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

Day SC4

November 19, 2020

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Thursday, 19 November 2020

(10.30 am)

Submissions by MR EDELMAN (continued)

LORD REED: Welcome to the Supreme Court of the United Kingdom, where we are beginning the fourth and final day of the hearing of the appeals in the proceedings brought by the Financial Conduct Authority against a number of insurance companies. The proceedings are concerned with the extent, if any, of the liability of the insurance companies under business interruption policies to policyholders whose businesses were affected by the COVID pandemic.

We're being addressed at the moment by counsel for the Financial Conduct Authority, Mr Edelman, and I will turn now to him.

Mr Edelman.

MR EDELMAN: Good morning, my Lords. My Lords, there's a key point on the clauses that require something like prevention of access or inability to use, sometimes it is expressed slightly differently but if I can treat those two categories compendiously and that key point is: are they intended to require a total prevention of access or inability to use for pre-existing activities or is some partial prevention or inability to use sufficient?

I was giving you at the end of yesterday the example of the restaurant with the access to the restaurant itself blocked. We can assume in this case physically blocked, although it's accepted by insurers that physical prevention is not required, but with the access to the rear leading to its kitchen making that usable by kitchen staff, and so it was possible therefore to do takeaway meals and take them to the road for collection by a driver who could deliver the meals.

The restaurant for this purpose we assume hires drivers or enters into a contract with one of the delivery services to tide itself over.

The answer that insurers give, they say if there was no pre-existing takeaway business, there is both a prevention of access and an inability to use because those must be applied to the existing activities at the time of the event.

If there was a pre-existing takeaway business, there is no prevention of access at all or inability to use at all because the continuation of that takeaway activity was possible. Nor could the restaurant recover the increased cost of working in respect of its additional delivery costs aimed at mitigating its loss suffered from the actual physical prevention of access to its restaurant which meant that its restaurant area and

therefore restaurant activity had to be closed. That in a nutshell is, as we understand it, the insurers' case and that's why I said to my Lord, Lord Hamblen yesterday that there is some overlap on some aspects of our case, but on this it's an all-or-nothing. There is actually a case of a café in Belfast that has, as far as I understand it, been refused indemnity because they used to sell cakes to passers-by from a counter at the front of the café, and maybe hot drinks as well, I don't know, but the main business of the café had to close but because they may be running the café, could still sell the cakes and maybe some hot drinks, there was no inability to use and no prevention of access. People like that are being refused any indemnity at all, even though nobody can go in -- if the counter's at the front, nobody is allowed to go into the rear part to go and sit at the seats.

Our submission is that these policies have to be construed and applied in a practical and purposive way and it really does stretch credulity to say that, in the two examples I have given, there is no prevention of access or inability to use in such cases. If the restaurant was to describe its activities in a proposal form or in a schedule to the policy, it might well put "Restaurant and takeaway" and for one of those

activities it's unable to use its premises for. It can't use the premises for the restaurant and there is a prevention of access to the restaurant. For anyone wanting to dine in, they can't come and dine in the restaurant.

We would say that, looking at that sensibly, one looks not just at all of the purposes, so that if you can still do one of them, there's no inability to use or prevention of access at all, one simply says "Well, there was an inability to use or prevention of access for that activity". And that, we submit, should be the answer to those categories of case. It's suggested in relation to the prevention of access cases that we've confused prevention with hindrance.

We say that hindrance is a different concept and there's no conflict in our approach. Hindrance involves the idea of something being made more difficult. But cover against hindrance would cover a situation, for example, where a road closure meant that a long detour was necessary for people to access the premises which would deter people from coming there.

Prevention, whether partial or total, is not about making things more difficult about whether or for what purposes people are allowed to go to or enter the premises, and the same point applies to inability to

use.

Now before I turn to the policies, can I also make some points about particular categories of business because there was some criticism of the fact that we didn't address in our appeal case how regulation 6 on movement of the public affected categories 3 and 5. We didn't address that in our appeal case. Just to remind you, category 3 includes food retailers, pharmacists and other things like hardware stores, and category 5 is businesses not mentioned in the 21 March Regulations or the 26 March Regulations and that would include professional firms, accountants, lawyers, estate agents and construction and manufacturing businesses.

Now, category 3, we say they are unable to use their premises for their normal activities or their ordinary purposes and there was a prevention of access because on 16 March customers were told to stop unnecessary travel and stop non-essential contact with others. Regulation 6, later on, 23 March, customers were told only to shop for basic necessities. The prevention of access is like our example of a road closed save for residents or their visitors. In other words, you can only go to these shops for particular purposes. That's so you can only use this road if you're a resident or you're visiting a resident, otherwise you cannot go

there, you're not allowed to under the 16 March announcement, saying that's what you ought not to do.

Category 5, taking the professional services, generally they would be able to work from home. There would be no reasonable excuse to go to work if you can set yourself up at home, and so on that basis you are unable to justify going to your business premises and therefore unable to use them and you are prevented from accessing them, and that would apply from the 16 March announcement onwards but obviously would include regulation 6.

We do, in fact, deal with it in our respondent's case in relation to some points made by Hiscox on their policy, which Mr Gaisman didn't develop orally because of lack of time. Had he developed them orally, I might have responded orally and dealt with this in response to him, but the relevant passages in our submissions, our response case, are paragraph 503 {B/10/497} and paragraphs 516.1 and 516.2 at {B/10/502}.

I'm not asking you to look at those now, but you'll see that we give some examples there of how it would all work.

Finally, I should mention category 4, non-essential shops. It's the same point about restrictions on the public generally. But in particular regulation 5(1)(c)

required those premises to cease to admit any person to the premises not required to carry on its business or provide its services, essentially remote sales. So if you were a shop, you had to close your doors to customers but your staff could continue to work on remote sales if that's what you were doing before or if that's what you wanted to start doing. If that's what you wanted to start doing, there is a prevention of access or inability to use, but if you were doing some of that before then there is no prevention of access, no inability to use according to insurers. We say that defies a common-sense construction and application of these policies, and undermines their commercial purpose.

So, my Lords, if I can now move on to the Arch policies. Just to mention that I have until 11.17 because we're splitting the five-minute break between the parties and then Mr Lynch will have his 40 minutes. With hard negotiation, I think I may have lost 30 seconds, but so be it. I've probably just wasted it by telling you that.

The Arch policy, we can probably take it now quite quickly. The intention of taking some points generally was to avoid repetition when I got to the policies. If we go back to bundle {C/4/227}, the prevention of access clause, the judges below dealt with this in the judgment

at 324 to 326 {C/3/125}. They are long passages, I hope you've read them; I'm not going to reread them.

Just to pick up some of the points that are made in response, if you go back to the previous page, reliance is placed on extension 1 "Hinders or prevents access" and it's said, well, if it meant "hindered access" it would have said so. For the reasons I've given, that misses the point. I'm not trying to turn hindrance into prevention, it is something different, but partial prevention is not hindrance, it's partial prevention.

Reliance is also placed on the disease extension 3 under "Disease" on page 226 still and at the foot of that extension, which it doesn't apply because there's defined diseases, if you want to go back to 224, you'll see this is one of those examples where they listed the diseases that the policy should apply to, just if you're interested, but it's not on this point.

Going back to 226 {C/4/226}, it's said, well, this talks about use of the premises being restricted and if in the extension we're concerned with, number 7, on page 227 {C/4/227}, if it had meant "use", it would have said it, but it says "prevention of access". I agree, that's why we've focused our submissions on whether people are allowed to go to the premises and whether, after regulation 5, the shop was allowed to let people

in. The answer was it could only let in those people who were working there in order to work on remote sales, it couldn't let in customers. That was a prevention of access to customers.

It may also have been the fact that there was an inability to use the premises for in−store sales but it is also prevention of access.

But one point that does support our submissions, and that is −− although I don't place enormous weight on it but it's a factor −− at page 226 {C/4/226}, going back to that, the preamble. We have reference to reduction in turnover and increase in cost of working. And if you go to the definition of "turnover" on 225 {C/4/225} it's:

"Money paid or payable to You ..."

In the top left−hand corner:

"... in the course of The Business at The Premises."

And we've got the definition of gross profit:

"... indemnify You in respect of any interruption or interference with The Business as a result of Damage occurring during the Period of Insurance."

"Basis of settlement" on the next column:

"Insurance of Gross Profit is limited to loss due to

Reduction in turnover, and increase in cost of working.

But it seems to be the case from Arch's perspective that when it comes to this prevention of access clause, unless your increase in cost of working is incurred after the prevention of access has ceased, perhaps, or in order to start up a new activity, you don't get indemnity −− this simply doesn't apply to a business in my example −− remember, I gave the example of hiring extra drivers or engaging the service of a delivery company at increased cost in order to reduce your loss of turnover resulting from the closure of your restaurant? That is not recoverable as an increased cost of working. And, again, we say that doesn't make sense of what the policy appears to be conferring on the insured as a benefit.

Similarly, it's said because in relation to office staff, because people could go −− the IT staff could go in and you could have your printing department go in, there wasn't a prevention of access. But those are −− and it is accepted that those are peripheral activities. Those are not fee−earning activities. But if you hired more IT staff, as so many people have done, so that the fee earners, the business itself, the profit−earning element of it could continue with all the fee earners working at home, that is not an increased cost of working because the fact that people from IT can go in

there to look after your server and make sure everything is working just demonstrates the case. As I understand what insurers are saying, it demonstrates the fact that access is not prevented.

And that is what I wanted to say about the Arch policy. I should perhaps, before I go from that one, show you a passage in the judgment at 310 where a concession is made, paragraph 122. Sorry, it's page 122, paragraph 310 {C/3/122}. Bundle C, of course.

You'll see the concession there recorded. It's just at the end of the third line:

"Arch also accepts that, where the effect of the actions or advice was that businesses had to close or cease business, there was a prevention of access, in other words, it was not necessary that access be physically impossible or obstructed."

Then the next sentence down:

"Arch accepts that there was prevention of access to businesses in Category 2... in relation to ... Category 1 which did not previously provide takeaway services, access was prevented because they could not be opened to customers without the policyholder making a fundamental change to the nature of the business."

That was the limit of the concession. That's where I got if there's an existing takeaway, then you lose.

Sorry, there's one further point I should have made about Arch's case. They've said that the extension requires the prevention of access to be directed at the means of accessing the premises. So although he says it's not about physical access, they do take a point that restrictions on the movement of people, the free movement of people generally is not a prevention of access, but we submit that's not what the provision says. It just requires that the actions or advice of the government have the causal consequence due to −− have the causal −− going back to page 227 {C/4/227}:

"The prevention of access ... [must simply be] due to the actions or advice of a government ..."

And that causal connection is satisfied if the effect of the government action or advice is to prevent people from going to the premises, whether it's to a shop, a restaurant or a professional person going to his or her office.

So, my Lords, I move forward to Hiscox and Hiscox 2, and grounds 2 and 3 we have on this one. Can I just show you, perhaps, Hiscox 2 at tab 7 in bundle C, page 430 {C/7/430}. And you'll see that the restriction is:

"... inability to use ... due to restrictions imposed ..."

I've made my submissions about "restrictions imposed". Question whether "imposed" requires legal force. We say not. "Imposed" is what the government was seeking to do in its announcements, but we debated that yesterday.

The question that I want to address is inability to use and I've again made some submissions about that, but just a particular example. Because we're on inability to use as opposed to prevention of access, let's say that, because of a problem with drains or sanitation, the owner of a two−storey department store decided that it wasn't going to be possible to have customers in the ground floor but they could still use the second floor, and so people could still go and shop on the second floor.

According to Hiscox, there is no inability to use at all because you can still use the second floor even though they would have no quibble with the fact that there is actually an inability to use the first floor. They say it's not a qualifying inability to use because you have to be unable to use the premises in its entirety. Hence, when we come to use my case about the lady running the small café, because she could still use the front part of her shop to sell cakes and maybe the odd hot drink, there was no inability to use even though

all of the property to the rear −− she was unable to use it because she was not allowed to serve in there and people weren't allowed to come in.

If we look at some of the elements in the clauses. Firstly, if we go to page 430 {C/7/430} you will see that this also has "Increased cost of working" and it also at the foot of the page has "Uninsured working expenses" and you'll see one of the uninsured working expenses is rent. And if you go to the definition of the word "Rent", you'll see it's defined as:

"Rent:

For the salon that you must legally pay whilst the salon or any part of it is unusable as a result of insured damage or restriction."

In this form of policy, the only clause that imposes a restriction on page 431 {C/7/431} is the public authority clause, "inability to use". We submit that that demonstrates that Hiscox contemplated and the policy contemplates part of the premises being unusable, which we say is right, albeit not the sole extent of the inability to use. This one is a very simple policy but there are others.

One point is made when we relied on the additional costs of working. It's said that this during the indemnity period and, as I've said, the indemnity period

could extend beyond the lifting of the restrictions but the indemnity period, you'll note on page 430 {C/7/430} starts with the date the restriction is imposed. So there is no reason to conclude that increased cost of working only applies after the restriction ceases to be imposed and it would be counter−intuitive for it to do so because it's saying to the insured "Don't worry, if you mitigate your loss, we will pay for your costs in doing so" and it defies belief, we submit, to say that if an insured incurs costs to diminish its loss, that actually could result in it losing cover, but in any event it's not covered for it in circumstances where it is unable to use part of its premises and incurs costs to reduce the loss as a result of doing so.

One can also see that in other forms of the policy, and I think there's this in Hiscox1, page 400 {C/6/400}. There is a reference to "Bomb threat" and that's about in the middle of the page, an extension for bomb threat, and you'll see that that refers to "total inability to access", "total access is denied". And so we submit that that is an indication that the draftsmen of these sets of clauses −− and I know I've just shown you two separate policies −− but you'll see from all the different policies that there are sets of words that Hiscox uses and one is entitled, in my submission, to

form a judgment as to what an insurer intends as to the operation of its policies from viewing its suite of clauses and that is how this all fits in.

It also, if we go back to page 431 {C/7/431}, if you look at the "Loss of income" at the first item under "How much we will pay" in the bottom quarter of the page:

"Loss of income

"the difference between your actual income during the indemnity period and the income it is estimated you would have earned."

Which again is consistent, certainly not inconsistent, with the contemplation that, despite the inability to use, there may be some income still being generated.

You'll also be aware that the court construed "interruption", still on page 431 {C/7431} at the top of the page as encompassing interference and as covering the normal range of things that a business interruption policy would cover. Hiscox appeal against that, but on the basis of the judgment that's broad, but on the basis of the approach to inability to use, it would only apply to the most extreme interruption, complete cessation, and would not be consistent with the more general meaning of that word that the court gave to it.

Yes, my Lord.
LORD LEGGATT: Sorry to interrupt you, Mr Edelman, I just wanted to mention now that I have some questions I would like to ask before you finish about wide area damage again, so I'm just inviting you, if you wouldn't mind, to leave a few minutes at the end.
MR EDELMAN: I will. Certainly, my Lord, yes, yes.
I'm trying to take this quite quickly because it is fairly fully set out in our case, but I'm just trying to meet some points that have been addressed. I think we've dealt with the "your activities /your business" point. It's said by Hiscox specifically —— and this is paragraph 107 of their response to our appeal {B/14/580}:
"... if an insured adapts after a period of being unable to use ... it will be able to claim for both the period of inability and the increased cost of working within ... [that] period."
But it simply doesn't address the argument that if there was the ability to adapt to use the premises in a way which makes it possible to carry on the business in a fundamentally different way, the inability to use must be looking at some particular pre—peril activity and that means that the premises were still able to be used. By definition, if you can adapt to use it for

something else, you were able to use the premises. So there is an inconsistency in the argument in saying "we're not saying you ceased to be unable to use it if you can use it for something new", well, if you can use it for something new, why should it be an inability to use if you continue to use it for one of two purposes that you were using it before but not the other?
My Lords, RSA1 which is at page 1129 {C/15/1129}, it's:
"Closure or restrictions placed on the Premises as a result of a notifiable human disease ..."
"Closure or restrictions placed ..." And it's a question there whether indirect measures suffice. And we say the correct reading of this is "closure of or restrictions placed on the premises" and that is in fact how the court read it. You'll see at paragraph 294 {C/3/118}, but we submit that on this one that if there is a closure of the premises that that, as we've said in our case, that that can be a closure which is —— all it has to be is caused by. So what you're asking is has there been a closure of the premises as a result of, accepting that there has to be some sort of reason associated with the disease for the closure, but a closure either because people are not coming to the business any more or because people are not allowed to

come to the business any more would be sufficient.
So even if there were premises that weren't ordered to close, if they had to close because of the circumstances, then that would be covered.
My Lords, the remaining policies to address are all policies where either we succeeded on other grounds in relation to RSA4 and Amlin 1 and Hiscox or we've failed but what we are doing is testing, because this is a test case asking for a particular declaration, if it's going to be altered to be altered consistently.
So I would rather answer my Lord, Lord Leggatt's question than deal with those which are less significant points.
LORD LEGGATT: Yes, thank you, Mr Edelman. I've just been reflecting about the wide area damage problem that you addressed us on early on and Orient—Express Hotels and I've just been wondering whether perhaps there are two different aspects or questions which may at some points have been conflated but which need to be kept distinct.
The first is illustrated by the case where the hotel is badly damaged, so is the surrounding area. The hotel has to close for two weeks, but even if it had been open nobody would have come to the hotel because they couldn't access it and the surrounding area was devastated. And you make the point, which I entirely

understand, is that if one applied a simple "but for" test, the claim would fail because you wouldn't be able to say that but for the damage to the hotel the loss would have been suffered because it would have been suffered anyway, and one shouldn't allow the claim to be defeated because there's another sufficient concurrent cause.
But let's now consider a separate situation. Suppose that the hotel, because it's perhaps in a sheltered position, it gets off quite lightly with not very much damage compared with most of the surrounding area, and after a week it is able to open again, although perhaps it's still got some damage, the top two floors are out of action, but the rest of the hotel is functioning, but nobody comes to the hotel because the surrounding area is damaged, or hardly anyone comes.
Now, here you can't say that but for the damage to the hotel, the loss would have been suffered anyway because it wouldn't. Here the loss is caused not by the damage or part of it, not by the damage to the hotel but only by the damage to other properties which are not insured. So how, on your case, do you adjust that loss?
MR EDELMAN: That is actually precisely the scenario that is posited in the textbook example that I showed you, because he said the hotel and the access bridge are

damaged and the diagram may have been difficult to understand, but what he was saying is during the period of closure which is referable to the damage, you essentially say you've got concurrent causes of the fact that you can't have any customers and you pay out ignoring the wide area damage.

You then come to the post−repair period. If you remember, the text there was explaining you do still have to make the assumption that in normal circumstances if you've been closed for a week it might take you some time to recover your full clientele because the word might go around "Oh, it was damaged by a hurricane" and people might be put off.

So what was being said in that text as an example −− and I can't do better than that −− was you accept that there wouldn't have been any customers anyway because of the wide area damage, but you don't in those circumstances say zero. You don't say "Well, once it's reopened it wouldn't have had any customers anyway". You say "In the normal world" −− let's say in the week afterwards it would have had 50% of its normal capacity and in week 2 it would be back to its 100% normal capacity because it would have done an advertising campaign "We're open, we're back in business. Miraculously we were only lightly damaged". So you

would compensate them for the 50% loss in the week after the damage because that's what would have happened in the normal world, but you do not compensate them for the extra 50% on the basis that they did reopen but there was nobody there because of the wide area damage because then that would cease to be indemnifying them for the damage. You would only be indemnifying them for the wide area damage, which on this hypothesis is not insured.

LORD LEGGATT: Yes. But I think what you said may coincide with what I was thinking about this which is maybe in the Orient−Express Hotels case both parties were arguing for a wrong position. One side, the insurers, were saying you compare damaged hotel in damaged city with an undamaged hotel in damaged city, and one can see the objections to that. But the insured was saying you compare damaged hotel in damaged city with undamaged hotel in undamaged city, and that also has its problems.

MR EDELMAN: Yes.

LORD LEGGATT: It seems to me maybe the correct analysis is what you compare is undamaged hotel in undamaged city with damaged hotel in undamaged city. In other words, you assume for the purposes of the adjustment that the city hasn't been damaged and you look in terms of what last year's turnover was, let's say, updated for trends

and then compare the two alternatives to the hotel within that. Is that possibly a way of looking at it?

MR EDELMAN: Yes, my Lord, and if you reflect on what is actually being done by doing that, what you're doing is taking out the hurricane for all purposes. You're taking out the peril for all purposes. Insurers have misunderstood, with respect to them, what we're saying about that because when we say "Well, you take COVID out", they're saying "Ah, that means Mr Edelman wants all the indemnity for all the effects of COVID" was the answer I gave to my Lord −− I think it was my Lord, Lord Briggs −− that's not the point because here we're on the adjustment and it's the point about when you're looking at that post−repair period −− because when it's closed, it's closed, it's 100% −− but when you're looking at the post−repair period for loss of turnover you are looking at, well, what would have happened in a normal world with no hurricane anywhere? You would have got 50% of your turnover. You in fact got zero, so we are going to give you 50%.

In fact, you can't say you would have got 100% from being −− you can't claim more on the basis of the non−existence of the hurricane when you come to all other losses and say "Well, I didn't just lose 50% of my revenue, I lost 100%". They say no, that's not the

answer.

That's why I said also one of the difficulties with Orient−Express is that it was an arbitration decision. We say we don't really know −− we don't know, the public don't know −− how the case was actually argued. We don't have the full award in the judgment. Of course, on appeal the approach to the judgment is conditioned by the way in which the case has been argued and therefore decided because there has to be an error of law in the decision and the decision itself is driven by the way the case is argued.

LORD LEGGATT: Thank you.

MR EDELMAN: With respect, you know, we say that the answer is to be found in that textbook, which actually explains how it should be done. I think I've got one minute left. I will maybe just have a quick look at RSA4, enforced closure. It's at 1321 {C/17/1321}. Just to point out that the real question here, no real additional question, it's whether "enforced" makes −− it's at the top of the page in the right−hand corner −− whether the word "enforced" makes any difference. We say no, it's still something that you didn't do voluntarily. You were forced to do it, but that doesn't mean legal compulsion. It just means you didn't wake up one morning and decide "I don't fancy working today, I'm

going to close the shop". You were forced to do something you wouldn't otherwise have wanted to do.

My Lords, otherwise for the remaining policies I will have, as Mr Gaisman did for some of his grounds for want of time, to rely on our written submissions, but in the comfort at least that by and large they are provisions which are not actually material to the outcome of the policyholders on those policies, albeit that the principle is important across the board generally, but they raise very similar points to other points in the case.

My Lord, those are my submissions and I think it's 11.17, well over my time to be quiet.

LORD REED: Well, thank you very much, Mr Edelman. We turn next then to Mr Lynch representing the Hiscox Action Group.

Submissions by MR LYNCH

LORD REED: Yes, Mr Lynch.

MR LYNCH: My Lords, good morning. It seems that my camera has decided to go on a voyage of its own which I hope I can repair.

(Pause)

My Lords, I hope that's satisfactory.

LORD REED: Yes, that's fine, thank you.

MR LYNCH: My Lords, thank you. My Lords, as you're aware,

I appear for the Hiscox Action Group with the perhaps regrettable acronym the HAG. Acting as I do for real policyholders, I would like to extend our gratitude to the court and to the court staff for holding this hearing so remarkably quickly and efficiently. We are very grateful.

I have the unenviable task of following my learned friend Mr Edelman and attempting to add to rather than detract from his submissions. My allotted time is 40 minutes. The HAG has three grounds of appeal and Hiscox has eight grounds of appeal; it will not be realistically possible for me to address all 11 grounds in 40 minutes. In respect of our appeal and Hiscox's appeal, both their oral and written submissions, I therefore adopt our written case and our responsive case together gratefully with the FCA's written case and responsive case and the oral submissions of my learned friend Mr Edelman.

If we could please turn to C/3/401, which is the public authority clause in Hiscox1. This is the centrally important clause for the HAG and in fact the basis for all claims put by them.

LORD REED: Could you give us the page number again please, Mr Lynch?

MR LYNCH: Yes. So it's bundle C, tab 3, page 401

{C/6/401}.

LORD REED: Yes, 401, thank you.

MR LYNCH: Thank you. It's clause 13. I intend to focus on three topics. First, three points on how to go about construing the clause.

Secondly, our third ground of appeal addressing the "your inability to use the insured premises" wording.

Thirdly, to the extent that there's time, some very brief comments on the "due to restrictions imposed by a public authority ... " wording.

Now, I will attempt to avoid overlap with Mr Edelman but it will be inevitable that there will be some and if I could just make one obvious first point, which is that it has been necessary for the purpose of rationalising the parties' various grounds of appeal to break up the public authority clause into phrases or even single words. Of course, that is not the correct approach to construction and the clause must, of course, be read as a whole.

So if I could turn please to three points on the approach to construction. Whilst all parties to these appeals cite largely the same authorities on construction and, as was the case below, profess to be applying the same principles, the way in which Hiscox has done so, we suggest, invites a critical examination

of whether there are, in fact, important differences of nuance that have emerged in the process of application but which have an overarching impact on the parties' approaches to the specific issues of construction articulated in their grounds of appeal. In that respect, we draw attention to three points that we submit are of assistance in relation to each of the HAG's and Hiscox's grounds.

First, the role of foreseeability in the construction of policies of insurance; second, the meaning of the reasonable expectations of the parties; and, third, the point that these are simple policies.

On our first point of construction, the role of foreseeability in the construction of policies of insurance. On the Hiscox wordings it is wrong to suggest that in the present context the nationwide pandemic and government's response were not within the risks which the parties objectively contemplated, but in any event the correct approach to the law on this issue of foreseeability is, we propose, as follows.

I have five points here. So, first, please could we go to {C/6/402}, so one page on from where we are, and we see in clause 19, (one, nine) this is a clause to which my learned friend Mr Edelman has already taken your Lordships. This is a cancellation and abandonment

wording and in particular (iii), which your Lordships may recall reads as 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."

Now, this wording appears in Hiscox1 lead, Hiscox 4 lead and Hiscox 4 variant with NDDA clause. The obvious point to draw from this is that on this wording the draftsman had well in mind and foresaw the possibility or probability of (a) a pandemic or epidemic and (b) {C/6/402}:

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

The second point under this heading is to refer to the factual matrix. Now, I won't go over the ground that my learned friend Mr Edelman has already gone over, but that appears at paragraphs 28 to 31 {G/5/11} to {G/5/13} of the FCA's skeleton for the first instance trial and also was addressed by my learned friend Mr Edelman, draft transcript Day 3, page 5, lines 4 to 20 and pages 13 to 14 {Day3/5:7}, {Day3/13−14} when your Lordships will recall that my learned friend addressed the examples of SARS and the 1987 storms.

It is also right to note that the public authority

clause in the Hiscox wording refers to "notifiable diseases" rather than, as some insurers do, a closed list and Hiscox is inherently thereby allowing for new diseases, i.e. building in unforeseen or unforeseeable diseases.

Third, under this first point of construction, we would refer to the guidance given by my Lord, Lord Justice Leggatt, as your Lordship then was, in the Equitas case which appears in relevant part at {E/14/266} and if I could invite your Lordships, if it's convenient, to go to that, please. This is paragraph 159, where my Lord addressed this issue and also quoted from the judgment of Lord Justice Chadwick in the Bromarin case and reading the passage at 159:

"True it is that the question whether a term must be applied is to be judged at the date when the contract was made ... and that when the relevant reinsurance contracts were made the parties could not have foreseen the situation that has arisen as a result of the law's response to mesothelioma claims. The court's task is nevertheless to consider how reasonable parties should have been taken to have intended the contract to work in the circumstances which have in fact arisen."

Then, quoting from the Bromarin case:

"The task of the court is to decide, in the light of

the agreement that the parties made, what they must have been taken to have intended in relation to the event ... which they did not contemplate. That is, of course, an artificial exercise, because it requires there to be attributed to the parties an intention which they did not have (as a matter of fact) because they did not appreciate the problem which needed to be addressed. But it is an exercise which the courts have been willing to undertake for as long as commercial contracts have come before them for construction."

Now, although my Lord, Lord Leggatt's comments in Equitas were made in the context of a question about the implication of a term, we do not understand the proposition your Lordship expressed to be anything other than an uncontroversial statement of the court's approach to construction generally. Indeed, Lord Justice Chadwick's comments in Bromarin arose in the context of a question of construction of a clause, rather than the implication of one.

It is also relevant to note that in the sentence immediately preceding the part of Bromarin that my Lord, Lord Leggatt quoted in Equitas, Lord Justice Chadwick also said this. If we could go, please, to {F/10/148} we see there a passage in the Bromarin case at G. And at G, my Lord, Lord Justice Chadwick stated:

"It is not, to my mind, an appropriate approach to construction to hold that, where the parties have contemplated event 'A', and they did not contemplate event 'B', their agreement must be taken as applying only in event 'A' and cannot apply in event 'B'."

That approach, which Lord Justice Chadwick describes as inappropriate, is, with respect, precisely the approach we suggest Hiscox has adopted in relation to these questions of construction.

Hiscox's reliance on the statements of Sir Thomas Bingham MR in the Philips case at {G/77/1556}, I don't propose we go to that, can be quickly dismissed. That relates to a different issue. The implication of a term was what was relevant there and the correct warning to the courts not to come to the task with the benefit of hindsight and fashion a term which reflects the merits of the situation as they then appear. However, your Lordships are not being asked to imply any term. This is simply a different situation and it's a different situation as a matter of principle because as Sir Thomas Bingham held at page 481 {G/77/1555}:

"The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for

which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power."

Our fourth point under this first point of construction is that insurance policies, just like any other contract, are never going to describe with perfect specificity the events that trigger cover. Instead what they do is categorise risks in ways that leave a large scope for those risks to materialise in unforeseen ways. That insurance policies operate in this way is part of their nature and part of why they are commercially successful. There is much variation in how events occur in life and that range of potential fact patterns must be caught by insurance policies, if they're to operate at all, by describing cover in a way that allows for such flexibility.

Our fifth and final point under this first heading is that it is important not to confuse two different questions. One, what is covered and, two, how did that covered risk eventuate? Absent an express exclusion, the question of whether two is foreseeable matters little if the risk is within the scope of the clause.

I would refer here to a case with memorable facts.

My learned —— I'm sorry to interrupt, but I suppose I'm interrupting my own flow —— I see my learned friend Mr Edelman has turned his video off. I'm grateful.

Sorry to break off in that way, but I come back to the case I was going to, which is Harris v Poland which appears at {H/1/1} and it's a case with memorable facts which are referred to be way of example. The short point is that where damage was caused by fire and that was covered, it was unimportant the way in which the damage caused by the fire eventuated and whether or not that —— sorry, what was unimportant was that the way that the fire eventuated was foreseeable or not.

So to explain that by reference to the facts: This was a judgment of Mr Justice Atkinson concerning a claim under a fire policy. In that case, the insured placed jewellery for safeguarding in a fireplace hidden under coal and wood. She went out, when she returned she forgot this and lit the fire causing damage to her jewellery. She made a claim under her policy which insurers denied. The language of the relevant insuring clause was in broad terms and stated that cover was provided against loss or damage caused by fire. That, for the court's reference, is at {H/1/3}. The plaintiff straightforwardly submitted that her loss fell within that clause.

Now, one way of characterising the insurer's arguments, which we don't have time to go in to detail, is at page 465 {H/1/4} the insurer's argument could be characterised as saying the way in which the risk eventuated, namely the damage caused by fire, was unforeseeable because nobody would have thought that damage caused by fire in a place where fire is supposed to be would be covered and nobody would have thought that someone would hide their jewellery in the fireplace and then set fire to it.

But that argument was rejected, rightly, by Mr Justice Atkinson who found for the plaintiff. In an approach which we suggest entirely constant with the modern approach to construction, Mr Justice Atkinson began by considering what the simple words of the policy would mean to the ordinary man and held that there was no basis for reading into those ordinary words a limitation that is not there. Now, if I refer your Lordships to pages 466 to 468 of the report which are at {H/1/5} to {H/1/7}. We don't have time to go to those now.

Those were our points on foreseeability.

Our second heading on points of construction generally is as to the meaning of the reasonable expectation of the parties. Now, here we seek with

respect to develop and expand upon a comment made by my Lord, Lord Reed at draft transcript Day 3, page 112, line 18 to Day 3, page 113 line 13 {Day3/112:18}, {Day3/113:13} and Mr Edelman's responses at pages 113 to 115 {Day3/113—115}.

My Lord, Lord Reed's comment was about how it is relevant to the interpretation of the trends clause that insurers' construction incentivises insureds to ignore government advice issued in the interests of public safety and thereby encourages socially irresponsible behaviour. My Lord commented that one has to interpret the contract to reflect what would reasonably to take the parties' intention —— sorry, I've misquoted that.

"One has to interpret the contract ... which reflects what one could reasonably take to be the parties' intention."

And that's draft transcript Day 3, page 113, lines 11 to 13 {Day3/113:11}.

Now, our general point here is that what one assumes the parties' intentions to be is grounded in community values and this chimes with my Lords' points about discouraging socially irresponsible behaviour. The authority in particular is the article by my Lord, Lord Steyn "Contract Law: Fulfilling the Reasonable Expectations of Honest Men at {H/2/16}, which was

endorced by the Supreme Court in Rainy Sky at paragraph 25 in the judgment of my Lord, Lord Clarke.

Now, I won't go through the article in detail obviously, but briefly the relevant points are these. The notion of reasonableness in this context is neither abstract nor technical, but is to do with what Lord Steyn describes as "Community values".

"It is concerned with contemporary standards not of moral philosophers but of ordinary right thinking people."

A reasonable expectation of the parties takes its distinctive colour from the context of the transaction and the HAG submits that the following facts are relevant.

One, that the insureds are SMEs; two, with low levels of sophistication as purchasers of insurance; three, low levels of indemnity; and four, the off−the−shelf nature of the policies.

Further, the fact that these are all businesses in the real world, many in public−facing forms of enterprise and for very good reason, and obvious reasons, strongly indicates that the parties would expect compliance with government statements, whether or not they technically had the force of law when given, as my Lord, Lord Reed put it:

"One has to interpret the contract ... which reflects what one could reasonably take to be the parties' intention."

This is particularly relevant to the "restrictions imposed" wording but also obviously relevant to the "inability to use wording" which must follow from the restrictions imposed.

The reasonable expectations of the parties is also consistent with taking the purposive rather than literalist approach to construction. The approach which best gives effect to the reasonable expectation of the parties is one in which dictionaries are generally of little help and the commercial purposes of the contract is more important than niceties of language.

Our third and final point on approach to construction concerns the simple nature of these policies. Our proposition is that these policies should be construed in a straightforward and uncomplicated way. Please see paragraph 8 of our written case {B/3/80}.

Why does this matter? Because Hiscox's approach to the construction and application of the clause results in various respects in extremely complicated, indeed unworkable, complexity when these are meant to be commercially realistic and readily applicable policies capable of straightforward application in everyday

scenarios with low limits of indemnity and not much time or money being spent in their mundane application.

In particular, this is a point of most obvious relevance to the counterfactual. The parties cannot objectively have intended a counterfactual which could never have existed in the real world. For example, depending on how my learned friend Mr Gaisman puts Hiscox's case, the nail salons issue, which would be likely to give rise to complicated issues on application and the adjustment of claims even if that is possible on Hiscox's approach.

These are complicated and expensive issues that small insureds are often unable to afford to pay and if my learned friend Mr Gaisman, with his references to the arbitration and to the ombudsman, inadvertently gave the impression that all of this is going to be very easy, then that would, in the HAG's submission, be a false impression. This would not be easy, this would be complicated and expensive and inappropriate for this kind of policy.

We would submit that this position is supported by five points.

First, this is supported by Hiscox itself at paragraph 6 of its reply submissions {B/14/551} where Hiscox describes as not controversial that the policies

should be:

"Comprehensible, clear and readily applicable in the real world."

Second, it is supported by the wording itself. {C/6/374}, this is the introductory wording to many Hiscox policies:

"We hope that the language and layout... are clear ... we want you to understand the insurance we provide."

Third, it is further supported by the judgment of my Lord, Lord Hodge in Wood v Capita {G/94/1958}, at paragraph 10 at B, and 12 and 13 at C and E. This is just a consequence of general principles of construction.

Fourth, our position is consistent with Lord Steyn's analysis of the reasonable expectation of the parties which places emphasis on: (1) what words mean to the ordinary speaker of English; (2) the role of community values in understanding the reasonable expectations; and (3) the importance of the nature of the transition in giving those reasonable expectation −− sorry, the importance of the nature of the transaction in giving those reasonable expectations their "distinctive colour".

Fifth and finally on this point, it is supported by

the approach and reasoning in Harris v Poland, which we've seen.

That brings an end to our points on construction. Obviously those points are intended to apply by way of general application and not simply limited to the HAG's grounds 2 and 3, which I now go on to address.

Turning now to our ground 3, our third ground of appeal is in summary that the court took, with respect, an unduly narrow approach to the inability to use wording and if we could please then go back to bundle {C/6/401} at clause 13, there we see again the public authority wording.

Now, there are six overarching points relevant to the construction of "inability to use". The first point goes to the natural and ordinary meaning of the term "inability to use".

The short point here —— and the short answer to a lot of Hiscox's arguments on this issue —— is that it is common ground that inability to use the insured premises means asking: can the insured use its premises for its business activities or not? One sees that that's common ground at, for example —— I know there are lots of examples —— but one example paragraph 80 of Hiscox's reply submissions at {B/14/571}. Now, Hiscox asserts that this is a simple binary question. One can

see that that cannot be right, with respect. The real problem for Hiscox here is that as soon as one introduces the qualification of "for its business activities" the question goes from being allegedly binary to obviously not binary. The "for its business activities" qualification, which it is common ground is correct, adds an immediately qualitative fact—sensitive and purposive meaning to the clause, which can only be answered by looking at the facts of individual cases to determine whether or not the insured can use its premises for its business activities or not, which will necessarily include a wide range of factors specific to each insured and the nature of their business.

But what are the insured's business activities? Now my learned friend Mr Edelman has addressed you on this already. It means their normal business activities. This will be in part evidenced on the face of the policy schedule, as my learned friend Mr Edelman has already said. For example, {C/6/360}, the insured is a bike repairer and retailer, but obviously the schedule only takes one so far. The real answer will depend on the true facts of any individual case.

Why add the qualification of asking what are the insured's normal business activities? Because that is the true question. It is inherent in asking what are

the insured's business activities? Of course this will depend on the facts because some businesses do multiple things. If a dine—in restaurant can only function as a takeaway that is not using its premises for its normal business activities. If the gunsmith, gun retailer, which is Hiscox3 {C/8/433} can only use its premises to answer the telephone about gun upkeep, then the gunsmith is not using its premises for its normal business activities, ie actually repairing, modifying and building guns.

Here "partly unable" means unable in the context of a business insuring the ability to use its business premises.

Further, the necessary element to assessing whether the insured can use its business premises for its business activities or not involves a quantitative assessment of the position on the facts. In other words, pulling those two elements together, a sliding scale of whether the insured can use its premises for its business activities or not, in terms of:(1) the volume of work done, 10% or more; (2) the nature of the work, is the dine—in restaurant now only a takeaway?

These questions of fact and degree are not difficult or so complicated as to be unworkable. They are simple questions of fact which the courts and arbitrators are

well used to addressing and are simply answered in simple low—value cases and which adjusters have been doing for, of course, many years.

Whether or not an insured can use its premises for its business activities is not a binary question, it is only capable of the answer "completely unable to use the premises" or "completely able to use the premises," contrary to what Hiscox contends in its reply submissions paragraph 80 {B/14/571}.

If we take just one example, this is a golf club example, which appears at example 6 of our written case {B/3/100}, the insured is a golf club which consists of a golf course and a clubhouse which serves food and drink, alongside hosting events and conferences. The entirety of the business was shut following the imposition of regulation 4(4) on 26 March, although the business was permitted to have groundskeepers on the premises for the maintenance of the golf course. Following the government announcements and guidance given on 13 May, the business was permitted to reopen its golf course but the clubhouse had to remain shut. This resulted in a severe dip in the number of customers.

Here, on reopening, plainly the insured was unable to use the clubhouse and suffered business interruption

and loss and thereby loss. But the ability to use the golf course would, on the court's approach, be more than vestigial and therefore there would arguably be no recovery. This, with respect, indicates that something has gone wrong with the court's approach, particularly if one posits the further example: what if they were different businesses; one could recover and one couldn't?

Now, our second point under this ground 3 is that, contrary to other wordings in the policy, the word "inability" does not denote the specific extent to which the insured lacks the inability to use. It does not suggest that the insured must be completely unable to use the premises. My learned friend Mr Edelman has already taken you to the bomb threat clause, that's clause 4 {C/6/400} which refers to total inability to use and also I believe my learned friend took you to it, but in any event clause 3, the NDDA clause {C/6/400} an incident which results in denial of access or hindrance in access to the premises.

Hiscox's responses are interesting. They say at paragraph 97 {B/14/577}, they argue that the use of the word "total" in the bomb threat clause is readily explicable because, when compared to the "hindrance" in the NDDA clause, it reflects the parties' desire to make

clear that only if there was no access at all would the clause bite in the case of a bomb threat. Our simple response is that this contradicts Hiscox's own case. If, as Hiscox argues, the word "inability" naturally denotes total inability, then there would be no need to include the word "total" in the bomb threat clause in order to differentiate it from the weaker requirement of hindrance, as this —— my Lord, Lord Leggatt.

LORD LEGGATT: Just reflecting on your point about whether it's binary or not, I can see your argument. Perhaps the answer is in a way it is binary but it depends how you're looking at the clause. I can see your argument that if you can't use the premises for a particular discrete activity or if you can't use part of the premises, then you can still come within the cover.

But on the other hand, let's suppose that you can use the premises but many fewer people can come in because you have to or you are observing social distancing and so you ration the number of people who can come in. You couldn't say that that was an inability to use, could you?

MR LYNCH: Well, my Lord, the answer will be a matter of fact and degree in each case and the answer will be it will be, depending on the facts, an inability to use to the extent of the inability and obviously one difficulty

is talking about these issues in purely hypothetical terms, but it doesn't take much for one to recognise that a business is only made up of employees and customers in large part for these kinds of businesses and there may be a point where it becomes clear that enough of a downturn is suffered by enough of a percentage of employees/customers being unable to attend for it properly to be called an inability to use and that will be, as I've said, a quantitative and qualitative assessment. But it would be wrong in principle, in my submission, to say that across the board because some people can attend it's not an inability to use.

LORD LEGGATT: Thank you.

MR LYNCH: My Lord, our third point under this heading is that our construction is supported by sub—clauses (a) to (e) and this is just a very brief point looking at clause 13 itself.

Here, Hiscox makes the point, well, look at sub—clauses (a) to (e), page 401 {C/6/401}. It's likely that there will be a complete inability to use because of those. Well, no, it's equally likely that there will be a partial inability because a flood might affect one part of a property or one category of work being done. It's not a complete inability that must follow.

Our fourth point is that the surrounding clauses in the Hiscox policies support our construction. My learned friend Mr Edelman has addressed these so I will just do these briefly. We see at {C/6/403} the "Loss of income" wording. Please see an example there:

"We will also pay for increased costs of working and alternative hire costs."

And then also the definition of "Increased costs of working" itself appears at page 399 {C/6/399}:

"The costs and expenses necessarily and reasonably incurred by you for the sole purpose of minimising the reduction in income from your activities during the indemnity period, but not exceeding the reduction in income saved."

Here the clause is obviously envisaging "working", in the present tense. It seems clear that these clauses, the policy itself, envisages, for example, alternative hire costs at {C/6/399} as well. The business continues. So to take my Lord, Lord Leggatt's point, it's envisaged by the policy wording itself that there is a continuation in the business. The question is: is there sufficient on the facts for it to be called an inability to use and, if so, on the facts what form does that take in each case?

Hiscox relies on the definition of "indemnity

period" which appears at 399 {C/6/399} and Hiscox argues that the word "restriction" there means only restriction. It does not stand in for the full insured peril. That is, with respect, wrong for the reasons we address in our written case, but is also contrary to the judgment where it's made clear that where there's reference to "restriction" it means the insured peril. That can only be right because otherwise the indemnity period would commence when there isn't an indemnity, so restriction must mean insured peril which takes away from Hiscox's argument on this point.

There's also at page 378 {C/6/378}, if I could go to that, please, of the policy wording there's an obligation on the insured to take every reasonable step —— sorry, it's down at the bottom of the page at 378 "Your obligations", at clause 2(a):

"You must:

"a. make every reasonable effort to minimise any loss, damage or liability and take appropriate emergency measures immediately if they are required to reduce any claim ..."

Now, here an insured will be under an obligation to minimise their losses which may mean branching out into other areas of loss, carrying on other types of business, is it right that that should be held against

them because then there would not be a complete inability?

The fifth point is that Hiscox's construction is uncommercial and renders cover illusory. The reality of Hiscox's position is that as soon as there's some use of the property for the business purposes, then there's no indemnity. That cannot be right and it's contrary to all the well-known authorities on this point, for example Cornish v Accident Insurance: please see {D/24/1628} paragraph 57 of our skeleton argument at first instance.

Then our sixth and final point on inability to use is regulation 6.

Now, the court's finding was at J270 —— excuse me, I'm just receiving a message.

Yes, so this is on regulation 6. The court found at judgment paragraph 270, which is {C/3/112} that cases in which regulation 6 would cause an inability to use the premises would be rare. Now, with respect, that can't be right. First, there was no evidence before the court. But if it's right that regulation 6 is indeed a restriction imposed, which it is, then there will be many cases where the regulation 6 "causing an inability to use" would not be rare at all.

So, for example, an accountant using the office and

going in only to look at confidential documents. Well, realistically that isn't —— that is an inability to use that and that is the effect of regulation 6.

With my one last minute, I just turn to our ground 2 just to make some very brief points.

The first point on —— and this is our ground 2 which addresses the restrictions imposed. Just on restrictions imposed, if I could please ask the court to draw a parallel between the current lockdown we are in and the lockdown that we were in.

The difference here is that the Prime Minister announced the restrictions on 31 October and had time to bring into effect the relevant regulations by 5 November. The situation in the first lockdown was more desperate and more urgent, and more worrying, yet that, on Hiscox's case, would not be a restriction imposed and that is an unrealistic construction, we would suggest.

My Lords, my time is up. Unless I can assist your Lordships further, those are our submissions.

LORD REED: Thank you very much, Mr Lynch. Well, we adjourn now for five minutes and then we'll resume to hear the reply by the appellant insurers.

(11.58 am)

(A short break)

(12.04 am)

Submissions in reply by MR LOCKEY

LORD REED: So we turn now to the insurers and I think we're beginning with Arch Insurance represented by Mr Lockey.

MR LOCKEY: Good morning, my Lords. In my 30 minutes I have to deal with ground 3 of the FCA's appeal, my reply to the FCA's response to Arch's appeal and causation and thirdly and finally my response to ground 1 of the FCA appeal. So if we can start with ground 3 of the FCA's appeal.

That seeks to extend against Arch very considerably the number of policies which have been triggered and, as I explained to your Lordships on Tuesday, the court below accepted Arch's case as to what triggered the extension 7, the GLAA clause, and for which categories of business at paragraphs 309 to 336 of the judgment {C/3/122}, {C/3/129} and we fully support and endorse the reasons given by the court in those paragraphs.

As your Lordships will have seen, the court below engaged in a careful exercise of construing and then applying the extension to the various categories of business in light of the advice issued and the actions taken by the government, all of which advice and action was also closely examined by the court below during and no doubt following the eight-day trial.

The court also considered the various theoretical examples raised by the FCA, along with some others, but rather than answering those hypothetical questions, the court addressed the facts and produced the judgment which we say is plainly correct.

The FCA does not suggest, and Mr Edelman did not suggest, that there were any relevant principles of construction which were misapplied by the court. He doesn't like the result but there's no suggestion that the court below applied the wrong principles. In those circumstances, we suggest that this court should be very slow to interfere with the judgment of the court below on those issues.

I do make the point that the FCA's case does not really engage at all with the court's reasoning as set out in paragraphs 309 to 336 of the judgment {C/3/122}, {C/3/129}.

Now, we have responded in some detail to ground 3 in our respondent's case at {B/12/534} and I will to have take that as read.

My Lords, the GLAA clause, just to remind you, {C/4/227}, requires that the relevant action or advice prevents access to the premises and can I make three fairly obvious points.

Firstly, access to the premises is plainly

a reference to the means by which entry or approach is made to the premises. That was common ground below. It's set out at paragraph 315 of the judgment {C/3/123} and is obviously correct. So the relevant enquiry is as to the effect of action or advice on the means of accessing the premises. The enquiry is not into the effect of government action or advice on the movement of people, or on who may enter the premises.

The second obvious point is that "prevent" is a word with an ordinary meaning; stopping something from happening or making something impossible. In practical terms, in the context of the subject matter of this litigation, nothing short of action or advice requiring closure will prevent access to the premises. The clause plainly does not contemplate a partial prevention of access and we remain puzzled about how there can be a partial prevention of access to the premises. Either access to the premises is prevented or it's not. The clause is not concerned with limits placed on the uses to which the premises are put or on who may access the premises and for what purpose.

The third fairly obvious point is that other provisions in the same policy confirm that our reading of the GLAA clause, which was accepted by the court below, is correct and that nothing short of closure is

required on the facts of this case.

Yes, my Lord.

LORD LEGGATT: There has to be some enquiry, doesn't there, Mr Lockey, into who can access the premises and for what purpose, otherwise there will be no cover unless the premises were sealed off to anybody and nobody could get into them for anything at all?

MR LOCKEY: (Inaudible).

LORD LEGGATT: This can't be right. If somebody lives above the shop and they come in through the door they are not prevented from access to the premises and yet you, I hope, wouldn't say the clause didn't apply if the shop is closed.

MR LOCKEY: No, my Lord, we accepted in the court below and we accept obviously here that the prevention of access refers to access for the purposes of carrying on the business at the premises.

LORD LEGGATT: Fine. Then once you accept that, why can't you divide it up into different businesses carried on at the premises and if the food hall is open but the rest of the shop which sells clothes is closed, there's prevention of access to part of the premises.

MR LOCKEY: The policy defines "the business" by reference to the terms in the schedule and therefore, for the purposes of the prevention of access clause, the

relevant access is to "The Premises", which is referred to elsewhere and defined elsewhere as being the place where the business, as defined in the schedule, is carried out, and therefore those are defined terms, my Lord.

LORD LEGGATT: Well, that doesn't mean that you can't have a prevention of access to a part of the premises, the whole encompasses the part, or that you couldn't have prevention of access for one business activity but not for others.

MR LOCKEY: No, my Lord, we would with respect disagree. There's simply a binary question by reference to the single defined premises, or in certain cases there will be multiple defined premises, it's the means of accessing those single premises which must be prevented.

LORD LEGGATT: What about the business activities which aren't even mentioned in the clause so you have to read in something about that, anyway?

MR LOCKEY: Well, that's because the business is defined by reference to the premises and we accept there has to be access to the premises for the purposes of carrying on the business because, for example, if one takes the situation of a bomb scare where the premises are required to be shut off, the fact that someone might be able to go in simply to switch off the electricity does

not mean that there's been a prevention of access to the premises. But subject to that qualification, in our respectful submission, the clause is simple, straightforward and provides essentially a binary yes/no question: are the means of the access to the premises stopped or not?

LORD LEGGATT: Well, it's very simple on your construction because it produces unreasonable results, it shuts out everybody. So in the takeaway example, it seems totally unreasonable to say that there's no prevention of access for the purpose of dining in the restaurant just because you can carry on a takeaway business. There's nothing to stop you separating those activities, is there, in the clause?

MR LOCKEY: Well, my Lords, the clause is concerned with the means of accessing the premises, not with the use to which the premises are put, which is a concept which is dealt with explicitly elsewhere in the same policy. Mr Edelman showed you extension 3 on the preceding page.

LORD LEGGATT: Well, then it shuts out the repairman from coming in.

MR LOCKEY: I'm sorry?

LORD LEGGATT: Then it shuts out the repairman from entering because there is not complete prevention of access for everybody for all purposes.

MR LOCKEY: For the purposes of carrying on the business there is. Where there is an existing takeaway business at the premises and the business is allowed to continue after the closure order, to continue that business, it is, in our respectful submission, inconsistent with the very plain meaning of the language used in clause 7 to say that there is a prevention of access to the premises for the carrying on of the policyholder's business which included the takeaway. The fact that part of the premises where one dines in can't be used does not affect the means of access to the premises. The premises remain fully accessible, it's just the use to which part of the premises may be put is impeded and that is dealt with not by clause 7 but by clause 3. Clause 7 only applies where the means of access is prevented.

LORD LEGGATT: I hear your submissions, as they say.

MR LOCKEY: Well, my Lord, you've already seen extension 1 which Mr Edelman showed you which refers to hindrance or prevention of access, and obviously prevention of access when used again in clause 7 must have the same meaning as it has in extension 1 and therefore cannot include hindrance of access.

So as far as extension 3 is concerned, as I said that draws a clear and obvious distinction between

prevention of access to the premises on the one hand and restrictions placed on the use of those premises on the other.

My Lords, the FCA's case involves the somewhat remarkable proposition that there was a prevention of access to the premises for businesses in category 3, essential retail businesses expressly permitted to remain open by the regulations, and category 5, businesses which were not required or advised to close their premises.

The argument is that there's at least a partial prevention of access to those premises because of regulation 6 or the social distancing guidance or the 16 March advice of the Prime Minister. But, again, that proposition only has to be stated for it to be seen to be wrong. Regulation 6 did not have any impact on the means of accessing category 3 and category 5 premises, nor did the social distancing guidelines, the 2−metre rule or the 16 March advice.

The FCA's argument becomes even more absurd when one appreciates that regulation 6 was itself subject to exceptions which permits people to attend category 3 and category 5 premises. For category 3 essential shops, employees and owners were able to access the premises as were customers. The FCA's case that during the first

lockdown there was a prevention of access to the premises of Tesco because of regulation 6 or social distancing guidelines or the Prime Minister's advice on 16 March is truly absurd.

LORD REED: An example that's not so absurd would be a shop such as Boots which was allowed to continue trading because they had pharmacies, but the areas that were selling cosmetics, for example, were closed off and unmanned. If they'd run two separate shops, one containing the pharmacy and the other containing the cosmetics, then obviously the cosmetics shop would have been closed and they would have recovered under the policy. As it is, because they had one single outlet, the public access continued to the outlet but people could only shop for the essential items and the rest would be barred by chains or whatever to stop them going into those areas of the shop.

MR LOCKEY: An excellent example, my Lord, of restrictions placed on the use of the premises, but clause 7 is concerned with prevention of access to the premises, the means of accessing the premises, which in your Lordship's example is not prevented.

LORD REED: Yes.

MR LOCKEY: My Lords, then if I can respond briefly to the FCA's response to our appeal on causation, Arch is only

concerned with causation and the trends clause at the stage of quantification of loss where our extension has been triggered. We're not concerned with issues of causation arising at any earlier stage at what Mr Edelman referred to as the primary causation stage, which is an issue for the disease clause insurers.

Can I return to the example given by Lord Briggs on Tuesday, Day 2, at page 145 {Day2/143:21}. The travel agent whose turnover reduces dramatically because no one is buying holidays in the period before the travel agent is required to close its premises. Mr Edelman seemed to be inclined to accept that on that example the losses in question were not access-related and we say quite right.

This shows that there is something wrong with the FCA's position on the counterfactual and indeed also with the FCA's appeal on ground 1. That's because the FCA's case, as you'll remember, is that once the insured peril is triggered and the remaining conditions satisfied, all the effects of the underlying elements, including therefore in Arch the emergency, are included in the indemnity, and that would include, on the FCA's case, losses which are not access-related and we would submit that calculating the travel agent's loss for the period of closure from the end of March to July 2020 by reference to the 2019 turnover, without taking into

account the losses which would have been suffered even if the premises had been permitted to remain open, does indemnify the travel agent against non-access-related losses.

Mr Edelman's albeit tentative response to the travel agent example demonstrates, in our respectful submission, why the FCA's argument that trends clauses are confined to extraneous matters cannot be right because the emergency which has led to what he has referred to as the non-access-related losses is not, on the FCA's case, extraneous to the peril, yet Mr Edelman appears to accept that non-access-related losses are not covered.

Our objection to the declarations made following the trial below is that they prevent us from arguing that all or part of the loss of turnover during the period of closure, measured by reference to the same period in 2019, would have been suffered in any event even if the premises had been allowed to remain open by reason of the economic effects of the pandemic, the stay-at-home regulation and the social distancing guidance, none of which are insured perils and that these are losses which are not access-related losses.

Can I remind you in this context of agreed facts document 8, which is relevant on this issue and indeed

to the court's consideration of ground 1 of the FCA's appeal. This was one of the sets of agreed facts for the trial bundle {D/12/1545}.

These were agreed facts and I would just invite you to cast your eye -- I'm not sure you've been referred to this specifically before -- if I could invite you to cast your eye over paragraphs 1 to 3, I don't have the time to go through this, but those are important points to bear in mind that they are agreed facts.

My Lords, turning to the Arch's case on "but for" causation, we say that "but for" causation is positively required at the quantification stage by the Arch trends clause. One removes the peril, no more and no less.

We submit that proof of "but for" causation is an essential element of showing that losses have been caused by the insured peril, a point made in Orient-Express at paragraph 58 of the judgment in the Commercial Court {E/31/932} and if necessary the presence of a trends clause is not crucial, but we don't need to succeed on that argument because the trends clause provides the test anyway, which clearly applies at least at the quantification stage. I appreciate there's a debate that may be relevant for the disease clause insurers in relation to the operation of the peril. But certainly at the quantification stage, which

is the only stage relevant to Arch, the trends clause applies.

Now, my Lords, the FCA has sought to persuade this court that there are implied restrictions on what can qualify as a trend or circumstance, even though the Arch trends clause requires reference to any trend or circumstance. On Day 2 at page 136 of the transcript {Day2/135:20}, Lord Hamblen asked Mr Edelman to explain how, as a matter of construction, the trends clause may be read so as to exclude as a trend of circumstance something which is connected to the peril and to limit trends or circumstances to extraneous things in the world which would have affected the business.

We respectfully submit that the FCA has no satisfactory answer to that point. The FCA's reading of the trends clause seeks to insert qualifications or limitations which are simply not there.

There was a reference to the Hickmott book and the suggestion that there was some settled meaning of the trends clause amongst loss adjusters at least prior to 2010 when Orient-Express was decided, some alleged settled meaning or practice which was not known to the three members of the tribunal in Orient-Express, one of whom was an insurance market practitioner, nor to the court, nor to the parties, nor to their advisers and nor

presumably to their experts. This settled meaning is supposedly that the trends clause does not include something which is connected to the peril and the suggestion is that Orient−Express was decided in ignorance of that settled meaning or practice.

But in our respectful submission, the Hickmott extracts which you've been shown do not bear anything like the weight which Mr Edelman sought to place on them. Hickmott is not a legal test. The book doesn't appear to have been referred to in any of the cases. It doesn't form part of the admissible factual matrix, and it doesn't represent admissible evidence of market practice.

More generally, Hickmott is concerned with the position where wide area damage, as well as damage to insured property, is caused by a storm and certainly for prevention of access clauses, such as the Arch clause, there is no wide area damage analogy which can sensibly be drawn. One could only draw the analogy if one made the elementary mistake of assuming that in our case the disease is the peril, but it's not. Our peril is prevention of access to the premises, not the disease and therefore our trends clause requires the application of a "but for" test to exclude the non−access−related effects of the disease. In other words, the effects

which would have been suffered if the premises had remained open.

Finally, in my allotted time a few minutes on responding to ground 1 of the FCA's appeal, and this obviously does not arise if Arch has succeeded on its appeal and I think that that is common ground.

Ground 1 is an attempt by the FCA to extend the impact of the counterfactual case which prevailed in the court below, and in his submissions Mr Edelman ran grounds 1 and 2 together, but ground 2 does not apply to Arch because, as you know, the Arch clause is triggered by government advice recommending closure as well as government action requiring closure. Therefore, we do invite the court to treat ground 1 separately from ground 2 and not to allow the FCA's points on ground 2 to cloud the analysis on ground 1.

I don't have time to invite you to look at the declaration the subject of ground 1 of the FCA's appeal. It's at {C/1/7} and it's paragraph 11.4(c). There's no appeal from 11.4(a) or (b).

Declaration 11.4(c), the one that's challenged by ground 1, refers to a measurable downturn in turnover prior to the operation of the insured peril and we submit that assuming that there is a measurable downturn in turnover prior to the operation of the insured peril,

declaration 11.4(c) is correct in principle and that we are entitled to take that into account when adjusting claims.

A measurable downturn in turnover caused by the emergency in the weeks before the operation of the insured peril is plainly a trend which has affected and is affecting the business before the operation of the insured peril, in our case the government action or advice requiring closure. One can test this again by reference to Lord Briggs' example of the travel agent.

It would offend common sense, of which Mr Edelman professes to be so fond, as well as contradict the terms of the trends clause to suggest that the downward trend before the insured peril operates should be ignored. It would offend common sense and be contrary to the trends clause to allow the travel agent to recover its 2019 level of turnover whilst it's closed.

The downward trend pre−peril is therefore a trend which on the face of the trends clause plainly should be taken into account when adjusting the loss. It means that the loss, once the peril occurs, is assessed by reference to the actual experience of the business at the commencement of the indemnity period or, as on the FCA's case, the loss is to be measured by reference to a completely notional pre−indemnity period experience of

the business. That is not sensible and it is not what the trends clauses provide for. We made the point in our −− I'm sorry.

LORD BRIGGS: It seems to me that there is a sort of battle going on. As I understand it, you and Mr Edelman both accept that if the pre−trigger downturn in relation to a prevention of access clause is some other economic consequence of the pandemic, then it doesn't get stripped out of the counterfactual, I think that's Mr Lockey's concession by reference to the travel agency example. But if the pre−trigger downturn is in fact an access−related downturn, in other words it's the killing effect of COVID on people coming to the premises in advance of a government restriction, then it should be stripped out of the counterfactual. That seems to be what Mr Edelman is suggesting.

I just wonder whether the difference between you isn't more about how you draft a declaration which captures that distinction, rather than one side saying "You strip out COVID for all purposes" and the other side saying "You don't strip it out for any purposes".

MR LOCKEY: Well, my Lord, I'm running out of my allotted time so I'm not going to be able to respond in full on that.

What I would respectfully suggest is that

Mr Edelman's suggestion or concession, if such it be, undermines completely his case on the trends clause because on any view the emergency is not, on his case, extraneous to the insured peril.

Anyway, I'm afraid I have to pass on now to the next insurer in line. I would like to assist your Lordships further and I'm sure I could assist your Lordships further, but time doesn't permit and obviously I have to rest on my written documents.

LORD REED: Yes. Well, we understand. Thank you, Mr Lockey.

I think we turn next to Mr Gaisman.

Submissions in reply by MR GAISMAN

MR GAISMAN: My Lords, I have 20 minutes. First, the Hiscox appeal, three short topics. The first one is Hiscox 4, judgment paragraphs 112 and 418 {C/3/69}, {C/3/149}.

Members of the court have asked questions about whether the analysis in 112, the thousands or millions of proximate causes, should be adopted and others will address that.

But as your Lordships know, as regards Hiscox, there is a specific reason why it should not. As I mentioned in opening, we have a clear finding in our favour in judgment paragraph 418 {C/3/149}.

Now, my learned friend for the FCA gave an answer on

Day 3, pages 84 to 85 {Day3/84:22}, {Day3/85:3} to my Lord, Lord Hamblen's question about this paragraph to the effect that all the judges were saying in 418 was, well, and I quote:

"... if you have all these pins on the board, if you take one pin out, it's not going to make any difference."

My Lords, they were not saying that. They were saying that what occurred within the one-mile radius was simply not causative of the restrictions and the court was accepting the submission which Hiscox made, which they recorded at the end of judgment paragraph 403 {C/3/145}. And there is a further point in relation to this.

Judgment paragraph 112 {C/3/69} is reflected in declaration 10 {C/1/6}. Now, your Lordships do not yet know, but I am telling your Lordships now, that there was a dispute between the FCA and Hiscox after the consequentials hearing about whether declaration 10 should or should not include Hiscox 4. That dispute was referred to the court and the court ruled in Hiscox's favour. That is why this declaration does not include Hiscox and is confined to the disease clauses.

The second topic is "but for" causation and Hiscox. Now, again others will address this topic more generally

but as regards the Hiscox wordings, there is no issue or there was no issue that one applies "but for" reasoning both to the main insuring clause and to the counterfactual -- and to the trends clause, the court below so held in the most unequivocal terms in paragraph 278 {C/3/114}. Nowhere has the FCA complained about that holding or criticised or said the court was wrong in that paragraph.

If it is now said, as regards some insurers, that "but for" causation should in some way not apply, that cannot be so for Hiscox, not only for the reasons just given but also because the Hiscox policies only insure against loss solely and directly caused or solely and directly caused by interruption, which is D in my chain A-B-C-D, and that interruption has itself, of course, to be caused by A-B-C. This is our ground of appeal 4.

I mention this point now, although it's in our case at paragraphs 97 to 100 of our appeal case, because I had thought that this appeal was proceeding on the basis of judgment paragraph 278 {C/3/114} and as we pointed out in our appellant's case, paragraph 26, the FCA explicitly stated below that it was not seeking to disapply "but for" causation.

But the words "solely and directly" put this issue, at least as regards Hiscox, beyond dispute. The FCA's

respondent's case para 224.1 accepts that the words "solely and directly" imposes a stricter test than proximate cause.

The effect of such a provision was considered by my Lord, Lord Hodge in the McCann's Executors v Great Lakes. Just for the reference, we haven't got time to look at it, {E/43/1196}: see especially paragraphs 16 to 17, 25 and 28. The effect in that case and generally is that where a loss is concurrently caused by two proximate clauses A and B but the policy only insures against loss caused solely by A, there is no cover. So the effect of this provision is to cement the "but for" test in the analysis and the words "solely and directly" make any debate about "but for" and other possible proximate clauses irrelevant because only losses solely caused by an interruption itself caused by A-B-C are covered and that applies both generally but also to the causation issue within the coverage question on Hiscox 4.

Thirdly and finally on the Hiscox appeal, the role of the disease in the counterfactual. My Lords, the FCA continues to say that it finds our case on this incomprehensible. We illustrated it in our appellant's case, paragraph 53, with the pipeline example. The point is simply this: Hiscox's indemnity does not extend

to the uninsured effects of the disease, represented in that example by pipelines X, Y and Z, but that sounds axiomatic. We don't insure uninsured effects. But that is what is meant by saying that the disease is removed insofar as it causes the restrictions imposed and it really comes down to two points, my Lords, which I would like to leave with your Lordships on this.

First, what is your Lordships' judgment on our 13th chime point? Perhaps that's a slightly 'question begging' way of putting it but it identifies the point. How can a public authority clause require underwriters to indemnify in respect of losses not caused by public authority restrictions? That's the first question I leave with your Lordships.

The second question I leave with your Lordships is this: who is right on this question? Is this an insurance against rats or drains, et cetera, or disease, provided only that there is public authority action, or is this an insurance against certain consequences of public authority action provided that the reason for that action is one of the causes stated in sub-clauses (a) to (e).

If we're right on that question -- and my learned friend said very little about that debate -- if we're right on that, it cannot be right to remove anything

wider than the consequences of the public restrictions caused by the disease.

My Lords, I turn to the FCA's and HAG's appeal. Restrictions imposed. Now, my Lords, listening to my learned friend Mr Edelman's "Through the Looking-Glass" submissions yesterday one might have forgotten three things.

First, the question is: what is the true construction of the words "inability to use due to restrictions imposed" in Hiscox1 to 4? Do they refer to legal restrictions imposed or something wider and, if so, what?

Secondly, this question is to be viewed as at the date of the contract. It is a question of the parties' original intentions. Obviously not with the benefit of hindsight.

One doesn't start, as my learned friend did, with the Prime Minister's 16th March speech and ask which bits of it were mandatory in the special coinage that the FCA gives that word?

Thirdly, the concept of mandatoriness is nowhere in the contract save in its usual sense meaning that which is either required or prohibited by law.

Now, my Lords, nothing that my Lord, Lord Leggatt said in Equitas, if I may respectfully say so, requires

one to do other than examine the presumed intention of the parties as at the date of the contract.

Now, let's go back to that point. The idea of the government ordering people what to do in a non-legal way would not have been familiar to the contracting parties, nor would the concept of restrictions imposed other than by authority of law. If someone had asked the parties at the time of contracting, "Do you contemplate the possibility of restrictions imposed by a public authority causing an inability to use other than by operation of law?" I respectfully suggest that their answer would have been, "Of course not. What sort of a country do you think we live in?" Or, to use the language of Lord Hope in the Lloyds TSB case, the meaning that my learned friend Mr Edelman puts on these words is a meaning that no reasonable person would have dreamed of giving them at the time.

It is common ground that the wordings in this case -- the meaning of the wordings -- and the wordings themselves should be clear and readily applicable in the real world. The court below provided a readily comprehensible test. I respectfully suggest that policyholders and insurers would be utterly bemused by the FCA's proposed test, which actually has been introduced in order to deal with a completely different

concern which the FCA has about the interaction of this point with the trends clause.

The test between what is permitted by law and what is forbidden by law is not only a readily comprehensible test, it is one that every inhabitant of this country has to live by every day of their lives, insured or uninsured. This has got nothing to do with insurance. Everybody under the present lockdown has to know what they're legally prohibited from doing.

My Lords, I hope it's not too old-fashioned to engage in a little bit of textual exegesis, although there was not very much of it in my learned friend's submissions. The words are "restrictions imposed producing an inability to use". Whatever the ambit of the inability that the insured must prove -- I leave that, that's a separate point -- it has to be an inability.

Now, restrictions that do not have the force of law do not create an inability because compliance is a matter of choice. In our country, an insured may do what it likes with its premises and if it's unable do that, it's because it is prevented by law from doing so.

My Lords, social responsibility is a laudable thing but it cannot create an inability to use. Similarly, perhaps I don't need to apologise, I almost feel I do,

for looking at the natural and dictionary meanings of the words used. We all know what "imposed" means, and it's not an accident that it does. As we point out in our respondent's case, the fact in the clause that the imposer is stated to be a public authority that has legal power —— that has to impose the stated restrictions refers to —— my Lord.

LORD LEGGATT: You're no doubt right, Mr Gaisman, that nobody at the time the policy was drafted expected that the Prime Minister would come on television and order people to do things without at the time a legal basis for that. But it's unrealistic, isn't it, to expect the policyholder, who watches that broadcast, to say, "Oh well, it's all very well for you to say that, Prime Minister, but unless and until the law is changed, I'm going to carry on business as usual." That's just an unreasonable way to expect a policyholder to react.

MR GAISMAN: Well, my Lord, there are two views about that. A struggling business that needs all the income it can get would not, I respectfully suggest, be open to criticism for staying open until it was required to close. But in any event, my Lord, the question is what —— one has to attribute a test to the parties —— an intention to the parties as at the date of contracting. And if the natural intention at that stage

would be to distinguish between what is required by law and what is not required by law, as I suggest it would have been, then that test is what carries forward into the future.

LORD LEGGATT: But it's not right to proceed on the basis that the parties wouldn't have thought of this situation, therefore it's not covered. You have to take the situation that has happened, the broadcast that is made, and say: what should the parties be taken to have intended the words to mean when applied to this situation, which has occurred?

MR GAISMAN: Well, my Lord ——

LORD LEGGATT: You say your approach is consistent with what Lord Justice Chadwick said, but it seems to me it's not.

MR GAISMAN: Well, it's consistent, my Lord, with what Sir Thomas Bingham said, and the difference between the implication of a term and the matter of construction is an irrelevant difference when it comes to the extent to which you interpret the contract in the light of events which has occurred.

But all I would do in perhaps the limited time I have is to quote to my Lord, Lord Leggatt what my Lord said yesterday at page 134 {Day3/133:18} because —— and in a sense I'm moving on to a slightly different question, a question of practicality. Your Lordship

said:

"... if we were to rule that the P[rime] M[inister]'s statement was mandatory that might be a bit too broad without looking at particular language of particular parts of it and looking at particular effects, or how they might reasonably be understood by particular business sectors."

Now, this is not this stuff, this speech, my Lord, of the clause at all. Let me give your Lordships two examples taken from the Prime Minister's speech. The only mention of restaurants in the Prime Minister's speech on 16 March is London restaurants. Is this a mandatory statement as regards restaurants not in London? What is London?

Second point. Some businesses subsequently ordered to close were not mentioned at all in the Prime Minister's speech on 16 March, such as beauty salons.

So we have a situation where the restrictions were imposed on 16 March depends on this Prime Minister's notorious taste for euphemy. Now, these are totally quixotic results. It cannot possibly have been intended, even if one attributes the very generous dollop of hindsight which I respectfully suggest is being posited.

Then we have another issue, my Lord. The reasonable impartial observer, because somebody's got to work out —— not what the law is, which everybody has to do —— but what something means. We have to parse the modal verbs, we have to cope with the fact that different ministers may say different things on different days in different language, and we have to accept that the libertarian and the valetudinarian will have a completely different approach to the question of what something either means or should be taken to mean. Although I understand the circumstances in which the first lockdown was imposed, I do very respectfully urge that taking too a narrow view of what is socially responsible without recognising that people are entitled to do that which they are not legally prevented from doing would be a mistake, because in fact what your Lordships are —— or what my Lord, Lord Leggatt in a sense is putting to me is that the contract should be interpreted in a way which ascribes a legally inaccurate understanding of the position to the parties. Because if the parties had understood the position correctly, they would have realised that there were no restrictions imposed by law.

My Lord, I see that in my enthusiasm to answer your Lordship's question, I've practically done myself

out of my remaining time. So all I think I can do now, I need to move on to inability to use, but we've managed to debate "inability to use" over two days, some part of two days, without actually looking at what the judgment below said on this. It's paragraph 268 at {C/3/112}.

This is what this appeal is about, my Lords, on this point. Because the judgment on this paragraph, which I have a particular pleasure in quoting since it reflects the submissions that we made below, unlike some other paragraphs, and this is what this is about. Did the judges below get this wrong?

Now, if I had time, which I don't, I would read this paragraph to your Lordships and I would commend it to your Lordships, because a great deal of the target that my learned friends have been aiming at has been the wrong target. All I am seeking to do is to uphold this paragraph of the judgment. Lord Mustill always used to say that if you asked a rhetorical question you were in danger of getting a rhetorical answer, so I will avoid that and simply say there's nothing wrong with paragraph 268.

My Lords, I think I'm out of time.

LORD REED: Thank you very much, Mr Gaisman.

Now I think we're going to hear for the first time from Mr Orr on behalf of Zurich.

Submissions by MR ORR

MR ORR: My Lords, can you see me and hear me?

LORD REED: Yes, perfectly, thank you.

MR ORR: My Lords, I have 15 minutes to present Zurich's submissions. Zurich is concerned only with two of the FCA's grounds of appeal, namely the force of law and total closure points; that is grounds 2 and 3.

There are two Zurich wordings in issue. They are in materially similar form. They are both prevention of access wordings. Could I take your Lordships to that wording as it appears in the Zurich2 policy. That is the policy that is quoted in the judgment. It is at {C/19/1448}.

My Lords, if I can start about a quarter of the way down, your Lordships will see the stem wording:

"Additional cover extensions applicable to Sub−section B1 — Business interruption 'all risks'

"Any loss as insured under this section resulting from interruption of or interference with the business in consequence of ..."

And then it's (b):

"Any of the under−noted contingencies.

"will be deemed to be an incident" and as an incident within the scope of cover.

The first extension is the action of competent

authorities clause. This is the extension which is the subject matter of the FCA's claim against Zurich. We describe it as "the AOCA extension". That's how it was referred to below.

The keywords, your Lordships see, are:

"Action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the premises whereby access thereto will be prevented ..."

There are two other extensions which are relevant to interpretation of the AOCA extension. First, on the next page, that's 1449 {C/19/1449}, the "Notifiable diseases" extension. Your Lordships see there the description of the contingency:

"Loss resulting from interruption of or interference with the business at the premises resulting from" various matters, including the "occurrence of a notifiable disease at the premises ... which causes restrictions on the use of the premises on the order or advice of the competent local authority."

The second extension that I want to draw your Lordships' attention to is the prevention of access extension on the following page, 1450 {C/19/1450}, and there the contingency is described as:

"Property in the vicinity of the premises damage to

which will prevent or hinder the use of the premises or access thereto, whether your premises or property therein sustain damage or not ..."

Your Lordships will note the draftsman's use in those two further extensions of the phraseology "restrictions on the use of the premises", the phrase "order or advice" as opposed simply to "action" in the AOCA extension, and the reference to matters which hinder access to premises and matters which prevent or hinder the use of the premises.

Now, my Lords, the court below found that the AOCA extension did not respond to the measures introduced by the government in response to the COVID−19 national pandemic. The court found that the AOCA extension provided narrow, localised cover intended to cover dangers occurring in the locality of the insured's premises. The court concluded that this cover was not triggered by the government action responding to the national pandemic, because that action was not caused by and hence did not follow any danger or disturbance that was specific to the locality of an insured's premises.

That conclusion is not challenged by the FCA. The FCA's appeal will not therefore affect the outcome of these proceedings against Zurich. The FCA has nevertheless chosen to appeal the court's findings as to

the meaning of the terms "action" and "prevention of access" in the Zurich wordings, and I turn to those points now. I deal first with prevention of access.

The court found ——

LORD LEGGATT: Can I just ask, Mr Orr ——

MR ORR: Yes, my Lord.

LORD LEGGATT: —— does this point have any bearing for the real world because of some other situations that arise or is it just an abstract question that we're being invited to decide to add to all the other important real questions?

MR ORR: My Lord, so far as Zurich is concerned it is abstract. The phrase "prevention of access" appears also in Arch's wording and I will come to that. So it has effect in relation to another insurer's wording.

So far as the meaning of the word "action" is concerned, I think I'm right, but I will be corrected if I'm wrong, that that is purely academic; in that it appears in the Zurich wording and also in MS Amlin's MSA1 wording. But, again, that wording is wording in respect of which the court below found in favour of MS Amlin and again the FCA, I think I'm right in saying, doesn't actually challenge the outcome of the case in respect of that particular wording.

So, my Lord, so far as action is concerned, the

short answer to your Lordship's question is yes and, indeed, that is a reason that we would pray in aid for this court to be cautious about overturning the court below's decision on the meaning of "action", at least as it applies in relation to the Zurich policies.

My Lords, so far as prevention of access is concerned, the court below found in relation to the Zurich wording that access to premises is prevented where the premises have been totally closed for the purposes of carrying on the insured's business. As in the case of Arch, in the context of the Zurich policies, the business in question is the business stated in the policy. That is the insured's pre—existing business.

Zurich submits that the court's construction of the phrase "prevention of access" is correct. The FCA's contention that partial prevention should also count as prevention of access is wrong, we submit, and on this issue we gratefully adopt the submissions made by Mr Lockey on behalf of Arch.

I make only at this stage the following short points.

First, we submit that the language of the AOCA extension is clear and unambiguous, cover is triggered where access is prevented, nothing less will do. Partial prevention of access may amount to hindrance of

access to the premises or possibly hindrance on the use of the premises. However, neither of those suffices for the purposes of the Zurich AOCA extension. Neither hindrance nor use of the premises is referred to in the AOCA extension, whereas they are referred to in the notifiable diseases and prevention of access extensions. The choice of different language in these provisions should, we submit, be taken to be deliberate.

The second point I would note is that the construction adopted by the court below accords with the genesis of action of competent authority extensions, such as those found in the Zurich policies. These extensions arose out of terrorist activity in the UK in the 1980s and 1990s which involved devices that did not explode, not just those that did explode, so that traditional business interruption cover contingent on property damage did not respond.

That is explained by Riley on Business Interruption Insurance in a passage cited in the judgment at paragraph 489 {C/3/167}.

So the paradigm situation contemplated by these extensions is one where a particularly dangerous situation, such as a bomb scare or other incident, require the police or other emergency responders to cordon off or otherwise prevent access to premises that

are believed to be dangerous. In this regard it should be noted, my Lords, that police cordons have the force of law. As the court below correctly observed, individuals other than those permitted to go through a cordon, such as emergency workers, would break the law if they went through the cordon. A police cordon therefore constitutes a legal as well as a physical barrier to accessing premises that are within the cordon.

My Lords, I note the time. I could finish off prevention of access before lunch, or ——

LORD REED: I think it might be better if we adjourn just now and we can sit again at 2 o'clock.

MR ORR: I am obliged, my Lords.

(1.01 pm)

(The luncheon adjournment)

(2.01 pm)

LORD REED: I think we're all ready to resume now. So we will return to Mr Orr. Mr Orr.

MR ORR: My Lords, finally on prevention of access, we echo Mr Lockey's submission that general restrictions on free movement, such as those contained in regulation 6 of the 26 March Regulations, did not prevent access to premises within the meaning of the AOCA extension. We submit that the court below was correct on this point for the

reasons it gave in paragraphs 328 and 329 of the judgment {C/3/127}.

It follows, we submit, that the court below rightly found that there was no prevention of access to premises in the case of businesses that were permitted by the March Regulations to remain open and that includes category 3 and category 5 businesses which account for 87% of the policyholders of the Zurich policies in issue in these proceedings.

My Lords, I then turn finally to the meaning of "action". Zurich submits that the court below was correct to find that the word "action" in the AOCA extension connotes steps taken by a competent authority which have the force of law. On this point, Zurich relies on the submissions made by MS Amlin and Hiscox on the force of law issue, as well as the points made in Zurich's own written case. I make the following brief points at this stage.

First, the narrow meaning to be ascribed to the term "action" in the AOCA extension is apparent, we submit, when the extension is read in the context of the Zurich policies. The AOCA extension does not refer to advice, in contrast to the phrase "order or advice of the competent local authority" which is the trigger for cover under the notifiable diseases extension. The

draftsman's choice of words should be taken to be deliberate.

Second, in the context of the AOCA extension, the term "action" is naturally read as connoting steps which have the force of law because only such steps prevent access to premises. Guidance or advice which gives an insured the option of complying does not have that effect.

Third, the construction adopted by the court below promotes commercial certainty. The FCA's contention that "action" encompasses not only actions which have the force of law but also instructions expressed in mandatory terms is a recipe for uncertainty and dispute.

Fourth, the FCA's arguments are, we submit, driven by hindsight. That is wrong in principle. The policies must be construed by reference to the background knowledge that would reasonably have been available to the parties at the time of the contract.

Finally, my Lords, a brief word on Mr Edelman's argument trying to link the force of law point to the FCA's first ground of appeal, namely the pre-trigger downturn point.

Mr Edelman argues that when these two points are combined, the construction adopted by the court below would reduce policyholders' claims to zero, even though

cover was subsequently triggered by legislation having the force of law.

Now, Zurich is not concerned with the first ground of the FCA's appeal. Nevertheless, to the extent that such an argument is relied upon to construe the AOCA extension in the Zurich policies, Zurich makes clear that it does not suggest and never has suggested that closure of a business in the period immediately preceding the introduction of legislation by the government, for example on 20 March in advance of the 21 March regulations, would of itself establish a trend that a loss adjuster could use to adjust a policyholder's claim to zero.

Mr Edelman's argument to that effect focuses on the short periods of time between, first, the announcement issued by the government on 20 March and the regulations introduced on 21 March and, second, the announcement issued by the government on 23 March and the regulations introduced on 26 March.

From Zurich's perspective, the notion that loss of revenue during those periods would be relied upon by a loss adjuster to reduce a claim that was covered by a policy to zero is fanciful. This, in our submission, is unjustified scaremongering.

The argument is also unsupported by any evidence.

There is no evidence before this court and there was none below suggesting that loss adjusters would approach the establishment of a trend in the way now alleged by the FCA.

The pre-trigger downturn point does not therefore support the FCA's argument as to the proper meaning of the term "action" in the Zurich AOCA extension.

LORD REED: May I just ask for clarification, Mr Orr? Are you restricting your submission to establishing a trend reducing the loss to zero or are you making a wider point that it wouldn't be relied on as establishing a trend at all?

MR ORR: No, my Lord, no, it would be part and parcel of the circumstances that would need to be taken into account, but I am responding to Mr Edelman's in terrorem argument that it would have the effect which he said would be to reduce policyholders' claims to zero.

LORD REED: Yes. So it might reduce the loss to some extent?

MR ORR: Indeed, but on the face of it not a significant extent because a trend is something that happens over a period of time. My Lords, so that was all I was going to say, unless I can assist your Lordships further and we submit, for the reasons I've given, grounds 2 and 3 of the FCA's appeal should be dismissed.

LORD REED: Thank you very much, Mr Orr.

Now I think it's now time for Mr Kealey to go over the top, as he put it.

Submissions in reply by MR KEALEY

MR KEALEY: I'm going to hope to stay there, my Lord, and in fact invade the trenches opposite me successfully.

I'm going to address five to six points in my reply. I say five to six because it will really depend upon how interventionist your Lordships are, but I am going to start quite slowly and probably I will gallop towards the end.

The first point, my Lords, is quite important. The gauntlet was fairly and squarely thrown down in front of Mr Edelman's feet. I think he bent down and tried to pick it up. If he did, he failed to get up properly again, my Lord.

The gauntlet was, my Lords, that Mr Edelman had not come up with any insurance case in this country or indeed in Scotland where something has been held to be a proximate cause which however was not a "but for" cause.

All Mr Edelman can point to are defence costs authorities, and they simply don't help him. They turn on the wording of the relevant defence costs expenses provisions. There is nothing in them that refers to

causation in any way, shape or form. They provide no support for there being a proximate cause where there is no "but for" cause. I can take your Lordships and invite your Lordships to go to the Zurich v IEG case, a case very close to Mr Edelman's heart since he was in it. It's at {E/21/494}. It's also a convenient authority because it refers to New Zealand Forest and its policy provision. The reason I take you straight to 494 rather than to the beginning is because that's where the relevant defence costs provision exists in the policy before the court in that case.

As your Lordships see, at paragraph 13 {E/21/494}:

"Each of the Midland policies issued during the six years when it was on risk provided that ..."

If your Lordships go to the last sentence on that page:

"The company [that's the insurer] will in addition pay claimants' costs and expenses and be responsible for all costs and expenses incurred with the consent of the company in defending any such claim for damages."

If your Lordships could now turn to page 503 {E/21/503} to paragraph 37 you'll see a similar type clause in the New Zealand case.

If your Lordships look at paragraph 37:

"As regards defence costs, IEG relies on reasoning

adopted by the Privy Council in New Zealand ..."

If you could go down, my Lords, to letter F:

"This covered 'all loss ... which such officer has become legally obligated to pay on account of any claim made against him ... for a wrongful act'."

Both provisions, therefore, depend upon a legal obligation. The wordings provided, my Lords, a complete indemnity. I think I've lost —— no, Lord Leggatt's back.

The wordings provided a complete indemnity. They compelled one obvious conclusion. The costs having been incurred by the insured and the insured having incurred a liability in respect of them for the defence of covered claims, it was a complete irrelevance that they might also have enured for the benefit of uncovered claims.

Your Lordships, I will give you the reference to paragraph 38 as well {E/21/503}. Even so, my Lords, if you apply the "but for" test to the clauses, as in Zurich, would the claimants have suffered the loss for which they claimed indemnity but for having incurred the costs and expenses with the consent of insurers in defending such claim for damages? Of course not. The answer is no, the "but for" test was satisfied insofar as it ever needed to be asked.

Whilst we're on Zurich, my Lords, I want also to point out to your Lordships the relevant paragraphs which dealt with the insurance fallout, rather like a nuclear fallout, the insurance fallout of the departure from the "but for" test in the Fairchild Enclave. There are certain paragraphs which I will refer you to and certain paragraphs I will read. Could I read paragraph 102 at page 525 {E/21/525} in the judgment of my Lord, Lord Hodge.

These are all paragraphs which I cite to you almost in terrorem. In other words, don't mess around with the "but for" test unless it is absolutely necessary and vital so to do and in this case don't. And I'm going to develop that submission in a more elegant form in a moment.

Paragraph 102 {E/21/525}:

"I have found this a difficult case, not least because I am generally averse to developing the common law other than by the application of general principles. I have shared the concerns which Lord Neuberger ... and Lord Reed ... have articulated. But we are where we are."

And that's a rather sad sentence:

"The law has tampered with the 'but for' test of causation at its peril: Sienkiewicz v Greif ...

Lord Brown ...[et cetera]. The Fairchild Enclave exists: the courts in Fairchild and Barker and the 'Trigger' litigation, for obvious reasons of policy, have developed a special rule of causation to do justice to the victims of wrongful exposure to asbestos fibres who have contracted mesothelioma as a result. Having done so, the courts must address the consequences of that innovation."

For your reference, could you also look at my Lord, Lord Hodge at paragraph 109, that's just a reference {E/21/526}; Lord Sumption at 114 {E/21/528}; Lord Neuberger and Lord Reed who gave a joint judgment. Could I take your Lordships to paragraph 193 {E/21/564} which your Lordships will find, I think, at page 564 of this bundle.

"The creation of an ad hoc exception from established principles governing causation in order to provide a remedy to the victims of mesothelioma was, in the first place, likely to result in certainty as to the legal rationale of the exception (as distinct from the social policy of enabling victims of mesothelioma to obtain a remedy against negligent employers), and the consequent breadth of that exception. The rationale could not be merely the impossibility of establishing the cause of an injury, since such a wide exception to

the general rule governing causation would destroy the rule ..."

Can I invite your Lordships to go on and then, as your Lordships see, Lord Brown referred to:

"... the unfortunate fact is that the courts are faced with comparable rocks of uncertainty in a wide variety of other situations too, and that to circumvent these rocks on a routine basis would turn our law upside down and dramatically increase the scope of what hitherto have been rejected as purely speculative compensation claims."

I think, my Lords, if you go to the last sentence in that paragraph, the last sentence in that paragraph:

"Secondly, the introduction of a novel test of causation in tort was bound, given the legal and commercial connections between different areas of the law, to give rise to a series of difficult questions and consequent uncertainty, as the ripples spread outwards."

I'm so sorry, my Lords, it was being pointed out to me, something was being pointed out to me, and I didn't know it was you.

LORD LEGGATT: That's fine, Mr Kealey, I was waiting until you had got to a good point in the passage. What I wanted to suggest to you is that the problem in Fairchild and other such cases is not the application of

the "but for" test, it wasn't a case in which there were multiple causes that would be sufficient to result in loss, the problem was that in that enclave, although it's put politely as a weak test of causation, actually what happened was that the need to prove any causal link between the particular negligence and the loss was abrogated and that's not ——

MR KEALEY: Yes.

LORD LEGGATT: —— your problem, it's just a case of dispensing with causation and satisfying yourself with an increased risk which doesn't amount to a causal link.

MR KEALEY: Well, it depends again on your perspective. Professor Jane Stapleton would say that an increased risk is a causative connection. Professor Lord Burrows would disagree, my Lord, with that but neither of those two persons is here.

But certainly in that case it might be said that no causal link could be proved although there possibly was a causal link between at least one tortfeasor's actions and indeed the disease.

LORD LEGGATT: (Inaudible)

MR KEALEY: In relation to the "but for" —— I'm so sorry, was your Lordship going to say something?

LORD LEGGATT: No, I was just agreeing with that proposition.

MR KEALEY: In relation to the "but for" test, dare we say it, the causative link cannot be proved either because unless you have A causes B, B is not caused by A. So it's an even more fundamental point.

In fact, the Fairchild Enclave at least had one tortfeasor who did something which was causative of the victim's mesothelioma. In our case, if you ask the question which I'm going to repeat ad nauseam until you tell me to shut up, which is: did the peril insured against cause the loss? The answer is no, there was no cause as a result of the insured peril. There was a cause, if you're an epidemiologist there was a cause and the epidemiologist can investigate the cause, but in terms of the contractual question ——

LORD LEGGATT: You say, do you, Mr Kealey, in the case, of two fires each started off and the house gets burnt down, this is a Hart and Honoré example, and either fire on its own would have been sufficient to burn the house down but two were started, but you say neither fire caused the loss; that's what you say, is it?

MR KEALEY: Absolutely not, my Lord. That's a terrible example. It's a case of two wrongdoers each of which causing a fire and the fire burns down the building in circumstances where if there had been one wrongdoer the victim of the fire would have recovered, but in

circumstances where there's a proliferation of wrongdoers, the law seems to think or the "but for" test seems to think that there is no wrongdoer. That is so absurd that the law in the case of tort as a policy reason in the case of two wrongdoers makes an exception.

LORD LEGGATT: Well, let me dispense with wrongdoers. There's a strike of lightning which starts a fire and a wrongdoer also starts a fire, if you like. We don't say that the lightning wasn't a cause of the burning down because it would have burnt down anyway or (inaudible due to overspeaking).

MR KEALEY: Well, actually ——

LORD LEGGATT: Neither caused it.

MR KEALEY: No, I'm sorry, my Lord, Professor Lord Burrows would tell your Lordship that in the answer to that particular example the natural cause has resulted in the fact that the unnatural cause is no longer a cause at all. If your Lordship looks at Lord Burrows' book on causation, he will say that if there is a human—made cause and a natural cause and the loss would not have occurred but for the natural cause, then the person who would be the tortfeasor has no liability as a result of the natural cause as it were intervening.

LORD LEGGATT: So, what, neither did cause the loss in that example?

MR KEALEY: No, absolutely not. Because again you're doing the wrong thing, dare I say it, my Lord. You're asking the wrong question. Did the wrongdoer cause the fire? The answer is no. No, because but for the wrongdoing, the fire still would have occurred.

My Lord, I hate to say this because I can debate this with your Lordship for probably the next 2 hours and I just don't have the time, and actually that's a very important point, my Lord.

Could your Lordship, just for your reference, the Carslogie case {F/14/229}; Mr Justice Hamblen's analysis in the Orient at {E/31/928}; see Clarke {F/60/1292}; MacGillivray {E/51/1453}, footnote 27.

Now, the concern I have, my Lords, and I'm going to have to jump in and really dash now and so I'm now becoming more —— I am now at a gallop, my Lord, and I might actually lose control in a moment and come off, but it doesn't matter.

LORD LEGGATT: I will respond to your request not to ask any more questions, Mr Kealey, and give you a free run for the last furlong.

MR KEALEY: Well, I hope it's longer than a furlong, my Lord.

Anyway Mr Edelman refers to Galoo and the Australian cases referred to in it. You have to read them very

carefully. I'm sorry they don't say what Mr Edelman suggests. They don't say "but for" causation is unnecessary, only that it's insufficient.

My Lord, I've got a very important point to make which I'm now going to rush through, if I may.

Your Lordships —— that is to say my Lord, Lord Leggatt —— has been postulating quite often the concept of two concurrent independent causes, despite everything I say about "but for", you're throwing me out with the bathwater, as it were.

If you discard the "but for" test in a contractual context, you discard the need for a factual causation link between what's insured and the BI suffered, the business interruption. Now, that is dangerous. Look at Fairchild. I've shown you the appellate court's warnings. The recognised exceptions are limited indeed and that includes material contribution cases where, for example, my Lord, there is a scientific limitation in being able to prove causation: see McGhee and Bonnington Castings.

Now, the courts have in those cases —— and I say this politely —— manipulated the rules of causation for policy reasons. Those are tort cases. They are cases of multiple wrongdoers. This is a contract case where the parties have contracted against the background of

established insurance, legal principles on proximate cause and "but for". It's a contract case where soi—disant policy reasons don't come into it, as they might do in tort, to permit the court to manipulate the rules. Contractual bargains are not to be rewritten because of difficult cases. This, my Lords, is not the case for developing such new previously unrecognised exception to "but for". There are two reasons predominantly. There are an awful lot I've got written down, but I'm going to select two.

Firstly, the FCA has expressly said that it is not relying on any exceptions to "but for". Two references: trial Day 1, page 92, lines 2 to 7 {Day1/92:2}; FCA's written respondent's case, paragraph 8, bundle B, divider 10, page 336 {B/10/336}. I'm going to read the last very quickly.

This case is not and never has been about manipulating the legal rules of causation as occurred in the extreme circumstances of Fairchild or about making new law with wide—reaching effects in tort law and contract law. It is not even about making new insurance law. That's the first one.

The second reason, my Lord, as I dash, there could hardly be a more dangerous invitation to the highest court of the land in an expedited hearing which is

ostensibly about the construction of numerous individual wordings for my Lords, these judges before me, to go off and discard the "but for" test in a proximate cause insurance case. If your Lordships really had wanted to do that, you should give me about two more days of legal argument where I take you through all the legal texts, Professor Stapleton, which your Lordship I know my Lord, Lord Leggatt knows all about because two of his examples to me were examples from Professor Stapleton's Law Quarterly Review as I recall, Professor Burrows, et cetera. I have to dash on, my Lord, I don't have time.

But this is not the case, but since Lord Leggatt is taxing me mercilessly, I'm going to deal with Lord Leggatt's two categories in relation to wide area damage. It is what I think he asked Mr Edelman. I think it was Mr Edelman.

The first category that your Lordship put is where the sheltered hotel —— it was a sheltered hotel, I believe —— was closed for two weeks due to damage, but even if it had been open nobody would have come to the hotel. So a one soi—disant concurrent cause, independent. The damage to the hotel, but there was also damage to the city, are therefore concurrent independent causes. You know our position: "but for"

means that there is no coverage. I won't repeat the submissions.

Even accepting for the purposes of this bad argument that I'm wrong about it, your Lordship's first category is limited to true cases of concurrent independent causes, and that question is entirely fact specific.

Secondly, when the case ceases to be one of concurrent independent causes, in other words damage may not be fully repaired, but whatever is the state or condition of the hotel is not such as to cause the business interruption. At that moment, you come to my Lord, Lord Leggatt's second category, but nobody comes to the hotel because of the surrounding area damage. In our case, on any view, that loss is caused by the uninsured effects of the hurricane and cannot be recovered.

Mr Edelman said, no. He said that even after the damage ceases to be a cause, you ask "What would have happened in a normal world with no hurricane anywhere?" My Lords, we say that that is just the wrong answer and that is the pervasive element of the entirety of the FCA's case against my clients on proximate cause and "but for" cause.

Finally, my Lords, because I'm dealing with the Orient—Express and physical damage. Physical damage is

much more tangible. You can see it, you can feel it, much more than disease. Applying my Lord, Lord Leggatt's categories is not at all easy when you're talking about disease. Let's say you've got a radial area of 25 square miles. Now, it may be at some stage —— it may be at some stage —— that one could describe the illnesses or the cases of illness within that area as being of some causative impact, but there will come a time, my Lord —— I've got two minutes left, I'm told, it's rather like one of these competitions —— there will come a time when that disease or the illnesses in that area simply will have no causative potency whatsoever. At that moment, that area ceases to be a concurrent independent cause.

Right. Last points. Last point, my Lord. Interdependent causes. Those are the only instances where you see that the "but for" test is properly applied to concurrent causes. Never anything other than interdependent: see Lord Hamblen.

Finally, my Lords, the Silversea, which is, it seems to me, my learned friend's best and only case. It is a case of such irrelevance that not only the court below but also Mr Justice Hamblen, as then he was, almost so described it.

It was a decision on its own facts based upon

particular expert evidence that was heard. Concurrent causes were not even argued. It was common ground that the events of 9/11 and the State Department warnings were concurrent causes. There was no argument on "but for". There was no argument on interdependent. There is no legal principle in that case of relevance to this.

I'm afraid I will tell you all about windfall profits being a terrible point, look at Riley. I will tell you about more serious the fortuity the less to recover is an awful point as well. I just don't have time to cover so many awful points made against me. It is a great shame, but at least I've covered to a degree "but for" and proximate, which is a bad point.

I think I'm out of time.

LORD REED: Thank you very much, Mr Kealey. In that event, we'll turn next to Mr Crane.

Submissions in reply by MR CRANE

MR CRANE: Can your Lordships see and hear me?

LORD REED: Yes, we can, thank you.

MR CRANE: Thank you. My Lords, I've got the standard allocation of 20 minutes in which I have to reply on my appeal and respond on Mr Edelman's appeal on QBE2 and QBE3. I'm going to spend the vast bulk of that time addressing causation on a hypothesis and the hypothesis

is that your Lordships are with me on the construction of the disease clauses with the result that I'm addressing causation on the hypothesis that the insured peril is not the disease generally, but occurrences or manifestations of the disease within the radius area such as to have caused the business interruption.

But before I do that I can't completely ignore the construction issues. On QBE1, I'm going to leave it, apart from making these points.

They all involve hypothetical questions and I'm asking your Lordships to imagine that someone had been asked what this clause meant before the present extraordinary crisis. I suggest that had that question been posed, say, a year ago, the person in question would have replied without too much hesitation that it was intended to provide cover for business interference caused by the manifestation of a notifiable disease within the premises or within 25 miles thereof and that person may have gone on to say that that impression is reinforced by the location of this clause in the contract amongst immediate neighbours providing local cover.

Now, assume the same person was asked a second question, which goes like this: How about a disease

like SARS, which might spread unpredictably and have widespread effects? To that question he would have replied "Well, if that's a risk they had in mind, it looks like the radius limitation was intended to ensure that it was only the impact on the business of an outbreak of disease within the specified area which was covered. Otherwise the radius provision wouldn't have made much sense."

Now, postulate a third and final question, which goes like this: "Well, it may seem utterly inconceivable, but say the government was to lock down people and businesses nationally without regard to the prevalence of disease in any particular area. Don't you think the cover would be triggered in that event if and when a single case of a disease manifested itself within the insured perimeter?" And he would have replied "What's the sense in that?"

If that's the risk the parties had in mind, the radius limit makes no sense. Why should cover in that event depend on the wholly arbitrary contingency of disease entering, perhaps in one case, in the specified area? If that's the risk you wish to guard against, you would need cover against disease generally. My Lords, those are my submissions on QBE1 for what they're worth.

QBE2 and 3 I'm going to take an even more radical

approach. I haven't addressed the proper construction of those clauses at all orally and I don't have time to do so. What we do have, however, is a ten-page respondent's case at tab 16 of file B, page 612 {B/16/612} which sets out a number of, we would submit, cogent submissions on the proper construction of this clause, the effect of which or the outcome of which is that on any orthodox application of the rules of construction the result hit upon by the court below was inevitable.

Now, before leaving construction, can I just make two further points which are relevant to causation and which have gained profile or at least emerged in the course of exchanges between Mr Edelman and the court yesterday.

The first is this. It has never been QBE's case that within the specified area their disease clauses cover a single occurrence of disease only. If by "occurrence" is meant a single case of notifiable disease.

The court below understood this perfectly, that what we were insuring were cases, a case or cases, occurring within the specified perimeter and we can see that at paragraph 235 of the judgment {C/3/104}. I'll be coming back to this in a different context.

Three lines down paragraph 235 {C/3/104}, the court said this:

"As we have found that this clause, unlike others we have considered, is drawing a distinction between the consequences of the specific cases occurring within the radius and those not doing so, because the latter would constitute separate 'events', we consider that insureds would only be able to recover if they could show that the case(s) within the radius, as opposed to anywhere else, were the cause of the business interruption."

Indeed, if one looks -- I won't take you there because it's not an efficient use of time -- at declaration 12.1 in relation to QBE2 at {C/1/8}, you will see that the declaration is framed in terms of either a single occurrence or multiple occurrences.

Indeed, my Lords, before I leave this point, I would remind the court of the case of Kuwait Airways Corporation v Kuwait Insurance Corporation at first instance, it went to the Lords but this point was undisturbed, the judgment of Mr Justice Rix, {E/26/840} at 686 where he discusses the nature of an occurrence in insurance law. An occurrence may denote an event giving rise to a plurality of loss, for example the Iraqi capture of Kuwait Airport on 2 August 1990 and the aircraft located there, or the

destruction, a famous example in the Dawson's Field arbitration, the destruction of three hijacked aircraft by the PLO at Dawson's Field in September 1970.

The problem, if it is a problem, of one insured occurrence cancelling another insured occurrence out, both occurring within the stipulated area simply doesn't arise. Any occurrence or aggregate of occurrences is relevant provided it has a causative impact on the business, namely it causes business interruption.

LORD LEGGATT: Sorry, Mr Crane, I don't understand why it doesn't arise if you apply a "but for" test, because if each is a separate occurrence, as it is, why don't they cancel each other out if you can say that but for this particular occurrence the loss would have occurred anyway because of another occurrence?

MR CRANE: Because they are all part of the insured peril.

LORD LEGGATT: Right.

MR CRANE: You can't set insured perils against each other if they are the proximate cause of loss.

LORD LEGGATT: Why not if they are different proximate causes without departing from the "but for" test?

MR CRANE: Because in any causation question you have to ask whether the insured peril is the proximate cause of loss and the answer to that as a matter of fact is yes, we can forget matter of law for the moment, if, in fact,

the insured peril or perils have acted in combination to cause the loss.

Now, it's highly unlikely that one case of COVID-19 or any other notifiable disease would itself cause interruption with the business. It's much more likely that it would be an outbreak in the locality. We accept that. We've always accepted it.

My Lord, it's never been part of our case that in a case where there is a cluster of disease within the relevant specified area you take each occurrence separately and examine its causative effect.

LORD LEGGATT: I realise it's not part of your case, I was just trying to test how you distinguish what isn't your case from what is your case which is where there was occurrence outside the area and why that makes a critical difference to the principle of causation.

MR CRANE: Well, it makes a difference for this very straightforward reason, my Lord. Once you have an occurrence of disease outside the stipulated area, it's not an insured peril. That's why -- I'm jumping ahead -- that's why, when we come to consider causation on a certain hypothesis as to the properly identified insured peril, we're comparing the aggregate of cases of disease insured within the area, we're comparing their impact with the aggregate of cases of disease everywhere

else in the UK. I will justify that in due course, if I may.

Before leaving this I should also correct a submission made by Mr Edelman which, with respect, Lord Leggatt corrected to an extent. It's never been our case that where the outbreak strays across the boundaries of the insured perimeter cover ceases. Nor has it been our case that it's only in cases where there is a de minimis occurrence outside the insured perimeter that cover exists.

In a case where an outbreak straddles the insured area and a non-insured territory, if I can describe it thus, you have to make a judgment of fact. You have to ask whether the cases occurring within the insured radius are the proximate cause of the interference with the business. This may involve more or less difficult judgments. Sometimes it's quite easy. The fact that there are just a few cases outside the perimeter, you can infer that any measures taken in response to the outbreak were prompted by cases within the insured area. Conversely, if there's one case within the insured area and a multiplicity of cases outside, the reverse assumption or the reverse conclusion will be the case.

I would like to leave it at that, so long as there is no ambiguity as to our case.

My Lords, can I now turn to causation on the premise that these QBE clauses properly construed respond to the insured peril of disease occurring or manifesting itself within the insured perimeter, if that is causative.

Against that background I completely adopt Mr Kealey's submissions on "but for" cause and the dangers inherent in disregarding it. But I also maintain that we need no help from "but for" causation to make out our case on causation on the hypothesis to which I have referred. The starting point is paragraph 347 of the FCA's respondent's case, and I wonder whether we can just look at that very briefly. It's in {B/10/439}. It's a short paragraph but it's very important. It's dealing with concurrent interdependent causes and it says:

"In any event, there are concurrent proximate causes only where the concurrent causes are of equal or nearly equal efficiency in bringing about the damage."

The references bear out that proposition. They're to Wayne Tank, The Miss Jay Jay and a case called Svenska Handelsbanken v Dandridge, which I respectfully commend to your Lordships, especially the passage on causation at 1685 {G/86/1685}. I haven't got time to go there, but I would respectfully invite your Lordships to read that statement of orthodox principles of causation

by the Court of Appeal.

Now, those are concurrent causes, interdependent causes, where neither A nor B on its own could have caused the loss. But as I understand Mr Edelman's case, what he wants to do is migrate from interdependent causes to what he calls independent but interlinked causes and leave behind the constraints which he concedes are applicable in the paragraph to which we've just referred, namely that where the insured peril and the non-insured peril are concurrent causes, the insured peril must be at least of equal efficiency with the non-insured peril. In fact, if one looks at that paragraph, the conventional position is that once you leave interdependent causation, you have to establish that the insured peril is the proximate or dominant cause.

But let's relax for a moment the requirement of dominance and say it must at least have equal efficiency. This is important because if you're going to leave behind "but for" causation, you've got to fill the void with something.

Our submission is that when you are looking at independent causes, perhaps interlinked, you have to identify that peril, the insured peril, which is the proximate cause of loss or at the very least of equal

efficiency that accords with non-insured perils. That's exactly what the court below did in an exercise which in our submission was impeccable. It applied orthodox principles of proximate cause. We can see that, my Lords, quickly. Go to paragraph 110 of the judgment {C/3/69} at page 69 of C3.

C, tab 3, sorry. That's become familiar to the court. There the court below identify the insured peril, we say incorrectly as the disease at large and measures taken in response. But the important point for my purposes addressing causation at this moment is to recognise that the court's articulation of the alternative principle of causation in paragraph 112 proceeds on the basis that that is the insured peril.

Now, having reached the conclusion that the insured peril is the disease in the UK at large, but there's no perhaps particular reason to ask whether any particular case of the disease has a causative status more or less than any other case because the measures taken in response to the disease nationally on any view were causative.

But when the court in fact moves to consideration of causation having properly or correctly identified the causative peril, we see a completely different approach to causation and we see that in paragraph 235 {C/3/104}.

This is the court's conclusion on QBE2, and I've read to the court the first sentence or so in a different context, but it's the last sentence which matters:

"In the context of this clause, [given the insured peril] it does not appear to us that the causation requirement could be satisfied on the basis that the cases within the area were to be regarded as part of the same cause as that causing the measures elsewhere."

"That's the indivisible cause of the disease at large. Or [and this is the alternative view of causation] as one of many independent causes each of which was an effective cause, because this clause, in our view, limits cover only to the consequences of specific events."

So what the court is saying there is once we conclude that the insured peril is the aggregate impact of cases within the specified perimeter, you then have to ask whether those cases caused the business interruption and you compare their causative impact, which in fact is nil, with the causative impact of the disease elsewhere in the UK generally and measures taken in response.

Now, Mr Edelman says that in coming to that conclusion they simply forgot about their alternative

view of causation. That's palpably incorrect or evidently in causation, so in the sentence which I just read. What the court concluded is that that view of causation was inapposite once they departed from treating the insured peril as the disease throughout the UK generally.

Now, that orthodox approach to causation which merely asked "What is the proximate cause of the loss, is it an insured peril?" Is repeated at different paragraphs of the judgment. We've been to some of them. 418, my Lords, at page 149 {C/3/149}, where the court approaches causation in the context of a clause which responds to dangers and disturbance and incidents within the vicinity of the premises. You can see the relevant wording at 391 {C/3/143}:

"An incident occurring during the period of insurance within a one mile radius of the insured premises which results in a denial of access."

There it's a local focus, so what you're asking is whether the interruption of the business could be said to have been caused by that insured peril. We have the same sort of orthodox focus and answer at 437 {C/3/155}. I won't read all of these because they're to similar effect. 436, I should say, and 437. Paragraph 444, {C/3/157} paragraph 467, {C/3/158} and paragraph 502

{C/3/160}.
My Lords, I hope this doesn't seem too formalistic a point, but if one reads the FCA's notice of appeal ground 4 against the court's findings on QBE2 and 3, I will leave the court to read it at leisure, it's at file {A/1/125}, paragraphs 59 to 62, there's an appeal against the conclusion on construction but no separate or even linked appeal on the question of causation.
Now, that means that actually we were rather taken by surprise when we saw this point advanced in the respondent's case on the hypothesis that they lost on construction. You're familiar with the alternative view of causation because that was the first time we'd seen it articulated, but even if they went down on construction somehow or other that would get them home. I'm not taking a technical point, I'm just saying that it looks a bit of an afterthought and I can see why.
Yes, Lord Leggatt.
LORD LEGGATT: You have had time to think about it by now, Mr Crane, but anyway. On the construction point, I thought that one of the arguments that insurers make —— I don't know whether you make it, but others do at least —— is that it's wrong to construe the 25—mile limit in the way that the Divisional Court did because it's not the disease that is being insured which might

just manifest itself partly within the limit, it is occurrences of the disease and an occurrence means somebody, an individual, suffering from the disease and we had, you know, my disease isn't your disease and that sort of stuff. Now ——
MR CRANE: (Inaudible).
LORD LEGGATT: —— you're then trying to reverse that on causation and now aggregate the occurrences as though they're a single cause when in fact the correct analysis is surely that which the Divisional Court in its alternative paragraph, I think it's 112, which is that each occurrence is a separate insured peril or uninsured peril if it's outside the area.
MR CRANE: My Lord, as Mr Edelman pointed out repeatedly in addressing the court yesterday, QBE have constantly referred, or not constantly but frequently, to an outbreak. We've never been scared by that term and indeed he invoked it in support of some other part of his argument.
Whether ——
LORD LEGGATT: I agree, he tries to have it both ways the other way around from you on the two points.
MR CRANE: But, my Lord ——
LORD LEGGATT: The outbreak is your primary argument but the individual case is that he's wrong about that.

MR CRANE: Yes. I've never tried to have it the other way.
LORD LEGGATT: All right. Well, I will put the point to Mr Salzedo then.
MR CRANE: I'm sorry, my Lord, I didn't mean to talk over you.
Whether it's disease manifested or disease occurring, notifiable disease occurring, in QBE2 in the premises or within 25 miles thereof depending on the facts, it may be a single episode or it may be numerous such episodes. It's more likely to be the plural than the singular and in cases where there is a cluster of occurrences all insured, then that's the peril which you have to address for the purposes of causation.
LORD LEGGATT: Thank you.
MR CRANE: One minute. My Lord, in support of the approach of the court below I make the following submissions. Every policy has to be considered as a stand—alone contract. The question to be asked in relation to each policy is: were the insured cases a proximate cause of the loss to the business, eg the losses caused by and following the government advice of 16 March and the regulations of the 21st and 26th? This is not a case of multiple wrongdoers, or even multiple insurers, each has to be considered on a stand—alone basis.
Second, do not be beguiled by a map of England

covered by 20 contiguous circles. We have to consider each case of causation as a stand—alone proposition, tested in the case of a policy with a one—mile radius in a remote part of the UK where the recorded cases of COVID occurred relatively late in the day, perhaps even after the business had been closed as a result of the 21 and 26 March Regulations.
By what contortion of reasoning, we ask, can it be said that the local case or cases within the radius were a proximate cause of the business interruption? How can it be said that the local cases have an equal causative impact when compared with the aggregate impact of all other cases in the UK? It's important to understand how the proviso works when the first case in the relevant area follows the commencement of the business interruption.
I think this got lost in an exchange on the Scilly Isles yesterday. In such a case Mr Edelman suggests that the single case within the relevant area is then a contributing cause to continuing business interruption, notwithstanding that that's a grotesque act of fiction in circumstances where the business has been closed, say, a week or two weeks earlier. That's how it works.
My Lords, I've used my time and thank you for

hearing me out.
LORD REED: Thank you, Mr Crane. We turn now to Mr Turner, I believe.
Submissions in reply by MR TURNER
MR TURNER: My Lord, I'm going to leave Mr Salzedo to come back to Lord Leggatt on his perils point, if I may. Can I just start with a preliminary point, which is on a couple of occasions during the course of his submissions Mr Edelman treated you to his surmise as to why things had been argued in a particular way at a particular time by RSA. I don't know whether your Lordships relied upon Lord Wilson for your racing tips, but if you do or did please continue to do so because Mr Edelman's powers of surmise are consistently wrong.
Can I say a little bit more please in relation to proximate cause and pick up Mr Edelman's example or illustration of the pins on the map and for your reference that was Day 3, page 51, line 7 and following {D3/51/7}.
The number of pins in Mr Edelman's map may not yet be infinite and may not have been infinite at the point at which the regulations came into effect on 21 or 26 March as the case may be, but you will recall being told by Mr Edelman that if one applied the infection

rate estimated in the Imperial College report, there would have been about 1.8 million cases spread throughout the UK by 28 March 2020.
Now, one can put that in the context perhaps of the origins of the proximate cause rule because Mr Edelman says each of those pins is a proximate cause of each insured's loss and of the government actions. If one goes back to the origins of the proximate cause rule, those can be traced back at least in terms of the encapsulation of the rule to the late 16th century and Bacon's Maxims of the Law.
We've inserted those into your Lordship's bundle, new bundle L, tab 1, page 3 {L/1/3} is the relevant maxim. The explanatory text perhaps illuminates the point which was raised by Lord Hodge on Day 3, my Lord, Lord Hodge at Day 3, page 67, lines 3 to 9 {D/67/3-9} where Lord Hodge posed the question that proximate cause perhaps involved a further requirement at the point of enacting the Marine Insurance Act as opposed to something different from "but for" causation.
Now, as confirmed in Leyland Shipping, amongst other authorities, the 19th-century translation that we see in bundle L, at page 3 {L/1/3}, of "proxima" as "immediate" has been refined to "dominant", in the words of Viscount Haldane in Leyland Shipping, or, to borrow from

Lord Shaw's speech, "effective", {E/27/896} or "efficient" {E/27/895} as causes of the loss.
It is in that context that the parties have so far been unable to identify any case with more than two proximate causes in the field of insurance as known to the courts of England or Scotland. That isn't an accident. In our submission, one simply cannot describe one of a series of a million or more events each adding an infinitesimal amount, perhaps a 10,000th of 1% or so, as being an efficient, effective or dominant cause of a loss.
If we take Mr Gaisman's nail bar and position it in, say, Huddersfield, and borrow from Leyland Shipping by way of analogy, that nail bar was not torpedoed by the fact that a Mr Jones in a village outside Bodmin caught COVID -- and on the FCA's case possibly did so asymptomatically -- without ever having been diagnosed as having COVID.
The nail bar was torpedoed, as the FCA accepts in its particulars of claim, by the national pandemic and by the measures taken to contain it. We submit it would simply be an abuse of language to describe Mr Jones' occult infection being perhaps 1 millionth of the whole as at the relevant date and the corresponding pin as being an effective, efficient or dominant cause of the

nail bar's misfortune.
Again, to borrow from Lord Shaw in Leyland Shipping at page {E/27/896}, Mr Jones' infection cannot be, and I quote:
"... variously ascribed the qualities of reality, predominance [or] efficiency".
Now, the atomisation of cause which is illustrated so graphically by Mr Edelman's pins is, in our submission, wholly antithetical to the notion of proximate cause.
My Lord, my next points relates to the RSA1 counterfactual where Mr Edelman made a number of forensic submissions, including as to RSA's pleading, where he referred you to a part of the pleading which was dealing with general principles in relation to causation and not in a part of the pleading that was dealing specifically with RSA1. I've already accepted that it took us longer to get to the light bulb moment than Mr Gaisman. The forensic approach taken by Mr Edelman should not obscure, in my submission, the need for the court to consider how as a matter of principle a hybrid clause such as the one in RSA1 is intended to operate. And in respect of that, I adopt Mr Gaisman's submissions before lunch specifically in relation to the second question that he posed in

relation to the 13th chime.

Very briefly on the RSA3 disease exclusion, my Lords, it was suggested by Mr Edelman that the exclusion did not apply to the product liability subsection. That was a submission made by reference to the contents page. It was another sophistical argument advanced on the strength of failing to show you the wording of the section itself. Section 6 starts at page 1255 in bundle C {C/16/1255} and it starts under the heading "Section 6 – Public liability", it has subsection (a) "Public Liability" and then five pages later or four pages later on, 1261 {C/16/1261} subsection (b) "Product Liability". Everything in section 6 is excluded or is excepted from the exclusion.

My Lord, in relation to closure or restrictions and enforced closure, you have our respondent's case at {B/17/622} and in relation to the example of the insured who decides one morning when he wakes up that he can't be bothered to open the premises, so there's a voluntarily closure, and the word "enforced" being there to emphasise that particular point, well a voluntary closure wouldn't be covered in any event because it's not a fortuity. Mr Edelman's attempt to invest the word "enforced" with some special meaning was actually an attempt to deprive that word of any content.

It is there for a reason. It means what it says.

My Lords, I am out of time and Mr Salzedo awaits.

LORD REED: Thank you very much, Mr Turner. Well, Mr Salzedo, I think there are ten minutes left to you, so your ten minutes begin now.

Submissions in reply by MR SALZEDO

MR SALZEDO: Thank you, my Lords.

Mr Edelman confirmed on Day 3, page 7 {Day3/7:1} that he did accept that as a result of the words of proximate causation and he immediately followed that with a statement that underlying all his submissions is actually it doesn't matter because of our concurrent cause argument. That response reflects the reality that the argument in this court has demonstrated that the primary basis upon which the court below found against Argenta is unsustainable. Grounds 1 to 4 of Argenta's appeal should succeed and that leaves my remaining nine and three–quarters minutes, ground 5, the concurrent cause argument.

My Lord, in an almost literal footnote to Mr Kealey's submission, another authority for Mr Kealey's correct answer to my, Lord, Lord Leggatt's question about fire and lightning is Jobling v Associated Dairies, which is in the bundle at {G/62/1079}. I obviously don't have time to go there.

If your Lordships think that Jobling is a notoriously difficult case for me to cite, then that only confirms Mr Kealey's submission that this appeal about the construction of contracts is not the one in which to be reviewing it.

My Lords, another question that's arisen in this regard and in relation to which I apprehend that my Lord, Lord Leggatt has a question for me already ––

LORD LEGGATT: Jobling is an example of a case with a supervening cause, isn't it, if I remember, as opposed to one like the fire case where the two fires burn down the house at the same time?

MR SALZEDO: My Lord ––

LORD LEGGATT: (Inaudible due to overspeaking) problems.

MR SALZEDO: Well, I see the argument, my Lord, but I hope your Lordships can see that there is also a pretty strong argument that actually they raise the same essential problem. But it shows that the issue is very context–dependent and that the context of an insurance policy is one in which the crucial question is the construction of the insured peril and the crucial question is not an abstract question of cause for a philosopher and it's not necessarily the same question as a question of whether a wrongdoer has caused whatever the consequences are that that are prohibited by the

rule in question.

My Lord, I fear I may incur a still further question by coming onto the question what is meant by the words "any occurrence". Now, I adopt what Mr Crane has said about this, but there are some Argenta–specific points to add.

In opening, my Lords, I pointed out that the meaning of any occurrence in Argenta1 was common ground. I showed your Lordships the record of this in a judgment at paragraph 158 at {C/3/84} and what I showed your Lordships there was that it was common ground that an occurrence was constituted by at least one case, not that each case was itself an occurrence. That, in fact, reflected common ground on the pleadings between the FCA and Argenta, the relevant parts of which are not before this court, because the common ground has not been challenged on this appeal.

As the FCA pointed out in its written case at paragraph 166 {B/10/383}, this common ground is the reason why Argenta has always in this case conceded expressly that a local lockdown like the one in Leicester might well be proximately caused by an occurrence within 25 miles of some policyholders.

The Argenta cover does cover interruption caused by local cases, including multiple cases in the same areas,

which is reflected in the use of the term "any occurrence" and not the words "a case". But that does not transform it and this, I think, is the question that my Lord was waiting to put to me, that does not transform it into cover for all the consequences of a global or national pandemic, because if it were, there would have been no radius limit.

Now, in my opening submissions I was making the point that the mere fact that multiple cases are part of one occurrence does not mean that all cases in the outbreak including beyond the radius are covered. When I was asked by my Lord, Lord Leggatt about this very issue on Day 1, page 73 {D1/73} and I made clear then that Argenta still accepted that common ground as a matter of substance.

Now, my Lords, if the transcript is accurate, in the heat of the moment in my answer I confused cases, occurrences and indeed outbreaks willy-nilly. My Lord, I resile from that confusion but I do not resile from the substance of the answer which is that multiple cases are covered and they are, in fact, as a matter of common ground, covered by the phrase "any occurrence".

Even yesterday, my Lord, at Day 3, pages 60 to 62 {D3/60-62} Mr Edelman insisted on the argument that I've referred to as having been made at paragraph 166 of his

respondent's case, the matter has always been and still remains common ground.

Now, my Lords, the common ground is also the natural reading of the whole phrase in its context. If I can take you back to {C/5/317}, you will see or be reminded that three of the paragraphs of box 4 use the phrase "any occurrence". In each of those sub-paragraphs, if the word "occurrence" limited the matter to a single case, they would all be open to the concern that's been raised a few times by my Lord, Lord Leggatt that individual cases within the radius could causally defeat each other, and there are two answers to that question.

The first answer is to accept the common ground about the meaning of "any occurrence" which has been acceptable all parties and the court below and at the very least is at least an available and natural reading of the words.

The alternative answer, my Lords, to go slightly broader into how this works in insurance policies, is to hold that as a matter of the construction of any ordinary insurance policy if it insures against two or more perils and multiple insured perils come together to cause loss, even if you need more than one peril to make a sufficient cause of the loss that's eventuated, that is an insured loss. Because otherwise, in any

multi-peril policy, take for example an all-risks policy, there will be many factual examples where the self-cancelling argument that my Lord has made to a few counsel in this hearing will be open to insurers.

Now, that can't be right and the court is then faced with the question, well, is it not right, because as a matter of construction if you insure more than one peril and more than one peril happens and causes loss, that is part of what you've insured, or is it not right because we need to throw overboard the general law of "but for" causation which has stood the law in such good stead and provided such certainty for English commercial law over centuries? In my submission, once one poses the question in that way, it is completely obvious what the answer is: Insured perils are insured, even if you need more of one of them to make a loss, but there is no reason to look outside what's insured and add that to the insurance. There's no reason to do that at all.

My Lords, the correct starting point is the words of the contract. The underlying fallacy in Mr Edelman's submissions is to suggest that there was some unqualified disease risk which was insured and this is the point about outbreak where my Lord says I'm trying to have it both ways by saying we didn't insure an outbreak.

My Lord, we insured multiple cases within the perimeter. We did not insure any outbreak of which those multiple cases happened to be part. You can call what happened within the perimeter an outbreak, but that does not make it the wider outbreak. It may even be part of a wider outbreak, but it doesn't mean that what was insured was the wider outbreak.

The starting point is the words of the contract and the enquiry that the court makes in relation to the words of the contract is as to what was insured by those words, not into what remained uninsured. What remained uninsured is simply whatever is left. What that enquiry reveals, when one looks at the words of Argenta1 or the other simple disease clauses, is that there was a comprehensible and meaningful agreement by the parties to insure the consequences of disease within a 25-mile radius which, as one sees from what's happened with COVID, is entirely meaningful. It will include local lockdowns, of which there have now been many more since Leicester where appropriate, but that does not mean that you have to bludgeon the words or even worse bludgeon the law of causation into some preconception that the cases within the perimeter are necessarily part of some wider matter, if that matter was uninsured.

Your Lordships should resist the invitation and

temptation to do any bludgeoning. Your Lordships should interpret this contract as any reasonable reader would have done when it was made and allow Argenta's appeal in full.

LORD REED: Thank you, Mr Salzedo. So now we turn to Mr Edelman for the FCA's reply.

Submissions in reply by MR EDELMAN

MR EDELMAN: My Lord, yes, and can I start with causation and I think I have a full right of reply to Mr Crane in relation to QBE2–3 and a right to deal with any new points of law that might have been raised during the course of other submissions, any new points that arise but not of course otherwise a general right of reply and of course a right of reply on my appeal.

Can I start with one observation, though. Mr Kealey particularly complained about a lack of time and introduced a lot of new material in his reply.

Firstly, we have, of course, had eight days of trial at first instance with insurers producing 860 pages of written submissions. They've done another 230–odd pages of submissions for this appeal. They've had two days. They've had the opportunity to divide time between them as they saw fit. They've chosen to divide it equally and repeat each other on a number of occasions. That's their lookout. They've had adequate opportunity to make

these points and if Mr Kealey ran out of time, that's the problem as between the insurers.

But turning specifically to the causation arguments that Mr Crane was making, my Lords can now see, once you actually start analysing what insurers are saying about their case, how it all starts to unravel. Because at first they say "Look, it's individual cases of the disease. That's what it says", and my Lord, Lord Leggatt put to me it says "an illness sustained by and that's by an individual". But then, of course, they're driven to accept and did accept –– and Mr Crane accepts and I'm focusing on him because I've got a full right of reply against him for QBE2 and 3 –– he accepts that, "Well, when it says illness sustained, it doesn't actually mean, it cannot be intended to mean an individual case, it must mean lots of cases or at least encompass lots of cases". That makes sense when you've got a radius of 2,000 square miles. It would also make sense when you've got a radius of 3.14 square miles of the one–mile cases.

So although they're a bit nervous about it, what they really do now come to accept is that "occurrence" does in practical terms mean an outbreak. An outbreak of the disease within the relevant policy area. Mr Crane accepted it, I haven't got a right of reply to

him but I will note perhaps that Mr Salzedo has just accepted it and he's got the same wording "illness sustained by any person". So it's the nature of the risk which is driving them to this concession.

Once they make that concession, you then have an outbreak in the relevant policy area which is in fact an indivisible part. You have an indivisible outbreak in the country of which the outbreak in the –– there isn't really a separate outbreak in the relevant policy area, it just happens to be part of the national outbreak.

That's where you then get to the court's conclusion on construction. Well, if this is contemplating outbreaks, not odd cases but is contemplating at least including outbreaks and they're accepting that conclusion because that's what happens within the relevant policy area, they know it's not going to be one case it's going to be a whole cluster of cases in the area, then you're driven to the conclusion everybody must have contemplated when you're dealing with this sort of risk that if there was an outbreak like that there was every chance that it was going to be outside as well as within. And you do then ask the question, and this is what the court posed: was it really intended that you should then get this arbitrary response of the

policy depending on the precise shape of the outbreak and whether it does or doesn't straddle the boundaries? Is that really what the parties intended when they are insuring this type of risk?

So one sees it in a nutshell with what Mr Crane and Mr Salzedo were actually driven to accept to get away from the obvious artificiality of an individual case.

Our alternative concurrent cause case is simply, well, if you want to go down the artificial route of treating these all as individual cases, that is where you got to. But actually if it's all an indivisible outbreak and it just happens to be present in the relevant policy area, that's what the policies contemplated and for that you don't need any rules of causation at all. It's quite simple.

I can illustrate this –– and this is not replying to Mr Kealey, it's just illustrating the point that I was making –– with two fires, one of which is caused by an insured peril and one of which by an uninsured peril which merge and cause the damage. Now, the critical point about insurance is it's all about the transfer of risk. It sounds facile to say that but it is important to distinguish the nature of the contract as being the transfer of risk and it's the transfer of risk of the insured peril from the policyholder to the insurer. The

insurer accepts that risk for a price; the premium. This is not about remedies against a wrongdoer who causes injury, it's about transfer of risk.

With all respect to the submissions that Mr Crane has made, if you have a situation in which a loss is caused by the overall effect of something which is partly caused by an insured peril or concurrently caused by an insured peril and an uninsured peril, then that is covered by the policy unless the non-covered element is excluded.

So in the fire example where you have two fires which merge, the simple answer would be that if the other fire was -- and it's caused by an excluded peril there is no cover, if it's caused by an uninsured but not excluded peril, it is covered. And that's why insurance is different because it's a transfer of risk. If the risk has manifested itself in that way, you have insurance cover.

So that, we say, is a quite simple analysis and here what you have is the outbreaks in each area forming part of one indivisible national epidemic and it's like the fires merging. Fire is raging in each policy area, but in fact it's a national fire. It's all one big fire. Fires may not be the great analogy because disease is a different thing. But if one is trying to draw some

analogy, that's it. The fact that you can see the fire in different parts of the country doesn't mean that that fire is ceasing to be causative of the damage that the whole fire, the merged fire, is causing.

So that's what I wanted to say in response to Mr Crane on the general point.

One other point on the construction of his policies, where he goes wrong, in our submission, is to read paragraphs of the judgment in isolation. One has to look closely at paragraph 102, page 67 {C/3/57}, this is his answer to my causation point and his reliance on what was said in paragraph 235 {C/3/104}. If one goes to 102, when discussing the RSA policy you'll see that the way it approaches construction is it asks five lines down or so {C/3/67}:

"Extension vii (a) is not expressly confined to cases where the interruption has resulted only from the instance(s) of a Notifiable Disease within the 25 mile ... As opposed to instances elsewhere. Nor in our view does the language used in this clause implicitly have that effect."

If you read the judgment as a whole in context and then you go to paragraph 235, which Mr Crane relied on, in our submission, if you read it as a whole, it is apparent that what the court is doing -- and if you read

everything as a whole -- what they are doing is they are treating QBE2 and 3 as being an exception as if it said "resulted only from the instance of disease" and it's only in that way that you can make sense of their conclusions about causation and their answer here.

What we say is that that was an extra stage in the reasoning that they missed out. They might have said, "Well, this doesn't fit with the other construction" but they then needed to consider the next question, if it requires looking at cases locally and isn't considering this broader outbreak potential, then is it nonetheless something which has to be only within the policy area?

They seem to have just jumped to that conclusion and that is the way we submit one rationalises their judgment but it's wrong, because there is nothing in QBE2 or 3 to suggest that the word "only" should be written in. Once you recognise that as being the court's error, then you realise that they missed out our concurrent cause argument if you get to that stage of the analysis.

I can't see if there's anything -- I think that's all I needed to say in relation to Mr Crane's arguments on causation. On Mr Kealey's argument, there was just one point that I wanted to make because he dealt with Zurich v IEGL and I think I'm entitled to respond on

that.

In that case, the situation was -- I think I've dealt with this in my submissions, but just in case I didn't. First, the argument on defence costs was that Zurich was only on risk for six of the 27 years for which there was a claim and so on defence costs it could be said that but for the insured being sued for Zurich's years of exposure, the defence costs would still have been incurred because of all the other years of exposure, and so the defence costs weren't but for caused by the insured occurrences.

But it was not a submission that found favour and it was being suggested they didn't even find that the defence costs should be apportioned by reference to those years. Zurich were liable for all of the costs even though they weren't a "but for" cause of the allegation -- the insured claims weren't a "but for" cause of the loss being incurred.

Then there's only one point on Mr Gaisman where I think I've got a right to say something and that is paragraphs 278 of the judgment {C/3/114} which he said wasn't challenged. That is at page 114 in bundle C. He says the court was adopting "but for" but we submit on the plain reading of that paragraph of the judgment they're saying whatever basis on which you're looking at

a counterfactual it doesn't matter because this is the answer. Mr Gaisman, we submit, is clutching at straws to say that that is a finding in his favour that there is a counterfactual "but for" at the primary causation stage. They just say whatever stage one might be applying the counterfactual, the answer is the same.

Now, I come to the specific submissions that were made and there's one which, while I'm on Mr Gaisman's, I will make because it's relevant to my —— it's a point on an appeal. It's actually on solely and directly which he did not address orally and he's now introduced in his reply submissions, so that is another new point which I think I'm entitled to reply to. So that's on his wording and if we take Hiscox 4, it only really matters to Hiscox 4 because only that has a radius requirement, and I will just find it. The introduction is at page 498 the preamble {C/9/498} of bundle C. The answer is quite a simple one, which is perhaps why Mr Gaisman thought better of wasting time on it in opening but only in desperation went to it in reply. It says indemnifies against financial losses:

"... resulting solely and directly from an interruption to your business caused by ..."

The simple answer is that the "solely and directly" words only apply between loss and interruption. I don't

disagree with him about the cause of those words, but what they mean is you can only get losses which are solely caused by an interruption to your business. But then what causes the interruption is the subject to a different causation regime and it's own causation regime, and so the words just simply don't apply at the stage of the analysis with which we are involved.

I think with those comments I can go back to the issues on my appeal and start with Mr Lockey. I may come back to Mr Gaisman in turn in due course on the FCA's appeal.

Mr Lockey said that the court below looked very closely at the prevention of access issue and I agree that they did, but unfortunately having taken the wrong starting point of an overly narrow approach to what prevention of access involves and I just want to remind you again of his concession at 310, because it is important to focus on this, recorded in paragraph 310 at page 122 of the judgment {C/3/122}. I did refer you to this passage but it is worth reminding you again. Towards the bottom of the paragraph, bottom third or so:

"... Arch accepts that there was prevention of access to business in Category 2... in relation to businesses in Category 1 which did not previously provide takeaway services, access was prevented because

they could not be open to customers without the policyholder making a fundamental change to the nature of the business."

At 326 {C/3/126}, which is at page 126:

"Mr Lockey fairly and properly accepts that the impossibility in question does not need to be physical or legal [because he had advice in his policy]... His concessions in relation to the pub and restaurant which started a takeaway service in lockdown or the theatre which started remote performances on the internet are well made... that entails a fundamental change... as described in the policy schedule [and] must be prevented."

He accepts there is a prevention of access if no one can go to a restaurant as a restaurant, but the owners and the staff are free to come and go as they wish from the premises, for example to cook themselves meals. And they are free after the prevention of access which closes down their restaurant to start up a takeaway business without, on Mr Lockey's analysis, there being a prevention of access. But, he says, there is no prevention of access if in addition to cooking meals for themselves before the lockdown they had also been cooking takeaway meals. This, we submit, is a wholly arbitrary and nonsensical distinction.

The example we gave, similar to my Lord, Lord Reed's example of Boots the Chemist, was of a department store with a small pharmacy by the front door and the whole department store is closed. No one can come in and no one is allowed in, even if the store was open, no members of the public were allowed in, but anyone can come in to buy something at the pharmacy. Mr Lockey would say there is no prevention of access. But of course if the department store said, "Well, we'd like to give our staff something to do, why don't we open, and the public needs access to pharmacies, why don't we set up a temporary pharmacy in the store?" Then there would be a prevention of access even though people are now coming into the store to visit the pharmacy. We submit that this is really cloud cuckoo land.

Then Mr Lockey said something about trends clauses which is relevant to our ground 1, so I have on that a full right of reply as well.

He seemed to suggest that I'd submitted that there was some settled meaning to these clauses. I've never said that there is something that the law would recognise as a settled meaning. My submission was, as I believe my Lord, Lord Leggatt understood it, that when one looks at the origin and genesis of these clauses, as revealed by all the textbooks going back many years, one

can see what their commercial purpose actually was. That is revealed by those texts and that is the background against which one construes the policy. It's traditional in insurance — in all contracts to have regard to the genesis and origin of a contract or a clause when one is construing it and this revealed what the commercial purpose of these trends clauses actually was.

When it comes to the application of a clause like Mr Lockey's with prevention of access of requirement, what you're doing is, as I've submitted, adjusting access—related losses. In some cases the exercise may be simple, as with my church donor example. In other cases, it may be more complex but the target is the same. The travel agent example, the calculation of access—related losses is, of course, affected by the separate legal prohibitions on travel. But they would still have to be assessed. One might, for example, assess them by reference to how online tour operators did in the lockdown as compared to the tour operator who only operated from a shop.

Now for Mr Gaisman's submissions. He referred to the meaning of the word "imposed" and said no one would have contemplated non—legal action. Well, my simple answer to that is: look at the Arch policy. It

contemplated prevention of access for advice by an authority.

Of course I'm not going to suggest that people would have had in mind what the government just did, but the fact that non—binding things might be said or done that prevented access in that case was apparent and it was obvious there that the sort of advice being contemplated in Arch was something that one had to comply with. The mere fact that one doesn't anticipate the government lockdown as occurred doesn't mean that the clause doesn't apply to it.

In all circumstances, we have a situation which emerges and one has to consider whether or not the policy language applies to it.

In relation to Zurich's submissions, I will just make sure there is nothing else in Mr Crane.

In Mr Orr, he said that no one would possibly suggest that there was a trend —— my Lord, sorry, yes, Lord Leggatt. You're on mute, my Lord.

LORD LEGGATT: I just wanted to ask, Mr Edelman, we have to deal with Zurich's policy in addition to all the others when it appears that the point on it is completely academic and doesn't affect any policyholder as opposed to all the other points which affect a lot of people very importantly?

MR EDELMAN: Well, I just ask my Lord to remember that these are just eight insurers which have been selected from a large number of insurers and certain clauses have been selected, but I am told that there are a lot of other policies out there which just use the word "action".

LORD LEGGATT: So there are some other policies, in fact, where the point does matter, is what you're telling us?

MR EDELMAN: Yes, yes, and that's why we're appealing it and of course ordinarily one wouldn't, but it's because this is a test case with selected policies which have a variety of points in them, the fact that Zurich needn't worry about this clause doesn't mean that the meaning of the concept of "action" in this sort of clause isn't significant.

LORD LEGGATT: Thank you.

MR EDELMAN: All I submit about that is that no one else has made the concession and Mr Orr said it's not a trend but you'll notice he didn't say whether or not it was a circumstance. Of course, it might not be a trend but the policy, they also say, it applies to circumstances and that's a point they take.

So can I deal with briefly with the points he made on action and he suggested, if we go to tab 18, page 1406 in bundle C {C/18/1406} that the fact that the policy refers to order or advice in another clause, this

is clause 3 on page 1406 {C/18/1406} is relevant when one construes the word "Action" which appears on the previous page at 1405 at the top {C/18/1405}.

Firstly, we say the draftsman has chosen different words, so we don't see that there's any contextual issue at all. In one it's used order and advice, in the other action, but actually if you wanted to do anything by context you would say "action" encompasses both and action has a naturally broad meaning of meaning simply an act or thing done and we say that that is sufficient. I'll see if there's anything else that Mr Orr said.

He then gave the origin of this clause with terrorist activities. In fact if you look at the texts that he cites, there is a different form of words that's used. This form of language has been adapted from that and the words have changed, but in any event even if the clause does have its origin in a particular type of danger or emergency, that doesn't tell you what the word "action" means in this clause, which is not confined to terrorist activities, it just maybe that someone got this idea of this form of extension because of that, and they used the word "action" which is a general word.

He talked about cordons, but what cordons have to do with this we fail to understand. That may be one way in which access is interfered with, but it's not the only

way. We also don't accept that cordons always involves a breach of the law to cross a police cordon. It may depend on the precise circumstances in which the cordon has been erected and for what purposes.

But we needn't really go into that because there's nothing to suggest that this is actually limited to police cordons. Yes, it refers to police but it also refers to competent local, civil or military authority. It covers absolutely every single authority that there is, and so police cordons have nothing to do with it.

Then I think the next submission I have on his approach is access will be prevented and that's where again he prays in aid these old clauses. I've just found in my note the old clause said "close down or sealed off". You'll notice those words, instead of "access will be prevented" it was "closed down or sealed off", which in my submission is a very different meaning.

My Lords, can I just check that I don't need to say anything more about those issues? I think I've managed to zoom through it even more quickly than I had anticipated I would do. I obviously wait to see if anybody sends me a message saying that I've missed anything out, but otherwise I might have to hand over to Mr Lynch a bit early, unless there's any questions that

the court wishes to ask me in the few minutes that are remaining. I've tried in my reply to simply focus on the important points that have been made, rather than covering everything again. I've tried to do it succinctly.

My Lords, I would ask Mr Lynch, if I'm handing over to him a bit early, to certainly leave me a few minutes at the end because there are just some matters I wish to raise which are not related to the issues in the appeal themselves, but to do with matters of obviously thanking the court, and matters of (inaudible) the judgment.

I don't want to hold up Mr Lynch, who I'm sure is chomping at the bit to get started. He may have more than his allotted five minutes because he can have five of mine.

LORD REED: Thank you very much, Mr Edelman.

In that case, we'll turn now to Mr Lynch.

Submissions in reply by MR LYNCH

MR LYNCH: My Lords, I'm grateful. I may need the extra time just to work out how the video works again. I'm sorry about this. There seems to be some issue with it, but there we are. Thank you. Thank you for your patience.

My Lords, I have only one point to address in reply and obviously I'm very grateful to my learned friend

Mr Edelman for the extra time, which I suspect I will not need and he will have the extra time he requires.

I just address one point, which is my learned friend Mr Gaisman's reference to paragraph 268 of the judgment and his assertion that there's nothing wrong with it, linked with my answer to my Lord, Lord Leggatt's question to me concerning inability to use and that question was posed to me today, draft transcript, page 46, line 13 to line 25 {Day4/46:16}.

Just by way of reminder of that question my Lord, Lord Leggatt put to me that:

"... on the other hand, let's suppose that you can use the premises but many fewer people can come in because you have to or you are observing social distancing and so you ration the number of people who can come in. You couldn't say that that was an inability to use, could you?"

Now, my Lord's question, which must, of course, have been directed at businesses that remained open but have fewer customers or employers attending the premises, might be, for example, an off—licence which remained open but only allowed two or three customers at a time.

Now, this helpfully brings us to a number of questions, we would respectfully submit, with paragraph 268 of the judgment {C/3/112}. We would draw,

first, an immediate and important distinction here between, for example, shops which were expressly permitted to remain open and those where no direction was given under the regulations.

Those businesses where no directions were given, for example an accountancy firm, were generally and very significantly affected by, for example, regulation 6. That prevented both customers and importantly employees from attending the business without one of the narrow reasonable excuses under the regulations.

There was, in our respectful submission, a clear inability to use for those businesses due to restrictions imposed precisely because of regulation 6. The fact that employees of many such businesses could work from home simply goes to quantum rather than liability.

On the reduced use point generally, another example is the cinema that can be still used for remote transmission or the church being used for funerals. There would be an inability to use for most normal business purposes although no part has an inability to use for all purposes. It means, as earlier examples we have considered during this hearing demonstrate, for example the golf club, Boots, the restaurant, only, in our respectful submission, would an unreasonably narrow

category of businesses fall within the approach set out in paragraph 268 of the judgment {C/3/112}.

Turning back to my Lord's question, businesses which were expressly permitted to remain open which is, as I understand it, those businesses being considered in my Lord's question, can be and often were also affected by regulation 6 and by other restrictions. For example, social distancing.

The answer given in our written submissions is that whether or not there has been an inability to use will be determined on the facts and the test we propose is whether this causes a material inability to use the premises for the insured's normal business activities. Please see our application for permission to appeal, paragraphs 38 to 44 {A/2/51} to {A/2/53}, the FCA appeal written case from paragraph 75 to 84 at {B/2/56} to {B/2/59} and our appeal written case from paragraphs 45 to 55 at {B/3/92} to {B/3/97}.

As I said in answer to my Lord's question in opening, it is a matter of fact and degree but to be tested by reference to a standard of material inability to use the premises for the insured's normal business activities. With respect, this is the approach that should have been taken at paragraph 268 of the judgment {C/3/112}.

My Lords, I've used my five minutes and those are my submissions in reply. That allows Mr Edelman, I believe, the time that he requires to make his further points. Unless I can assist your Lordships further?

LORD REED: Thank you very much, Mr Lynch.

Mr Edelman.

Further submissions by MR EDELMAN

MR EDELMAN: Yes, my Lord, as always is the case there was a point that I forgot to mention. It's a very short point and it was on the statement that the Prime Minister made on 16 March, which Mr Kealey raised which is about the restaurant point and it's a very short point. It's {C/29/1783}.

He said that at that page, just above the middle of the page:

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

Then he made the point that on 1784 {C/29/1784} at the top of the page, you see about Londoners at the bottom of the line:

"... [they] should avoid confined spaces such as pubs and restaurants".

And said that restaurants were only closed down in London. We submit that it was obvious from the context

of that that other such social venues, pubs, clubs and theatres, and when he goes on to mention pubs and restaurants in relation to London, other such social venues obviously meant restaurants. It's simple. That's all I wanted to say on that.

Now the final points I wanted to raise with my Lords, firstly, there's one thing to mention and that is the position of Ecclesiastical. You'll see that they are respondent to the appeal. That's because although they succeeded on an exclusion clause, they likewise have an element of their clause which is the subject of a declaration because it wasn't just a general declaration, declarations were made as to each element of the relevant clauses because this was a test case. That element of their clause will be affected. They've agreed not to take part in these proceedings and to be bound by the result because their policy doesn't raise any separate issue. I just wanted my Lords not to be taken by surprise in due course when, at the decision stage and declarations, insofar as they are modified, involve Ecclesiastical. There's nothing for my Lords to consider. You have the submissions as they are, but just so my Lords were aware of the fact that no additional issues raised, but they are a respondent to the appeal so the declaration against them can be

changed if necessary and appropriate.

LORD REED: Did they enter appearance as respondents by putting in a notice of objection?

MR EDELMAN: No, my Lord, they didn't.

LORD REED: Well, our rules —— we might have think to —— I don't want to go into it now but you might want to think what the implications are of our rules.

MR EDELMAN: Well, my Lord, I think on the basis that this was a test case and really it was just a matter of sorting out the —— making the declaration in relation to them consistent with everybody else.

LORD REED: Yes, I see.

MR EDELMAN: Because they are going on —— when the declarations are made, whatever they are, they will be publicised by the FCA.

LORD REED: Yes.

MR EDELMAN: And it was not —— it was thought not desirable to have inconsistent declarations as the final result.

LORD REED: Yes.

MR EDELMAN: We want to have a consistent pattern.

LORD REED: I understand that. So I dare say once you have a judgment or judgments you will then want time to —— an opportunity to try to agree the terms of the consequent orders?

MR EDELMAN: Yes, absolutely, and that's the —— before I get

to the very final matter, obviously I need to echo all the thanks that have been expressed so far to my Lords for hearing this case with such expedition and patience, particularly patience to me. I am very grateful for that. But obviously, having thanked you for the expedition and the patience, comes the very awkward question about timing of a judgment. I know this is something that parties wouldn't ordinarily ask about.
LORD REED: Yes.
MR EDELMAN: We would expect it when it comes, but in the current circumstances I hope my Lords appreciate this question being asked.
LORD REED: Yes. Well, I can tell you we haven't yet discussed the case, so I don't know, for example, if we're of the same mind or if we're liable to be a range of views. That has a major effect on how quickly judgments take to be issued. We have taken steps to try to organise the lists in such a way that people should have more time than they ordinarily would have to devote to writing judgments, because we're well aware of the practical importance of the judgment, particularly for the businesses that are affected, and we will do what we can to produce a decision just as quickly as we can. But whether that will be before Christmas or sometime in January, I can't tell you.

MR EDELMAN: No, my Lord, I appreciate that because, as I've explained and I have explained to those instructing me, this case was already squeezed into the list.
LORD REED: Yes.
MR EDELMAN: So it's not as if there was already a gap in the diary for it.
LORD REED: No. Unfortunately, it's had to be squeezed in along with other cases being squeezed in, which, for other reasons, are also in their own way very important. So we'll do what we can, obviously, and we can keep the parties' solicitors informed of what the likely timetable looks like.
MR EDELMAN: That would be very much appreciated if that was possible. Just so expectations can be managed amongst all the policyholders.
LORD REED: Yes.
MR EDELMAN: The FCA and the insurers, I'm sure, will be realistic about it, but it would be helpful for the FCA to be able to update policyholders about where things stand.
LORD REED: Yes.
MR EDELMAN: I'm very grateful to my Lords and that's all I have to say, apart from reiterating my thanks ——
LORD REED: Well ——
MR EDELMAN: —— and of course our thanks to the transcribers

and all the court staff who have made all the video link arrangements possible and operate so smoothly.
LORD REED: Well, for our part, we're grateful to all counsel, particularly for managing the hearing in such a disciplined way that we got through it as smoothly as we did. As I say, we'll now start putting our heads together and let you have a decision as quickly as we can manage. Thank you very much.
The court will now adjourn.
(4.01 pm)
(The court adjourned)

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