause)

LORD JUSTICE FLAUX: Can we go on to the next page, please?

(Pause)

(11.09 am)

MS MULCAHY: So what is summarised there is that the authorities don't contain much discussion of the circumstances in which there can be two effective causes, but it is accepted that two effective causes can in principle exist by reference to Wayne Tank and The Miss Jay Jay and Midland Mainline.

Then at paragraph 74 reference to The Miss Jay Jay principle that where there are two effective causes, neither of which is excluded but only one of which is insured, the insurers are liable, and that the question of proximate cause has to be determined by a broad common sense view of the whole position, and that by "proximate" is meant proximate in efficiency.

You have seen the reference to the causes needing to be equal or nearly equal in efficiency. It is fair to

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

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

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

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

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

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

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

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

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

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

He says:

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

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

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

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

Then there is a citation from Halsbury's Laws:

"' It seems that there may be more than one proximate (in the sense of effective or directive) cause of a loss . If one of these causes is insured against under the policy and none of the others is expressly excluded from the policy ; the assured will be entitled to recover .'

"No authority has been cited to us, which leads me to suppose that this passage incorrectly states the relevant law relating to marine insurance policies and, in my judgment, it incorporates the principle applicable to the present case."

Then it is stated that:

"The loss is treated as proximately caused by the cause insured against , notwithstanding the presence of a concurrent cause not covered by the policy ."

Then we see the same over the page at the top of the next page:

"I therefore conclude that the loss in the present case is properly to be treated as having been proximately caused by a peril insured against (the impact of adverse weather conditions), even though the faulty design and construction of the yacht may have been of equal efficiency in bringing about the damage."

So cover isn't lost where this another concurrent

cause of the loss , it is enough if the insured peril is a cause of the loss , and non-excluded causes are not treated as excluded .

The position is different , as we know, and we don't need to go to it but per Wayne Tank, if one of the causes is insured and the other is excluded , the position is different . The parties are taken to have intended that the cover do not respond. Other jurisdictions have taken a different approach to Wayne Tank but that is the position in this country, subject to it being revisited .

That is the position in relation to insurance in relation to concurrent causes. Just to look at the point about interdependency and independency, we fully accept that the causes were interdependent in Miss Jay Jay and in Wayne Tank for that matter. They were both necessary , neither were sufficient on their own. And it was enough if the insured peril was part of the combination that caused the loss , for the purposes of Miss Jay Jay if it was uninsured, if there was another uninsured cause it didn't prevent cover , if there was another excluded cause it did .

But as we have seen, the legal proposition wasn't expressed in terms of only applying to interdependent causes in Miss Jay Jay. The passage from Halsbury's

Laws doesn't refer to it having to be only interdependent causes. We won't go back to it , but in The Kos, at paragraph 74, the principle is again expressed in terms; where there are two effective causes, neither of which is excluded but only one of which is insured , the insurers are liable . So they are put in general terms.

Turning to independent causes, and I will come back to this issue when we get to Orient-Express, but I would like to go to The B Atlantic case, it is {J/130/10}, and pick up a dictum of Lord Justice Christopher Clarke in that case. It is at paragraph 26, where he states , having discussed the principle of concurrent causes:

" Alternatively , both A and B may both be adjudged to be proximate causes. If so, it may be that in order for the event in question to have happened it was necessary for both A and B to occur."

So that would be interdependent causes:

"Or it may be that the event would have happened if either A or B had occurred, but on the facts both of them can be said to have caused it ."

That third sentence makes it clear he is considering independent concurrent causes expressly , although the situation did not in fact arise on the facts of that case. And our position is that there is no rule that an

insured cannot recover in respect of concurrent independent causes. It is all a question of construction and policy intention . If there is some completely unrelated independent concurrent cause it may well be right that an insured cannot recover on the basis that the loss would have occurred in any event, and the claimant cannot show that it is worse off as a result of the insured cause. But if there is a relationship or a commonality between the concurrent causes such that , per Lord Justice Christopher Clarke, both of them can be said to have caused it , the position is different , and it doesn't offend the compensatory principle for there to be recovery .

Just in this regard , can I take you, again you may well be familiar with this case already but because it relates to independent causes I would like to refer you to the case of McCarthy v St Paul International Insurance Company. It is a decision of the Federal Court of Australia and it is at {J/100/1}. Whilst that is coming up, if I just explain the background to the case. It was a situation where a mortgage lending firm of solicitors faced 36 claims arising out of advice recommending investments to clients , and a large part but not all of the claims related to dishonest actions of an employee and it claimed under its defence costs

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

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

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

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

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

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

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

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

Then after surveying various cases on exclusions,

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

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

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

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

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

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

LORD JUSTICE FLAUX: Yes.

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

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

MS MULCAHY: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

it was the flood to core 2 in a block of flats, was caused by what he said were two equally efficacious causes. There was a closed isolation valve and the wrong position of the non-return valve which prevented a water surge arrester from operating. They were independent causes and each was a "but for" cause. If we look at paragraphs 190 to 193 on page 49 {J/119/49}, at paragraph 190, the authorities -- and I am going to go back to them in a moment. In fact, let's do that now, at 173 to 175. It is {J/119/42} onwards. Perhaps we can put up 43 and 44 on the screen. We have the discussion of the Kuwait Airways test. I think we have gone on to page 43. Then at 174:

"One of the main deficiencies with the straightforward 'but for' test arises where there are two concurrent independent causes of the loss."

Then we have a reference to Mr Justice Hamblen as he then was in Orient-Express, where he cited that there can be exceptions to the "but for" test. Then at 175:

"I consider this approach is also borne out by the textbooks."

Referring to Clerk & Lindsell:

"Where there are two simultaneous independent events, each of which would have been sufficient to cause the damage, the 'but for' test produces the

patently absurd conclusion that neither was the cause. The only sensible solution here is to say that both cause the damage."

At 176:

"A distinction should be drawn between cases where there are two concurrent independent causes of the loss and those cases where there are two co-operating causes."

Then he gives some examples.

Then going back to page 49, it was argued that those cases meant that both of the causes were causes of equal efficiency. And Mr Stansfield QC maintained:

"... this is one of those rare cases where the 'but for' test would lead to the patently absurd conclusion that neither was the cause, and that instead the court should conclude that both ... were equal causes.

"As part of HSE's alternative submissions, Mr Hargreaves QC also argued the same thing: that [they] were causes of equal efficiency."

Then at 192:

"It seems to me that, on this central issue of causation, Mr Stansfield's primary submission [and the alternative submission of everybody else] is to be preferred. On any sensible analysis of what happened here, there were two equally efficacious causes of the

flooding. There were two obstructions that caused the vacuum and prevented the surge arrester in work working. As a matter of common sense, it simply cannot matter that it was the closed IV which might be said to have been the proximate cause of the vacuum, and the NRV which might equally be said to have been the proximate cause of the disabling of the surge arrestor. They both cause the vacuum; they both caused the surge arrestor not to work. They were there equally efficacious causes ..."

Then he says:

"Accordingly, based on this analysis, I depart from the 'but for' best, but only to adopt the well-known alternative approach set out in the authorities [which he had already referred to]. I conclude that the liability issues must be resolved on the basis that there were two equally efficacious causes of the flooding ..."

That is a situation where there were independent causes and each was a "but for" cause, and the contractor was held -- he basically, as he said, departed from the "but for" test, adopting the approach that you regard them both as causes. There was an appeal in this case but this issue isn't affected by the appeal.

The defendants say again this is a two wrongdoers situation, but nonetheless it is a situation occurring in contract where the "but for" test has been adapted in order to accommodate causation as being both causes.

MR JUSTICE BUTCHER: Mr Justice Coulson there uses the language of proximate causation.

MS MULCAHY: He does.

MR JUSTICE BUTCHER: He uses it, as it were, in a simply contractual situation.

MS MULCAHY: Yes, he does, with only two causes as well.

What I am trying to do at the moment is to show you in the case law where it has become necessary to take an approach to the "but for" test that doesn't simply apply it to a single cause. As I said, multiple wrongdoers, whether in tort or contract, is one situation, because it produces the result otherwise that there is no cause of the loss, and yet the court regards it as appropriate for there to be a finding that both causes should be taken into account.

There is a further situation which is conceded by the defendants, and it is paragraph 56.7 of their skeleton, it is {I/6/49}. They say that if you had two concurrent independent causes that were each separately insured, it would be absurd to hold that neither insurance responded. This would justify, as they put

it, a departure from the "but for" test.

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

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

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

My Lords, I imagine that that may be a convenient

moment to have a shorthand break.

LORD JUSTICE FLAUX: Yes.

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

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

MS MULCAHY: Thank you.

(11.48 am)

(Short break)

(11.55 am)

LORD JUSTICE FLAUX: Right, if you are ready.

MS MULCAHY: Yes, my Lord.

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

against the loss insured.

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

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

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

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

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

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

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

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

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

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

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

(Pause)

Again, rather than read them to you, may I just ask your Lordships to have a brief look at 26 through to 28.

(Pause)

LORD JUSTICE FLAUX: Yes.

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

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

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

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

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

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

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

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

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

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

the issues of principle which we have to decide.
MS MULCAHY: It matters --
LORD JUSTICE FLAUX: Either you are right or you are wrong as to your case on causation, and if you are wrong then the insurers are right.
MS MULCAHY: It matters in a practical sense, because it can be said that if the burden is on the insured to disprove all other possible causes of the loss, as advanced by the insurer, that it would be incumbent on them when making a claim, along with the financial information submitted, to have to submit, for example, academic papers at their own cost as to the impact of disease on consumer behaviour or the economy, with or without government intervention, on the responses of governments to diseases where a large island of immunity is found, or consumer behaviour in response to differential levels of disease in different locations, or else have their claim rejected.

So the question is, and bearing in mind these can be very low sub-limits of cover, what is the burden on the insured to have to prove?

I mean the defendants say even if the burden is on them, discharging it will be easy, and they rely on the experience of Sweden, where they say the fact is that Swedish businesses have incurred losses on a comparable

scale to those seen in the UK, despite the absence of restrictions like those in the UK.

It is not necessary to address the evidence in Sweden in any detail, but what is being put forward as a fact is in fact a mere submission. The only fact which is agreed is that many businesses in Sweden may have experienced business or trading losses, notwithstanding the absence of comparable measures. And Sweden is of course a different country, a different government, it has a constitution that doesn't entitle its government to declare a state of emergency in peace time.

I think the importance of this is just being precise about the question. What are the defendants actually saying? Are they saying that but for the government action there would have been interruption? Are they really saying that but for being closed for three months you would still have been closed? Or are they saying that but for the interruption there would still have been some loss? Because that would be a quantification, not a cover point, you know, in relation to how much loss would have occurred in any event. And the position isn't clear.

We say if it is going to be argued that the loss in any given case would have been solely caused by an alleged concurrent cause, it is for the insurers to

argue and to put forward evidence in relation to that. If they say something else has caused it, it is for them to prove it.

That is as far as it goes, but it just is important to raise as an issue you have to decide.

I am going to come now to the Silver Cloud, which we say -- I know you will have read this in advance of the hearing, but it needs careful attention. We say it is the closest case to the present. It is closer than Orient-Express because it relates to a non-property damage trigger, and of course it is at a higher court level than Orient-Express.

For present purposes I will highlight a few points. If we go to {J/90/1} the first instance decision first.

As my Lords know, in this case a luxury cruise operator claimed after the 9/11 terrorist attacks under a BI policy under its A.ii cover, its cover for loss resulting from State Department advisory or similar warning by a competent authority regarding acts of war, armed conflict, terrorist activities (whether actual or threatened) that impact on future customer bookings or necessitate itinerary changes.

The claim arose out of the US State Department warnings that were issued on 12 September and onwards through to the end of 2002. The A.ii cover had

a $5 million limit.

The relevant issue is on page {J/90/2} of the bundle, page 218 of the judgment at the bottom of column 1. It was that the insurers argued, you can see just before the "Held by QBD":

"The insurers ... argued that the loss was not covered by section A.ii of the policy as it had been proximately caused by the attacks on September 11 rather than by the warnings which followed them."

If we go to paragraph 9, especially the first sentence, it is on page {J/90/11}, we see how Mr Justice Tomlinson as he then was dealt with this. He said:

"There can in my judgment be no realistic argument with the proposition that Silversea's business was severely and prejudicially impacted BY the reaction of, principally, Americans but also travellers worldwide to the events of 11 September and to the warnings which followed as to the likelihood of further attacks on 'western', specifically American interests and as to the need to exercise caution both at home and overseas and in particular to avoid when overseas conspicuous displays of western affluence. Although it was actively trying to increase its market share in [Europe] and no doubt elsewhere, it was from the United States that [it]

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

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

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

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

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

These are presumably the sorts of experts that the

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

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

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

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

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

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

MS MULCAHY: Yes.

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

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

the Court of Appeal judgment.

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

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

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

MS MULCAHY: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

LORD JUSTICE FLAUX: Give me a paragraph number again.

MS MULCAHY: Paragraph 99:

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

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

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

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

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

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

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

Towards the bottom:

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

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

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

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

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

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

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

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

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

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

So the question here is the issue --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

because of the other cases in which it is recognised that where you have two causes, one insured and one not insured but not excluded, then there should be cover. That was the point that was being made in argument; it is a passage at the end of 103, where I had submitted the terrorist actions were a necessary pre-condition, actual or threatened, of the warnings within the cover. In other words, that is the point about inextricable connection. But as my Lord put to you --

MS MULCAHY: Yes.

LORD JUSTICE FLAUX: -- it is nonetheless the case that the reasoning, at least part of the reasoning in 104 is based upon the fact that the terrorists' acts were actually covered elsewhere in the policy, because they were an insured event.

MS MULCAHY: I accept that that is --

LORD JUSTICE FLAUX: I'm not sure how much you can really get out of this, to be honest.

MS MULCAHY: That is a fortiori the current situation. But the point I rely upon is that it was held that the cover in A.ii was premised on terrorist activities provided they generate the relevant warnings about them. If they do and those warnings cause loss of income, there is cover.

We would say here the cover is premised on the

emergency or the disease, as well as what may be identified narrowly as the insured peril. For that reason, this is support. Something extra is required, but in this situation provided it can be shown, and to get to cover you have to show A plus B plus C plus D, then this is support for if A plus B plus C plus D, if three of them are uninsured but not excluded, we say that must be taken into account. You don't re-resurrect them as rival causes for the purposes of "but for" and causation. And this is support for the proposition that where you can show it is premised on the underlying cause, you don't subtract that when you are looking at causation.

MR JUSTICE BUTCHER: I see that. Also, you could say that if one is premised on the other, then when the other happens they are, as it were, more likely to become inextricably linked and indistinguishable.

MS MULCAHY: Exactly. That may be different from when you have got something wholly extraneous; that is a different situation. But here one looks at the policy intention and what was intended in terms of the commonality of the relationship. But as I said, here what is being said is, yes, you have to knock down the four dominoes but then you resurrect three of them for the purposes of causation, and you say the loss was

caused by them instead. We would say that is wrong as a matter of principle, and this case is support for making clear that the boundaries of the insured peril need not be the boundaries of what is subtracted for the purposes of the "but for" test or to be treated as a proximate cause. And we say that is a mixed question of fact and law.

The defendants keep well away from most of the statements of Lord Justice Rix in paragraph 104. They fail to explain why the finding that terrorism and warnings were inextricably linked is different to the link between COVID-19 and government action in the present case.

What they say is they rhetorically ask: why has it not been cited more widely? But the fact is the point hasn't arisen in any other case, other than Orient-Express, until now.

My Lords, can I take you now to Orient-Express, which is the key decision relied on by the defendants and which I need to address. Again, I know you will be very familiar with it, and have read it in full in advance of this hearing.

Can I just say first of all about the status of the decision. We acknowledge the eminence of both the tribunal and the judge here, and the criticisms which we

make of the judgment and of the approach are made with due respect, and recognising that the case falls to be revisited in a different context, albeit one that has some analogies. It is highly relevant that Mr Justice Hamblen as he then was recognised that there was a real prospect of success in challenging his decision, by himself granting permission to appeal. The case settled, I believe, the day before that appeal. So this is a first instance judge, that the judge accepted had a real prospect of being wrong as a matter of law.

As Mr Edelman has already mentioned, the decision has attracted academic criticism; the leading book on business interruption insurance, Riley, suggests it was a decision which didn't accord with either insurers or insured's expectations. And although it was fully argued, Mr Justice Hamblen didn't have the benefit of the breadth and depth of the submissions made in the present claim, where a very large number of differently worded policies and examples and arguments are being considered.

My Lords know that this case concerned the effects of Hurricanes Katrina and Rita which caused property damage to the hotel in New Orleans, and the claim was for losses as a result of the hotel being closed for just over two months. And it is {J/106/3}, paragraph 5.

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

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

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

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

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

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

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

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

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

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

It concerned a business interruption property damage

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

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

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

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

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

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

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

Then (a):

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

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

Then the insuring clause:

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

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

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

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

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

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

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

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

And derived support for that from The Silver Cloud.

The judge addressed that at paragraph 32:

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

We say that is wrong, it goes beyond fact:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

completely unrelated. They are related where they are contemplated as a matter of construction of the policy.

So we say in summary the Orient-Express is wrong. It fails sufficiently to take account of the Silver Cloud and the need to construe party intention, where the rival cause is the underlying cause on which the policy trigger is premised; it fails to take account of the need for realistic counterfactuals to give effect to policy intentions; it produces an unintended windfall problem, and it fails to deal with the problem of concurrency as between the property damage clause on the one hand and the LOA/POA clauses on the other.

As I said, much of this comes back to common sense, which we would say is not in conflict with intelligence, as QBE would suggest; it makes no sense to have to go through four sequential steps to get to cover, and once you have gone through all four you reverse up back through three of them and you use only one as the facts against which the counterfactual is to be tested. So you pretend they are not there for causation purposes, by subtracting them, even though they are required for cover purposes.

My Lords, Mr Edelman is going to turn and address the trends clause issue. I am conscious it is 12:55pm, so I will leave it to you and him as to whether to start

on that now, but it may be that he could do five minutes.

LORD JUSTICE FLAUX: It's probably sensible if we break now and Mr Edelman comes back at, shall we say, 5 to 2.

We have had an email from Mr Gaisman, on behalf of the insurers, about your request this morning in relation to the interveners, which I think in principle is accepting that we should sit for the additional two half hours, but on the basis that insurers have an additional two half hours themselves at some point, which I think is how it was put at the last case management conference and it would be difficult to resist.

He also says on behalf of Mr Turner, I think, that could I think it's HIGA go first, because Mr Turner is going to be dealing with their submissions on Thursday and needs to be aware of what their points are, to the extent that they are developed from the skeleton. Again, that seems to me to be a perfectly reasonable request.

If anybody has anything else to say about that, let's come back to it at 1:55pm. All right?

MR EDELMAN: Agreed. 1:55pm.

(12.57 pm)

(The short adjournment)

(1.55 pm)

Submissions by MR EDELMAN

LORD JUSTICE FLAUX: Are you ready, Mr Edelman?

MR EDELMAN: Yes, I am.

My Lord, firstly the order of interveners, as requested by Mr Turner, has been agreed.

LORD JUSTICE FLAUX: Jolly good.

MR EDELMAN: I don't want to be churlish about extra time for the defendants, but having put in 850 pages of written submissions it's difficult to see why they should need extra time. Obviously it is a matter for the court, it is only an hour, but it does reduce yet again our time for responding to what they say, but I am happy to be guided by the court on that.

LORD JUSTICE FLAUX: Unless out of the kindness of our hearts, Mr Edelman, Mr Justice Butcher and I agree to sit for half an hour extra two mornings next week, in which case everybody will have the same amount of time and you won't have any of your reply time reduced.

MR EDELMAN: Yes. If it is only two mornings, perhaps ...

LORD JUSTICE FLAUX: We will see how we go.

MR EDELMAN: One other point, a rider to what Ms Mulcahy was saying. My Lord raised with her facts about interlinking between disease and government action. Of course, the relevant facts on that are all agreed, and

you have that in bundle C, Agreed Facts 1, 2 and 4.

LORD JUSTICE FLAUX: Yes.

MR EDELMAN: My Lords, moving now on to my topic, which is trends clauses.

The headline of the FCA's case is that if it is right about how the causation tests are intended to apply at the primary causation level under these policies, then it would be rather surprising if a trends clause which was dealing merely with quantification of the loss should somehow subvert that causation test. So in a sense, and this may be where we agree with the defendants, but it is the primary causation test which is critical, because that must indicate how the quantification clause was intended to operate; and the quantification clause can't be seen, as I said, as being the knight in shining armour coming charging to the rescue of a failed causation case at the primary level.

Now, in our written submissions we consider each wording separately and we analyse whether or not there are trends clauses and whether they apply to the cover question. It's not part of my submissions at this stage to address that issue, but rather the function of trends clauses more generally. That is going to be the focus of what I hope will be relatively short submissions.

So can I start, my Lords, with an analysis of the

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

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

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

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

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

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

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

But what we have --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

be ridiculous again.

So that, in a simple way of expressing it, is the flaw. And it is with the analysis of the insurance.

MR JUSTICE BUTCHER: I know you say he buttressed that by paragraph 52, but the way in which he really got there was to focus too much on the word "damage" in the trends clause.

MR EDELMAN: Yes. What he does is focuses on the word "damage", takes that literally, then he seems to test it against this argument well, that's leaving out of account the insured peril, and then reaches the wrong judgment about what the insured peril actually is. Because the insured peril was the hurricane, indubitably.

LORD JUSTICE FLAUX: Putting it another way, even if he was right in his analysis up to this point, when he gets to OEH's sixth point he reaches the wrong answer, because the answer should have been: actually, the hurricane was the insured peril and therefore you don't strip it out.

MR EDELMAN: Exactly.

LORD JUSTICE FLAUX: Because he recognises the principle.

He doesn't suggest that OEH's argument was misconceived.

MR EDELMAN: No.

LORD JUSTICE FLAUX: Because you should strip out the insured peril. What he is saying: well, the answer to

it is that that wasn't the insured peril. And he is wrong about that.

MR EDELMAN: Exactly. Yes.

LORD JUSTICE FLAUX: That is your point, yes.

MR EDELMAN: Yes, he is wrong about that.

One then has to go on and say: is Mr Edelman leading us up the garden path, leading us to an answer which has the most ridiculous results? Then one starts asking which has the more ridiculous results. And that is when you get to those American authorities where -- and it is referred to, if we go back to page {J/106/10}. I don't think I need to take you to the detail of it, because he sets out what the decision was, it's in paragraph 50, where the majority in the Prudential case simply aren't prepared to countenance a result which Mr Justice Hamblen's decision permits of the insured -- not just, as in his case, the insured getting nothing under the main insuring provision, but in other circumstances an insured claiming a windfall profit, because that is what was happening in Prudential. The majority said: this cannot -- I accept their reasoning is thin; there is nothing in there that you can look at as a lawyer and say "That legal reasoning convinces me". That is why I am not going to take you to the reasoning in the case. It's not because it's not justifiable, but

it is not going to extend your learning.

LORD JUSTICE FLAUX: What is it, Second Circuit?

MR EDELMAN: Yes, it is Fifth Circuit. Court of Appeal though, Court of Appeal's Fifth Circuit.

LORD JUSTICE FLAUX: Which is the Fifth Circuit, do you know?

MR EDELMAN: I think that was Carolina.

LORD JUSTICE FLAUX: Yes. It is not New York or California, that's for sure.

MR EDELMAN: No, it is not.

The point I want to make about that is that it's in fact Mr Justice Hamblen's result that leads to commercially absurd consequences, because his result, because he preferred the dissenting judge, the dissenting judge would have allowed the windfall profit of being the only place open.

You just take out my damage, the hurricane had happened, I am the only place left standing. Now, you are the only hotel in town left standing. Now assume that actually there hadn't been a lockdown in that local region. Then you are entitled as the insured, according to the insurers, to claim the windfall profits of being the only hotel open in the region. As is every other single hotel. So insurers have to pay each hotel the windfall profits of being the only hotel in town, even

though they have all been flattened by the same hurricane.

Is that the commercially sensible result? Or is the commercially sensible result simply to ignore the hurricane and say: well, you were making a profit of $50,000 a month before, or your turnover was $100,000 a month before, you were shut for two months, we will compensate you as if the hurricane didn't occur, the damage to your property, in particular the hurricane didn't damage your property but we are taking the hurricane out as well, as if business had continued as usual. And isn't that what business interruption insurance is supposed to do?

In my Buncefield example, shouldn't it simply be saying to the warehouse man: how were you doing before the Buncefield explosion? If you can shut for six months, we will compensate you for six months loss of earnings. Not: we will either compensate you for nothing or, if you are in a sort of business where you can claim a windfall, we will compensate you and everybody like you for a windfall.

So in fact his result is the commercially nonsensical, I would submit, of the results. But he was driven to it by an incorrect analysis of what the insured peril actually was.

So reversing Orient-Express would in fact restore sanity, rather than creating mayhem, and restore these policies to function in exactly the way an insured such as the warehouse owner in my Buncefield example would expect them to operate.

LORD JUSTICE FLAUX: I can't now remember, I will see if I can find it, does the judge set out anywhere what the tribunal had said about the transcript?

MR EDELMAN: Yes, he does.

LORD JUSTICE FLAUX: Where is that?

MR EDELMAN: He has got the decision of the tribunal which starts at page 4, paragraph 17 {J/106/4}. That is where it all starts and they set it all out. The answer to the trends clause is at page {J/106/5} on the top of the second column. Having applied the "but for" test for primary causation, they say at the top of the second column, fourth line down:

"But in any event the language of the trends clause is, the tribunal thinks, conclusive. This clause specifically requires the business interruption loss to be assessed by reference to the results which 'but for the damage' (ie the damage to the hotel) would have obtained during the relevant period. It is accordingly irrelevant whether there was a concurrent cause of any such losses."

Now it was argued, it seems, very differently below, not by those who appeared for the claimant, very eminent counsel who appeared for the claimant.

LORD JUSTICE FLAUX: Mr Schaff was parachuted in when the damage was already done.

MR EDELMAN: Exactly, and Ms Sabben-Clare. The damage was already done in all senses.

LORD JUSTICE FLAUX: He had what can only be described as an uphill struggle, as is apparent from the judgment, because it was, after all, a section 69 case and he was met by the fact that a lot of these points hadn't actually been argued.

MR EDELMAN: Exactly.

LORD JUSTICE FLAUX: If you look at what the tribunal says about that, which is really in 20 and 21 of the award, there is another passage towards the end, after they had dealt with the American case, right at the bottom of the right-hand column:

"... the tribunal has no doubt that the policy in the present case permits recovery only for loss caused by the damage to the hotel itself."

It doesn't seem to have been argued, so far as one can see, taking those passages together, the one you drew our attention to and that one, that in effect, in truth, it wasn't a case of two concurrent causes, there

was only one cause.

MR EDELMAN: Yes, absolutely.

LORD JUSTICE FLAUX: The cause was the hurricane, and it was nothing to the point that it had caused damage to everything else in the city, because the answer that should have been reached is that you don't excise the insured peril.

MR EDELMAN: Exactly. What they have done, there is another error in the approach, is to focus on the word "damage", because they are quite right it only says "damage" and it doesn't say "the cause of the damage", but what does it mean when it says "special circumstance"? All you will see in many of these policies, I don't think many or any of them use "special" but I am not relying on that, they use "circumstance". What is the sort of circumstance that this clause is contemplating? Does that circumstance encompass the peril against which there is insurance? I will use that rather than "insured peril" to avoid the confusion about whether it is all risks or defined peril cover. The peril against which there is insurance, which caused the damage. That is the simple point.

Although they did argue that case, the meaning of "circumstance" is argued in Orient-Express by Mr Schaff, it doesn't appear to have been argued below, it is

argued by Mr Schaff but is answered in the wrong way, because of the wrong definition of the peril.

That means that when one is approaching all these trends clauses, one is excluding the cause of the damage.

Now that also has -- and if one identifies that point from the trends clause, that also has a sort of cross-fertilisation point backwards. Because if that is the premise of the trends clause, should the primary causation argument on business interruption losses, shouldn't that operate in the same way?

I have said one would expect the trends clause to follow causation. So I have said, well, you know, if you are against us on causation then you might well be against me on the trends clause because you have excised for all business interruption purposes the insured peril.

But if the trends clause is only adjusting quantum by reference to things other than the cause of the loss, then you would not expect the yes or no answer to be answered by having a counterfactual which excludes all or part or any part of the cause of the loss.

So it supports the argument we have been making earlier, that when you have a composite clause, as we do in these cases, you don't cherry-pick or salami slice

the causes; and that would be inconsistent with both what the trends clause is doing and what, therefore, one is anticipating the causation test to be doing as well. So it is a bit of a bootstraps argument I know, but it does --

MR JUSTICE BUTCHER: I must say I am less convinced by that bit, Mr Edelman. I am not sure you read back very convincingly.

MR EDELMAN: All I would say is that if I am right about the trends clause, it would be surprising if one was quantifying the loss on a different basis from that on which one was assessing whether it was payable at all.

MR JUSTICE BUTCHER: No, I agree with that, but that is really your first argument, isn't it?

MR EDELMAN: It is. But if you are with me -- putting that argument aside, the primary causation argument aside, if you are with me that the analysis of the trends clause is incorrect and, sorry to use the phrase, it does what it says on the tin, it's all about the ordinary vicissitudes of life, extraneous factors, the sort of Jobling type thing, which the law has always regarded as an intervening factor which must be taken into account, the ordinary vicissitudes of life, if that is what it is about, if that is what you are doing at quantification stage, shouldn't that be consistent throughout the

application of the business interruption cover? Should quantification be involving some different principle from the principle that is engaged with primary causation? I appreciate they are different creatures, but they are aiming at the same result; it is one overall exercise.

That is why I submit that there is some relevance to the primary cause as to how trends clauses operate.

That means that you do ring-fence your A plus B plus C plus D and you take all of that out, because it is not a qualifying circumstance for the purposes of the trends clause. It is looking at things that are extraneous to what it is that has, in those circumstances, combined to cause the loss.

So you take all of those out for the trends clause. I suppose another way of expressing my point is that if you are taking it out for the trends clause, and that is the obvious and logical thing to do, and that is what the trends clause is contemplating you will do, because it's not a relevant circumstance, then why shouldn't you be doing that too for the purposes of the primary causation test? Why should the two be different?

So the interruption, the primary causation test is asking: but for anything extraneous, is there anything extraneous outside the elements that are in the insuring

clause which would have caused your interruption anyway?

LORD JUSTICE FLAUX: The classic example, I suppose, it comes in somewhere in your skeleton I think, is the pub that is forced to close on 20 March, but in fact was going to close for the entire month of April in order to conduct refurbishment.

MR EDELMAN: Exactly, yes. Precisely. Or the factory that has to close down. It may be that a factory is not a good example, because people have to work there. But some other peril, if there was some peril affecting the factory and there was a fire, let's say a fire affecting the factory is a better example, and they had a planned maintenance shut down anyway. As long as they can do the maintenance, if it's some part of the building which means it is not safe to go in but someone can go in and still maintain the machinery, and so they have their one week out for the machinery to be maintained at the same time that the building is being repaired, they are entitled to say: well, there was this extraneous thing, you wouldn't have been producing that week anyway; it's nothing to do with the fire.

That is that sort of situation, and it covers it. My Lord is absolutely right, the pub that would have been closed, they had planned building works, renovation works, it would be a fraud on the insurance for them to

say: well, we will have it for that entire period, even though we were going to be shut for a month anyway.

That is what causation is about; "but for" the government's closure order was there some extraneous reason for which you would have been closed anyway? And it is the same test under the trends clause, and that's not surprising, that is what one would expect.

When one goes to the clauses that one sees in this case, one sees that there are many with reference to trends, where they all talk about trend-adjusted. And if one is asking the reasonable reader -- let's take one example, let's go to QBE, {B/13/22}. Let me just make sure. I have two references and I want to check that I have got the right one. Page 22 anyway, if we start there.

LORD JUSTICE FLAUX: That is the VAT clause.

MR EDELMAN: No. Can I go to -- maybe 105 is what I am after. Actually, it is 27, sorry. I have completely written down the wrong number, which is ...

LORD JUSTICE FLAUX: Yes. {B/13/27}

MR EDELMAN: That is the main insuring clause:

"We will indemnify you in accordance with each item of business interruption insurance described below ... resulting directly from damage to property ..."

Then you get the usual mechanism: insurable gross

profit; rate of gross profit turnover; fall short of standard turnover; gross fees.

Over the next page you have: gross revenue; increased cost of working.

If one then goes forward just for an example to page {B/13/102} and this is true for all the revenue figures, it says "Standard gross revenue", 23.97, "Trend Adjusted". And you'll see "Standard turnover", you will see it says again "Trend Adjusted", which is a defined term which you will find on page {B/13/105}. It is 23.117:

"Trend Adjusted means adjustments will be made to figures as may be necessary to provide for the trend of the business and for variations in or circumstances affecting the business either before or after the damage or which would have affected the business had the damage not occurred, so that the figures thus adjusted will represent as nearly as may be reasonably practicable [note the words 'as may be reasonably practicable'] the results which but for the damage would have been obtained during the relative period after the damage."

Just looking at that to the reasonable reader, this is not a reasonable expectation of the policyholder point, this is just the reasonable reader, all of that smacks of ordinary accounting adjustments, things that

would have happened to the business anyway. And when it says "but for the damage", what does it mean, and what are "circumstances affecting the business"?

In our submission, it flies in the face of what this is informing you of to suggest that the circumstances can include any part of what was contemplated by the insuring provision.

LORD JUSTICE FLAUX: Well, in a sense, if one just focuses on the words "either before or after the damage", those can only be matters which have got nothing to do with the damage, by definition.

MR EDELMAN: Exactly, yes.

LORD JUSTICE FLAUX: The fact that it goes on to say "or which would have affected the business had the damage not occurred" doesn't suggest that you are then focusing on some broader range of circumstances but it's the same set of circumstances, isn't it? I mean, in my example of the pub, if the pub had already -- well, maybe that isn't a good example. I am trying to think of what "either before or after the damage" would cover, in an example like the pub or the restaurant or whatever.

MR EDELMAN: The classic example of a restaurant would be the head chef had already given in his notice.

LORD JUSTICE FLAUX: I see, yes.

MR EDELMAN: He had already given in his notice but he was

working out his notice when the fire happened, and then the insured presents to the insurer his turnover figures for the period up to the fire and says: look how well I was doing. But there had been a circumstance before the fire, the chef that was the main attraction, his reputation had spread far and wide, had just been poached by a Michelin star restaurant.

LORD JUSTICE FLAUX: Yes, I follow.

MR EDELMAN: And afterwards, the day after the chef gives in his notice, he says "I'm terribly sorry to let you down at this terrible moment, but I was always going to go, I had already been negotiating and I was going to go anyway". So the insurers are entitled to say: the minute the people heard about the fact that your head chef was going, your turnover would have decreased. Your past figures, in those circumstances, are no reliable guide to what your position would have been but for the fire.

If I am right about that, then you have to excise from the counterfactual, under the trends clause and I would say it follows on the main causation test, what it is that is associated with what is insured.

I have to put it that vaguely because we don't have, the insurers say -- we have put our arguments in writing, we may not develop them orally, I think they

are sufficiently in writing as to why we say clauses which only refer to damage don't apply, but let's assume they do for the sake of this argument. One puts something in, and what the defendants want to put in, for example, is they say: let's put in -- and one of them puts it in explicitly, Hiscox says "but for the restriction" and they say: Aha, but for the restriction you would have still had all the other ingredients of the clause. You would have still had, in Hiscox, the occurrence of the disease. So that goes out.

But what is the restriction for? What is the restriction referring to? Is it referring, just like this, to the damage, and you can carve out what causes the restriction? Or when it refers to the restriction is it actually just identifying, as it were, what the immediate thing is?

MR JUSTICE BUTCHER: If you are right about damage, and "damage" is a shorthand for the insured event causing the damage, then you are probably going to be right about restriction as well, that it's a shorthand as well.

LORD JUSTICE FLAUX: Damage caused by a peril covered by the policy or whatever.

MR EDELMAN: Yes. One can get there that way or just say that when one is looking at trend of the business

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

So there are two ways of construing the clause.

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

MR EDELMAN: Yes.

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

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

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

disease.

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

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

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

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

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

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

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

LORD JUSTICE FLAUX: It's a short point.

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

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

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

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

Once you have got all the ingredients, you are

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

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

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

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

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

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

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

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

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

This illustrates, in our submission, the point that

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

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

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

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

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

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

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

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

MR EDELMAN: Yes. I agree.

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

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

I would add to that is that one has to take into account not just what is explicit in the clause, but what is implicit within it, what sort of situation it is contemplating. So it has to be realistic, is the qualification I would apply to that.

So if the clause is obviously contemplating a certain type of situation, one has to be realistic about what that is actually contemplating.

I am applying that to my Lord's example of a 25-mile disease clause. What is it contemplating? It is contemplating a notifiable disease which has epidemic capacity. So does one just look to the insured peril and say: ah well, it is only disease within 25 miles, so that is all I am going to excise, and there is disease outside the 25 miles so I take that into account as a circumstance? Or is this actually contemplating, potentially, not only but in its range of contemplation, an epidemic disease which may affect, which may occur also within the 25-mile area? And if it is contemplating an epidemic disease, then you don't take the epidemic disease out. I think that is the point where I would part -- I don't know whether that was what my Lord was getting at, but that is where I would say you have to be careful with these very esoteric insured perils. It is much easier with much simpler ones.

MR JUSTICE BUTCHER: In fact, Mr Edelman, I was more thinking about the multi-component type clause, but I see what you say about the disease clauses.

MR EDELMAN: Yes. Multi-component, yes, but a lot of those have as their original triggering cause something like an emergency likely to endanger life. That is going to cover -- once you take the "emergency" out, you haven't got COVID. So I am fine with that. You know, there is something else out there like, you know, you were going to have building works anyway, then I am content with it.

My Lord, I think I have probably more than enough on trends clauses, unless I get any messages telling me that I have left something out, but we can always pick something up later if necessary.

I was now going to move on to Hiscox. I am keeping an eye on the time for the shorthand writers, but would my Lords please alert me if I overrun.

We now move on to the individual policies. Can I just preface my remarks with this, I have probably said this before but it is worth repeating. When we come to the policies, there is a lot in writing from both parties, and in their own individual ways they raise very confined issues of construction.

The causation is a much more fundamental issue,

which is why we spent a significant amount of time on it, but the policies say what they say or don't say what they don't say, and my Lords have the benefit of written submissions. So if we take things at a bit of a canter, I hope my Lords will understand that. It is going to be impossible for us to address every single example and illustration that the insurers have given, but we hope in our submissions to cover the principal issues that have been raised.

If we can start with the Hiscox wordings. I am going to address first the public authority clause, firstly in the form in Hiscox 1-3. You will find that at {B/6/42}.

LORD JUSTICE FLAUX: That's not right.

MR EDELMAN: Obviously not. Let me see what ...

LORD JUSTICE FLAUX: We have got it now, Mr Edelman.

MR EDELMAN: I was right.

LORD JUSTICE FLAUX: You were right. Okay.

MR EDELMAN: I was just beginning to get into a state of more than mild panic that all my policy references would be wrong, but ...

This is a form of words which you will see the public authority clause in the middle of the page, 13:

"Your inability to use the insured premises due to restrictions imposed by a public authority during the

period of insurance following ...

"(b) an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority."

The wording is the same in Hiscox 1, 2 and 3. It is the same in 4, subject to the addition of the words "within 1 mile of the premises". So what I am going to do is deal with all the common 1 to 4 issues first and then I will deal with the 1 mile issue afterwards.

Just before I do that, I should actually show you on page {B/6/41}, the previous page, that the preamble to this is "solely and directly from an interruption to your activities", and the words "solely and directly" and the significance of "your activities" will also feature in the submissions.

Going back to {B/6/42}, you have seen that "solely and directly" and "activities" element in the preamble. We then have got the words that are causing issues between the parties: "inability to use"; "restrictions imposed"; and "occurrence". Fortunately, there is no dispute about "public authority", so that is one to tick off the list.

Here we say this is a classic case where the insured peril, if one wants to describe it as that, is the combination of all these events.

So firstly, logically, we start with subparagraph (b) "an occurrence". I will come back to the other bits, I'm not missing them out, but it seemed to be a logical place to start. "An occurrence"; no vicinity limit on that. But Hiscox says that there has to be some requirement of locality. One has to read in a requirement of locality into that, even though it doesn't say anything about where the occurrence has to be. And we say that the required nexus is with the inability to use the insured premises.

MR JUSTICE BUTCHER: I think you are right, Mr Edelman. I didn't understand Hiscox, or I don't recall that Hiscox said that the vicinity requirement is made out by the reference to "an outbreak of which must be notified to the local authority".

MR EDELMAN: No, it is the occurrence.

MR JUSTICE BUTCHER: Because "an outbreak of which must be notified to the local authority" is just identifying the type of disease, is that right?

MR EDELMAN: Yes.

MR JUSTICE BUTCHER: That is common ground, isn't it?

MR EDELMAN: Yes, that is common ground as I understand it, because that is the mechanism. You notify. If a notifiable disease breaks out, even COVID, you have to notify it to the local authority.

So what they are saying is the concept of an occurrence, and they give some context to it, they say this all smacks of something local.

LORD JUSTICE FLAUX: An occurrence.

MR EDELMAN: An occurrence.

LORD JUSTICE FLAUX: Not lots of occurrences, but an occurrence.

MR EDELMAN: Yes.

Even if one says it's an occurrence, the policy doesn't restrict the cover by reference to the geographical location of an occurrence. And it is interesting because it says "an occurrence ... an outbreak of which must be notified". So it is already contemplating that this is the sort of -- that an outbreak itself, we would submit an outbreak itself is an occurrence.

And this is necessarily contemplating, as I have already indicated, that this could be an outbreak of a new epidemic disease. So we say that the word "occurrence", you know, it isn't confined to any single case. An occurrence, consistently with what it says in the (inaudible) can refer to an outbreak.

That is contextually what it seems to be contemplating in relation to a disease; it is an occurrence of a disease, an outbreak of which must be

notified.

Obviously, the more geographically distant the outbreaks of the disease are, the less likely they are to affect the ability to use the insured's premises. So the locality requirement, which is Hiscox's big point, the locality requirement is satisfied by the fact that it has to have the specified impact on the insured's premises.

Ordinarily one would only expect a local outbreak to have such an effect. But they have written a policy which doesn't impose that, it doesn't specify that at all. It doesn't say "only has to be local"; they have written a policy which applies wherever the occurrence is.

The fact that they have taken the calculated risk that only local occurrences will result in the inability to use is just their bad luck. Otherwise they actually are better off, they would say, than insurers who have imposed a 25-mile limit. But with absolute silence they have specified a requirement that it must be within some undefined, unspecified, perhaps unknowable -- the occurrence must be within some locality to the premises.

If one goes or has a look at some of the other covers, or if one goes to {B/6/44} in my version, I hope it is 44. It is going to be {B/6/43}. I seem to be on

a different version.

Cancellation and abandonment cover. You will see at (iii) of 19 at the bottom of the page, it has an exclusion for:

"any action taken by any national or international body or agency directly or indirectly to control, prevent or suppress any infectious disease."

So the draftsman had well in mind the fact that the control, prevention or suppression of infectious diseases could be the subject of national or international body intervention or agencies.

Yet it suggests that an occurrence of the disease must be somehow local. We submit not.

Now, they try in their submissions, and I won't take you to all the paragraphs, I don't think there is time to do that, but hopefully you have at least some recollection of what was in the Hiscox skeleton, but they go on a lengthy trawl through the policy provisions to try to demonstrate that the focus of the policy is on events affecting the premises.

We don't disagree. Because if one goes back to page 42, this does have to affect the premises. There has to be inability to use due to restrictions imposed. That is the link to the premises.

They say that they can't have been intended to cover

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

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

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

LORD JUSTICE FLAUX: Yes.

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

LORD JUSTICE FLAUX: Where are we?

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

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

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

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

If one goes to --

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

MR EDELMAN: No. Exactly.

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

MR EDELMAN: Exactly. Each insuring clause has its own

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

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

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

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

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

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

a trawl through disparate insuring clauses.

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

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

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

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

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

MR EDELMAN: Okay.

(3.15 pm)
(Short break)
(3.23 pm)
LORD JUSTICE FLAUX: Right, Mr Edelman.
MR EDELMAN: My Lords, there is some speculation in Mr Gaisman's skeleton at H4, with its 1 mile limit, was devised out of an abundance of caution rather than as reflecting the absence of any restriction in these policies. But in fact if you look at the dates of the policies, I won't trouble you with it now, but you can look at the dates at the bottom and you will find that the version of H4 and H2 is 1215 and H1 is 1217 and H3 is 1218. So that doesn't seem to work either.

He gives some example about somebody who goes from AInwick to Ilfracombe, and says this shows how far far-fetched our case is. But of course it is perfectly possible, if a person had recently travelled from one place to another, to spread the disease from one place to another, and unfortunately that is what has happened.

The critical point, the critical answer to this, is that in order for there to be cover there has to be something that affects the premises, and that is the be all and end all of the requirement of locality in case. The occurrence can be anywhere. But obviously the further away the outbreak is from the premises, the less

likely it is to result in restrictions being imposed on the premises.

H4 has the 1 mile requirement. And of course if there is some sort of locality requirement in H1 to H3, the same arguments would apply here to those policies, and for that we rely on our prevalence arguments.

The only issue between the parties here as to the application of the clause is that Hiscox accepts only a scientifically verified incidence of the disease which must have been verified at the time before restrictions were imposed will suffice. That is paragraph 89 of the skeleton, for your reference. And all the clause says is "occurrences of disease", and we say "diagnosable" is sufficient. The whole premise of the restrictions that were imposed was not just the known but, as I said, the known unknown. And if the known unknown happened to be within 1 mile of one of Hiscox's insureds under H4, well, then they have cover.

The next item, if we can go back to {B/6/42}, is the words " restrictions imposed".
LORD JUSTICE FLAUX: There we are.
MR EDELMAN: So the next words are "restrictions imposed", what's required there. No issue that the UK Government is a public authority. Common ground that businesses required to close or cease were capable of fulfilling

these requirements. And Hiscox doesn't dispute that regulations 6 and 7 of the 26 March regulations were restrictions.

Just can I say that those concessions are and will be valuable for numerous businesses whose claims will benefit from clarification of that.

There is a disputed issue about whether non-legally binding advice or guidance, as Hiscox would put it, and other measures were restrictions. Hiscox relies on the case of Dolan, which said that the closure of schools wasn't judicially reviewable because it wasn't legally enforceable.

We have made our submissions, when we were discussing government action, about the status of government guidance, which was expressed in imperative terms. I am not going to repeat those submissions here, but the same applies here. Those were imposed. One has to apply a sensible meaning to that. And let's take the example of schools, because that is what the Dolan case was all about. Yes, the government didn't in fact find it necessary to pass regulations to close schools, because they told schools to close and they did. It is quite plain that the government would have used its statutory powers had there been a body of schools who weren't prepared to accept what the government was

telling them to do.

No issue between us that they didn't in fact pass those regulations. No issue that there was not, therefore, a legally binding, enforceable obligation on schools to close. But to say that in the current circumstances, in this particular context, that restrictions were not imposed is to, we submit, fly in the face of reality. These have been very unusual circumstances, they have thrown up unusual events, and one has to apply the policy in a sensible way.

The next topic is "following". The restrictions imposed have to be following an occurrence. I think it is common ground that that is a weak test of causation and I have dealt with that.

The only point is if Hiscox's argument is accepted that the occurrence requires a local event or if one is dealing with Hiscox 4 and one has got an occurrence within 1 mile, one then is back to the causation question of the local instance of the outbreak, the local manifestation of the outbreak, being part of the cause of the restrictions that were imposed.

We have dealt with that, and I am not going to deal with it again. In essence, it's the single indivisible outbreak, it's just part of the national outbreak, or alternatively each one is a line in the spreadsheet

making it -- each making its concurrent contribution to the cause.

I then move on to --

MR JUSTICE BUTCHER: But the word "following" does at least suggest a temporal requirement as well.

MR EDELMAN: Yes. Quite, absolutely. Temporal and causal. So if you haven't got an outbreak in your locality, 1 mile, whatever is required, when the restrictions are imposed, if you can't show by any evidential means that we were discussing, by the underreporting ratio, there is no -- it all comes to zero, for example you are in the Scilly Isles and a case doesn't -- they do have cases, let's say, I am not sure whether they have or haven't, but let's say they don't have their first case until April or May, then you haven't got the causation. I accept that.

MR JUSTICE BUTCHER: And any interference that there has been up to that point will not be covered.

MR EDELMAN: That is right.

MR GAISMAN: May I just correct something that Mr Edelman said on [draft] page 135 at lines 8 to 10 of the transcript, when he was describing the common ground?

He said Hiscox does not dispute that regulations 6 and 7 of 26 March were restrictions for the purposes of this clause. We do, and I will be developing that, but

we make that plain in paragraph 189 of our skeleton. Thank you.

MR EDELMAN: My understanding was that they didn't dispute that they were restrictions, but disputed whether they caused an inability to use, which is where I thought the debate was. But if we have misunderstood that in the 134 pages which Mr Gaisman managed to deliver, almost half the length of our submissions dealing with all the insurers, and a major contribution to the 850 pages we received, I apologise.

LORD JUSTICE FLAUX: Now, now.

MR EDELMAN: Well, it took a long time to read.

LORD JUSTICE FLAUX: Mr Gaisman has made his submissions, Mr Edelman, he is just putting down a marker and he will develop his submissions, and you will have an opportunity to reply, if it is necessary.

MR EDELMAN: I will try.

LORD JUSTICE FLAUX: If he has to come back again, I hope he can do it without making a wailing noise.

MR EDELMAN: "Inability to use". I think I had finished -- I was interrupted, so I am not sure where I had got to, but I think that is where I had got to.

The issue between the parties is whether there has to be a total inability to use or whether partial inability to use is sufficient.

In particular, does your inability to use encompass the prevention of customers from travelling to the premises, either due to regulations 6 or 7 or due to guidance, for any non-essential purposes?

We agree that ultimately whether or not there has been an inability to use will depend on the facts of each case, but there are some important questions of principle which we would ask the court to consider and, if possible, to decide.

The first one is: does inability to use have to be total or is partial inability to use sufficient?

Hiscox, as we understand it, seeks to apply an absolutist test. If any part of the business actually remains open, even if for a highly restricted purpose, for which you can use the premises, there is no inability to use the premises.

Our submission is this is a wholly uncommercial construction of those words in their context. Take, for example, if one goes to {I/13/55}, that is part of Mr Gaisman's submissions, I think it should in fact be page {I/13/56}, one has the second half of paragraph 173, a Chinese restaurant, they say 80% of whose business is take-away. One can take whatever percentage, but let's say a restaurant is 50% of its business is take-away and 50% is eat-in in the

restaurant. As a result of the restrictions it has to close the restaurant area for restaurant use, it can't use the restaurant area as a restaurant. Is there an inability to use the premises? Mr Gaisman would say no, because you can still use the kitchen to cook take-away meals and you can still use the restaurant area as a place for people who have come to collect their take-away meals to sit and wait for their take-away.

LORD JUSTICE FLAUX: I don't think you can, actually. I don't think you were allowed to do that.

MR EDELMAN: No, you can't.

LORD JUSTICE FLAUX: I think you had to stand outside.

MR EDELMAN: Right. I think my Lord is right.

LORD JUSTICE FLAUX: Certainly where I live you had to stand outside.

MR EDELMAN: If people can come in. So I suppose he would say you can use it if people can come in to collect their take-away meals. So you are using the restaurant area for people to come in and collect.

LORD JUSTICE FLAUX: Yes.

MR EDELMAN: It is a matter of impression, really, but is it really the case that this policy only applies where you are unable to use every single inch of your premises, and if you can use part of it then there is no cover, but if you can't use, if you are simply unable to use,

for example, in this case the restaurant area as a restaurant, which it is designed for, is it truly saying that that is not an inability to use the premises?

It must be, if one goes back to {B/6/41}, an interruption to your activities caused by your inability to use the premises. Your activities as a restaurant, not as a take-away, your activities as a restaurant have been interrupted -- we will come to that as well -- because you are unable to use the restaurant area.

We submit that this is --

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

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

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

MR EDELMAN: Exactly.

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

MR EDELMAN: Yes.

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

a question of fact.

MR EDELMAN: Yes, quite.

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

"For the insured premises that you must legally pay while the insured premises or any part of it is unusable" so it actually recognises that you can have an unusable part. That is not the complete answer, it is just an illustration of the point. But that does help. There is one matter that is raised by Hiscox, it is going back to B/6/56, paragraph 174.

LORD JUSTICE FLAUX: No, not B6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Now, the fact that the majority of professional people are not continuing to work from their offices but, like all of us, are working from home, using online platforms, demonstrates the point, we submit, that they are unable to use the premises as they normally would have done. Our working at home may reduce or even eliminate our loss, but that is a question of quantum and not coverage. Otherwise this cover would be totally illusory for professional people. Every insurer would be able to say: the fact that the government has forbidden you from going into work because you can work at home doesn't mean you are unable to use the premises. It doesn't prevent you from visiting the premises, for example to collect papers and so on, so you are able to use the premises.

LORD JUSTICE FLAUX: If you are right that even in the case of category 5 businesses there were restrictions imposed, and as I think it was either you or Ms Mulcahy told us yesterday, however one phrases it, the advice, instruction, whatever it is to stay at home and to work from home where possible, and if that is a restriction that has been imposed, then the inability to use the premises must follow from that, mustn't it?

MR EDELMAN: Exactly, my Lord, yes.

LORD JUSTICE FLAUX: The fact that you might be able to, you

know, in the case of your instructing solicitors, that people are able to go into the office to do photocopying or to pick up papers or whatever, is neither here nor there, because they are all in fact working remotely.

MR EDELMAN: But for Mr Gaisman's purposes you are still able to use the premises for something; the photocopying, having papers delivered to you, going backwards and forwards, you are able to use the premises. We submit that this must --

LORD JUSTICE FLAUX: Not for the business for which they are intended. Herbert Smith Freehills is not Kall Kwik.

MR EDELMAN: Yes, exactly. That is our answer.

If you have a restaurant take-away business, you can say: well, you can't use it as a restaurant, you are unable to use it for one of your business purposes. That is sufficient.

As I said, it is a question of fact that there is some fundamental difference, and it was illustrated by one of the declinature letters that we referred to, which is that there was a café that also sold cakes to passers by. Obviously they wanted to serve cakes to people who were having tea and other food in the café, but they had cakes which people could pop into and still buy. And because cake is a food, it was something that they were still permitted to sell.

According to Hiscox, there was no inability to use the premises because they could still sell cakes even though they were unable to use it as a café. And that is the point. That is one of the road blocks that the FCA seeks to remove.

Then once you get into that, you are then into a question of fact, I quite agree, and we are not asking the court to look at the nuances of it. But just simply, you know, does it have to be total?

MR JUSTICE BUTCHER: Is there going to be much of a question of fact there, Mr Edelman? If you are right that, as it were, any professional offices, their usage will have been significantly affected by the restrictions, because of the restrictions posed on the workers, not on the premises, then that will mean that they all potentially --

MR EDELMAN: Yes.

MR JUSTICE BUTCHER: Won't it? Would there actually then be much of a question of fact available or around?

MR EDELMAN: No. Where there may be is if there is a reduction in business because of restrictions, and then there is a question whether there is an element of inability to use or whatever. I am just trying to be fair on insurers, more than anything else. We don't actually see this as very difficult if one applies it

commercially and realistically.

LORD JUSTICE FLAUX: I suppose the example of the Chinese take-away, that is essentially a take-away that has two tables there and you can eat in the take-away if you choose to, so it is, you know, 10% of its business or something of that kind, then you would say the intended use of the premises is the Chinese take-away, and there isn't, in that example, a restriction imposed on the intended use of the premises.

MR EDELMAN: Well, except for the 10%.

LORD JUSTICE FLAUX: Well, that may be where questions of fact come into it. I follow your point when you say, well, if you are right about this, then these issues are really issues of quantification of loss as opposed to --

MR EDELMAN: Yes.

LORD JUSTICE FLAUX: -- threshold issues of cover.

MR EDELMAN: Exactly. But that 10% who do sit there and eat, that might be very important to the bottom line of the Chinese take-away.

LORD JUSTICE FLAUX: I understand that point.

MR EDELMAN: So it is not to be dismissed, even that 10%.

LORD JUSTICE FLAUX: No.

MR EDELMAN: If you can't use it, and I would say even that 10% would be an inability to use the premises for one of your activities, and that is sufficient. It doesn't

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

LORD JUSTICE FLAUX: Yes.

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

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

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

MR EDELMAN: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

to reach that conclusion in order to decide the case.

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

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

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

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

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

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

MR JUSTICE BUTCHER: If we get that up.

MR EDELMAN: {B/6/41}

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

MR EDELMAN: Yes.

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

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

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

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

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

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

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

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

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

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

One irony about this whole argument is Mr Gaisman says: ah look, we didn't say "interference" and everybody else does. So he is referring, which he criticises us for doing, he is referring to other policies to construe his. But it doesn't help him.

Can I just check, I think I have probably covered enough on that.

I will come back to the "solely and directly" in a moment. I think I only have ten minutes left, but I will see if I can try and cover the non-damage denial of access clause, which is in the Hiscox 1 wording. I think it is on page {B/6/41}, we have it up on the screen.

This is an alternative round of making a claim under the Hiscox policies. Our primary one we advance is public authority; we also advance this one as well:

"An incident occurring during the period of insurance with a 1-mile radius ... which results in a denial of access or hindrance in access to the insured premises, imposed by any civil or statutory authority or by order of the government ..."

So the first word is "incident", not defined. We say, given its ordinary natural meaning, which is an occurrence or an event, it can be small or it can be large scale, it is not qualified. And provided it, we

say, fits in within the required range, the 1 mile radius, it qualifies. One could say the Great Fire of London was an incident, occurring on a wide scale, and if access to the insured's premises in the suburbs was hindered by authority responses to such an incident, the policy would provide cover provided that the fire encroached within 1 mile of the insured's premises. The fact that there was a preponderance of the fire outside the 1 mile zone would be irrelevant, because the incident itself can be local, regional or national, provided its occurrence encompasses the applicable radius.

Alternatively, we say that there are incidents, as required by the clause, by virtue of the occurrence of COVID within the relevant radius, and that is our prevalence argument.

There is a variant of this in some of the Hiscox 2 policies. I don't think I need to turn them up, because they just use the word "vicinity" instead of 1 mile; and we say that should be construed as areas surrounding or adjacent to the insured premises in which events that occur would be reasonably expected to have an impact on the insured or its business. We take that from a definition of "vicinity" in RSA4, but we will come to that when I come to RSA4.

Then what does it have to do? It has to result in a denial of access or hindrance in access to the insured premises.

The lowest bar is the hindrance in access, so I will just deal with that. We say regulations 6 and 7 clearly result in a hindrance to customers' access to the premises. Only a narrow range of permitted excuses for accessing many businesses are provided for by the regulations. Access is therefore hindered by the regulations.

But the difference between the parties is that Hiscox argues that access is a physical or legal inability to access only. They admit that the inability to use the premises in the disease clause that's -- is in the absence of -- under the inability of use clause, they accept that inability of use should be for the purposes of the business, and we say the same applies to access. If you are talking about using for the purposes of the business, your activities, it must be access for the purposes of your business.

But Hiscox says as long as there is no physical or legal impediment to access, it wasn't hindered. We say that government action, about which you have heard, did hinder access to businesses that were not closed, and it hindered it by deterring or preventing customers or

employees from visiting the premises other than within the permitted exceptions. We say that is sufficient.

My Lord, "following", I think I have probably dealt with. I will just review my notes overnight and make sure there is nothing else I have missed out.

In the five minutes I think I have, can I just deal with "solely and directly", because that is quite an important topic. The question is: what does "solely and directly" apply to?

In its defence, Hiscox correctly identifies that that the loss must arise solely and directly from an interruption. And to be a qualifying interruption, the interruption has to be caused by, looking at the public authority clause on page {B/6/42}, your inability to use the premises. That has to follow the occurrence of a disease.

Now, in its skeleton it produces a newly formulated case which seems to be suggesting that "solely and directly" applies at each stage of the causal chain. So the inability to use has to be solely and directly due to public authority restrictions, and presumably the restrictions have to solely and directly follow the occurrence of disease, whatever that may mean.

We submit that that argument is hopeless. The drafters included specific words linking the various

elements; you have got "caused by", "due to" and "following".

The FCA agrees that "solely and directly" is deliberately narrower than the other causal restrictions, but each link in the chain has its own causal connector. So one is not looking to whether any link in the chain was solely and directly caused by the other. You are looking at whether you have a qualifying interruption, applying the causal tests for the purposes of, for example, the public authority clause there stipulated, "caused by", "due to", "following", and if one does, one then asks whether the loss, the monetary loss that the insured is claiming, is solely and directly due to that interruption.

Then, you will see in Mr Gaisman's skeleton there is a reference to the PMB Australia case. We can address that in the reply if necessary, but our submission briefly is that Hiscox is misapplying the case. They didn't supplant the words "solely and directly" and replace them for "in consequence of". All they held was "in consequence of" meant proximate cause in that context, but not solely and directly.

So we submit that as a matter of plain construction of the clause, the solely and directly only looks to whether the loss that has been claimed is solely and

directly caused by a qualifying interruption, and in order to be a qualifying interruption the qualification criteria have their own separate causal requirements.

My Lord, I think that is now time up, virtually.

LORD JUSTICE FLAUX: Yes, I think that is probably sufficient for today, Mr Edelman.

MR EDELMAN: I have nearly finished Hiscox, so I will only be a short time tomorrow.

LORD JUSTICE FLAUX: All right. So we are 10.00 am tomorrow morning.

MR EDELMAN: Yes, my Lord.

LORD JUSTICE FLAUX: Very well. We will see you at 10 o'clock tomorrow.

MR EDELMAN: I'm grateful.

(4.20 pm)

(The hearing adjourned until 10.00 am on Wednesday, 22 July 2020)

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