MR LYNCH: My Lord yes.

LORD JUSTICE FLAUX: Good morning, Mr Lynch.

MR LYNCH: Good morning, My Lord, I’m grateful to your Lordship.

LORD JUSTICE FLAUX: Good morning, Mr Lynch.

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MR LYNCH: Yes, Mr Lord Justice Flauff.

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Your Lordships will see it is an analogy, but it is the same point.

In the AIG case, the SRA said: look, the word "related" is far too broad, it has to be given a very narrow meaning, it must mean something intrinsic, a relationship only between the matters or transactions, and not with some third matter, because otherwise it is too broad.

The Supreme Court held, following my Lord Lord Justice Rix in Scott v Copenhagen Re, that it is not the right approach. The right approach is to look at the word "related" and say, well, given its natural meaning it is capable of multiple applications because that is its natural meaning, that's its right meaning.

And it is not a question of reformulating the clause, it is an exercise of judgment, not a reformulation of the clause to be construed and applied.

Obviously that is an analogy only, but it is applicable here.

If I could then go, please, to (M/2/7) just to make it good. Obviously this isn’t a point that applies only to aggregation clauses, it is a point that applies across the board, and your Lordships will see there, if your Lordships could please read the Tophams extract.

(Pause)

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(Pause)
However, it is not the only set of circumstances which fall within the ambit of the clause, because its proper construction recognises the breadth of the wording used. Hiscox is well capable of using narrower language. If we see [B/6/41], please, and the non-denial of access clause at clause 3, there they specify, at the end of that clause, "for more than 24 consecutive hours". Now, that is a very specific wording used and it is well able to do that, but it also is well able to use more flexible language.

Now, what we would obviously seek from the court is guidance in terms of the proper construction being the broader construction, and whilst the court cannot of course apply the clause to all the facts of the various cases, there are some agreed facts where that can be done, for example the 16 and 23 March statements made by the Prime Minister. Otherwise, the parties will be able to apply the properly construed clause to the facts themselves.

That was my first point about how to go about the proper construction of the clause, which again obviously your Lordships will now have Hiscox saying that in fact the Lordships will be very familiar with, but your Lordships will now have Hiscox saying that in fact the right approach is a very narrow construction, and hopefully those introductory points would help.

On to my second point, which is the occurrence or localisation. So the second point I would like to address is the argument the word "occurrence" must mean localised insured premises. Mr Edelman has already addressed you on this point and so I will only deal briefly with a couple of additional points.

If we go to [A/10/16] please, that should be paragraph 14.3 of the Hiscox defence. I am afraid I must have an incorrect reference, but I can just tell you what the defence says. It’s paragraph 14.3 -- thank you. Sorry, it is [A/10/6]: "An occurrence must be local and specific to the insured, its business or business activities or the premises."

Now, we deal with this point in paragraphs 132 to 143 of our skeleton, and I won’t repeat those points, but what that means is reading in the words "local and specific to the insured premises" at the end of the public authority clause.

Now, the first and most obvious point to make is the clause simply doesn’t say that, and it is a point of such obviousness that it could be missed; but the task at hand is obviously to construe the words which are there, which words say what they say. That is particularly the case in a policy of this kind where, if we please look at [B/6/15], we see the introduction to the Hiscox wordings say:

"Thank you for choosing Hiscox to protect your business. We hope the language and layout of this policy wording are clear because we want you to understand the insurance we provide, as well as the responsibilities we have to each other."

If we return, please, to [B/6/42] and 13(b), obviously it doesn’t include the words that Hiscox says it should include, but nor does it have to mean what Hiscox says it means for any other reason. For example if the clause didn’t work, there was some problem with it or it didn’t make sense, but there is a perfectly reasonable and legitimate construction, indeed obviously the right construction, which is to read the words as they appear in the clause; Hiscox say in response: well, the occurrence of disease could be in Manchester and the insured premises are in Truro. Well, there is Mr Edelman’s very good answer to that, which is that the occurrence is not the entire insured peril. The occurrence has to lead to restrictions imposed by a public authority, which have to lead to the inability to use the insured premises. That is a sufficient restriction on the clause. In the most common case, an occurrence of disease in Manchester may well not affect an insured premises in Truro, but that will simply depend on the facts. Trying to reword the clause to deal with this kind of factual example is plainly wrong.

Hiscox make a lot of the noscitur principle, but Mr Edelman has, with respect, dismantled that point.

For your reference, without going to them now. We have included various authorities on the point in bundle M, at M2 to M8. I don’t need to go to those authorities because the problem isn’t with the authorities, the problem is with the substance of the point.

The difficulty is for Hiscox that there are various of the other underlying events within this wording that are not localised to the premises. So we see, for example, on page [B/6/41] at clause 7, that’s insured damage arising at the premises of a specified customer.

Now, where Hiscox did want to include a geographical restriction, they did. So if we see on this same page, if we see at clause 3 there is a 1 mile restriction and we see at clause 2 there is a vicinity restriction. Now, if we go back again to the next page, please see page [B/6/42], within the clause itself, within 13 itself there are also restrictions, so we see at (c) and (e) the restriction to insured premises.

Now, if we can then compare, please, [B/9/36]. We see there the public authority clause is at clause 7,
and your Lordships will see at 7(b):

"An occurrence of notifiable human disease within 1 mile of the business premises."

Now, obviously bearing in mind concerns about reading across between the policies, and bearing those points in mind, there is an oddity which arises, which Hiscox does not appear to address, perhaps because there is no good answer.

The oddity is this: if Hiscox is right that the true meaning of 13(b) in Hiscox 1 is that the occurrence following which the restriction has been imposed must be one that is local and specific to the insured or the insured premises, then this would apparently be narrower than Hiscox 4’s wording that expressly includes the 1 mile restriction. So applying Hiscox’s construction, what is obviously a restriction on the wording, i.e., within 1 mile, in fact buys the insured a 1 mile radius, which is a large area.

So if we then look at {I/1/68}, please. There we see the helpful maps, the top one being the relevant one. There we see what 1 mile buys a company in terms of radius, which is a large area.

So, if we then look at {I/1/68}, please. There we see the helpful maps, the top one being the relevant one. There we see what 1 mile buys a company in terms of radius; the insured with the restriction on their wording gets all of that area. That is given to them by one. There we see what 1 mile buys a company in terms of radius, which is a large area.

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Now, let’s imagine he comes into work on Monday morning, day 1, and he finds there is a serious defect with the drains, there is sewage flooding all over the floor. He is faced with an immediate dilemma. He is well versed, as it happens, with insurance law and he is well advised and he now thinks to himself: hang on, a second, do I shut, faced with the sewage, knowing I will face the insurers’ counterfactual argument, or should I stay open for fear of that argument, should I run to the council and ask them to shut me down immediately before anything else gets in the way? What does he do?

Obviously these kinds of rhetorical questions might otherwise be amusing were it not all so incredibly serious for the insureds who desperately need the insurance money. But in reality, returning to the real world or the hypothetical, he would obviously have to shut, and he wouldn’t open, he would call a plumber. He would have to do both: for obvious reasons he can’t open; for obvious reasons he can’t open his patisserie when it is covered in sewage; but also, he has to under the terms of the policy,

So if we see {B/6/18} at the bottom, please, there is the reasonable precautions clause, and:

"You must take reasonable steps to prevent accident or injury and to protect your property against loss or damage. You must keep any property insured under this policy in good condition and repair. We will not make any payment under this policy in respect of any incident
and by that time the repairs have been done, that have been necessary under the closure order, and on day 10 it can open. All that time it has been closed for two reasons: first, the serious defects in the drains, and then later, that cause is a background cause, but the proximate cause, being the closure by the council. If the council had not closed the patisserie it would have been closed anyway because of the defective drains.

What if on day 10 the patisserie reopens but can only use half the space because restrictions remain in place because the temporary drainage had to be put in place and the council has fenced off half the patisserie? There we have continued restrictions but half open. But again, the entire, all the ingredients are there to make a recovery.

It may be that Hiscox would say there is no interruption because the business was already closed, and Mr Gaisman can tell us the answer when he gives his submissions. But if not, if Hiscox is right on its "but for" approach to causation and the correct counterfactual is to ask: if the council had not closed the patisserie there would still have been the defects in the drain so it would still have closed, the clause would simply not respond.

To argue to the contrary isn't to say that Mr Duckett should be provided with cover for defective drains alone. As I have said, he doesn’t recover anything from days 1 to 3. Mr Duckett then does not recover, after day 10 on the first variable; he only recovers during the period when all the ingredients of the public authority clause operate.

Addressing, albeit very briefly, your Lordships’ point, raised with Mr Edelman, as to the impact of days 1 and 2; so there is a closure on days 1 and 2, we respectfully adopt Mr Edelman’s approach as a matter of general principle. More directly, Mr Edelman’s approach is consistent with the answers on the Hiscox terms.

To be clear, this is a very important point for certain policyholders. It is important in respect to the Hiscox Interveners to note many of them did not suffer a downturn until the restrictions, so that is a distinction. It is also right to point out that the Hiscox Interveners are generally on the wording the trends clause, if we could see that, where there is the trends clause - I appear to have the wrong term. The trends clause, I thought, was 45. Yes, sorry it is at the top. It starts on [B/6/44] and goes on to (B/6/45). Do you see at the bottom of 44:

"Provided that you advise us ..." et cetera.

Then on to 45, your Lordships will see at the top:

"Your schedule will show if business trends cover applies and the additional percentage amount."

For most Hiscox Interveners they don't have in their schedule that that applies, so they don't have the trends clause problem. But for those that do have loss prior to restriction and the other kind of trends clause, it is a very significant issue. I don't have time to go into the issue in detail, all I have time to do is briefly to show you the contractual mechanism under the Hiscox wording.

If we could please go to [B/6/44], "How much we will pay", your Lordships will see:

"How much we will pay."

"We will pay up to the amount insured [et cetera]."

Then the two primary choices are loss of income or loss of gross profit.

Briefly to explain, loss of gross profit, please see (B/6/41). Your Lordships will see at the top "Rate of gross profits". This is the essence of the calculation:

"The percentage produced by dividing gross profit by your income during the financial year immediately before any insured damage, insured failure or restriction."

So if there is a downturn in those two days, it will make whatever difference it makes as an impact across...
1 and 2, you have had terrible days 1 and 2, so you continue that into the counterfactual. No. What it is right to do is to say: normally you would have earned X amount. Because otherwise the "or" would apply to both. So for both loss of income and loss of gross profits the correct counterfactual is not to look at: well, you have had it on days 1 and 2 so that continues through. I don’t have time to get into Mr Edelman's point and my time is up, but I wanted to flag that because it is a very important issue for those insureds who have that relevant wording. As it happens for the Hiscox Interveners, for the reasons I have explained, it is not of as direct importance. Finally, just one last point, if I may, on the Hiscox approach to public authority wording. If we go back, please, to page 42, so (B/6/44), what Hiscox does is tread an uncommercially and unrealistically narrow path. Because here, obviously whatever happens the background event must be serious enough to lead to public authority restrictions, so it has got to be quite serious. But equally, if their counterfactual is right, the more serious the event, the less likely it is that the insured will recover. So when does it ever apply? That isn’t a difficulty on our construction.

1 (10.32 am) Submission by MR KEALEY 2 LORD JUSTICE FLAUX: Yes, Mr Kealey. 3 MR KEALEY: Thank you, my Lord.

4 My Lords, of course I only represent Ecclesiastical and Amlin in this matter, but it has been agreed that I should deliver the oral submissions for the benefit of all insurers on the fundamental principles that apply in this case on causation in insurance. So my task is more academic, I suspect, although in due course I am going to go into the detail of some of the clauses, or at least some examples, in order to explain to your Lordships what insurers’ case is.

The written argument on causation, the joint argument for all insurers, is at bundle (1/6/1). This is a joint document and your Lordships will have read it. I re-read it last night and I commend it to your Lordships, because I doubt very much that my oral delivery is actually going to be very much of an improvement on what the parties have written.

21 LORD JUSTICE FLAUX: You are too modest, Mr Kealey. 22 MR KEALEY: My Lord, I’m known for my modesty.

23 The target of my submissions, my Lord, is worth stating at the outset, my Lords. Firstly, the FCA’s case is that there is a single
proximate cause of everything, everything relevant to this case. Could I invite your Lordships to look at paragraph 53.1 of the amended particulars of claim at {A/2/35}. This is important:

"As a matter of the proper construction of the wordings and/or the law, both for the purposes of considering whether causation is sufficiently direct, and for considering the appropriate counterfactual to any applicable 'but for' test, there is only one proximate effective, operative or dominant cause of the assumed losses, namely the (nationwide) COVID-19 disease, including its local presence or manifestation, and the restrictions due to an emergency, danger or threat to life due to the harm potentially caused by the disease."

That, my Lord, is the FCA's indivisible case on all wordings of all insurers, regardless of the specific words in any particular clause. So there is only one proximate cause of everything, from which no distinct and independent causes can be separated out. That is the case that insurers have to meet.

Before continuing, my Lords, I would ask you to compare 53.1 with the wordings in due course, because the wordings contain no peril, no insured peril resembling that.

If your Lordships turn to the FCA's trial skeleton, paragraph 225, which is in {I/1/91} slightly more widely at paragraph 91. At 225, the third line:

"The single proximate cause is the disease everywhere and the government and human responses to it."

So human responses, my Lords, are now included. Again, the observation I make is that nowhere is there any policy wording that resembles that peril.

The second point that I wish to make at the outset, so you have it well in mind before you start attacking me, is that the FCA's case as to the correct counterfactual for the purpose of the causation test generally is a situation where there was no COVID-19 in the UK, no government advice, no government orders, no laws or other measures in relation to COVID-19. In other words, a disease-free United Kingdom. If you could turn back to the amended particulars of claim, paragraph 77 at {A/2/45}, you will see that what I have said I hope is correctly summarised, is a correct summary of what they say:

"The proper counterfactual (for the purposes of the causation test generally and ...)"

This is paragraph 77, my Lord.

LORD JUSTICE FLAUX: 77. Yes, sorry, Mr Kealey.

MR KEALEY: "The proper counterfactual (for the purposes of the causation test generally and to the extent applicable under trends clauses) for considering what would have happened but for the insured peril considered in this claim is the situation in which there was no COVID-19 in the UK and no government advice, orders, laws or other measures in relation to COVID-19, or alternatively in which such of these events as the court adjudges to be interlinked (if not all) had not occurred."

Now before the alternative case, I will just invite you to have another look at that counterfactual and I will say again that that counterfactual, or the circumstances in that counterfactual, bear no true resemblance to any of the insured perils in any of the wordings in this case.

There is another reference, it is paragraph 74 of the same pleading. I will just give you the reference, but if I can take you to the trial skeleton of the FCA, paragraph 10.3, that is in {I/1/10}. I will just read out for everybody's sake the first few lines:

"Nothing in the wordings or in the law entitles the insurer to deny cover, or requires the court to find a lack of cover or reduce the indemnity, by reason of loss not being caused by the insured peril, but because it was caused by COVID-19 more generally (such as other public authority action or public reactions to the pandemic). Moreover, if and to the extent that it is necessary and appropriate to consider what would have happened but for the insured peril ... the correct counterfactual is a scenario in which there was no COVID-19 and no government intervention related to COVID-19 -- not an artificial one in that there was, for example, government intervention but no COVID-19 or vice versa."

Now of course, my Lords, counterfactuals are in a sense artificial, and indeed the counterfactual being proposed by the FCA is in itself totally artificial, because it assumes that in a disease-ridden world there is one disease-free set of islands, namely the British Isles. So even the FCA's counterfactual is an artificiality.

Yesterday my learned friend Mr Edelman suggested that counterfactuals and the "but for" test were all insurers' misconceived idea. You needn't look it up, it is {Day3/11:1} to page 12:

That misunderstands the position. Counterfactuals...
and the "but for" test are inherent in any causation
analysis, including in contract. Unless you are
undertaking a "but for" test or standard and applying
it, and applying a counterfactual, you are actually
applying a different and unspecified concept of
causation. I am going to come back to --

MR JUSTICE BUTCHER: You will obviously show us, Mr Kealey,
the insurance cases which have tested whether there is
a proximate cause by a counterfactual, a "but for" test.

MR KEALEY: I shall take you to the cases which tell you
that in contract cases and in insurance the "but for"
test applies.

MR JUSTICE BUTCHER: Yes, but you will show me the insurance
cases where that has happened.

MR KEALEY: I hope to be able to do that, my Lord, yes.

LORD JUSTICE FLAUX: Other than Orient-Express?

MR KEALEY: Other than Orient-Express.

I shall also hopefully be able to show you, not that
you need to be shown, but I shall also be able to show
you the cases that tell you that insurance is a form of
contract of indemnity, and a contract of indemnity is
a form of contract, and an insurance contract sounds in
damages for breach, and the purpose of damages is to put
the victim of the breach in the position in which he or
she—or it would have been but for the breach.

29

MR JUSTICE BUTCHER: Is that a long way round of saying that
you haven't got one?

MR KEALEY: I don't think it is a long way round of saying
that. I hope not. I will have a look and tell
your Lordships.

If you could go to Endurance Capital at {K/184/1}.
If you go, please, to Lord Justice Leggatt's judgment at
page 8 of that divider, at paragraphs 34 to 36
(K/184/8), you will see there at 34 the learned judge
says:

"... the general principles which govern the
assessment of loss under a policy of insurance against
property damage in the absence of any different express
provision are well established and are not in dispute.
*First of all, in a case where (as here) an insurer
has agreed to indemnify the insured against loss or
damage caused by an insured peril, the nature of the
insurer's promise is that the insured will not suffer
the specified loss or damage. The occurrence of such
loss or damage is therefore a breach of contract which
gives rise to a claim for damages: see ... The Padre
Island. Ventouris v Mountain, and Sprung.*

*The general object of an award of damages for
breach of contract is to put the claimant in the same
position so far as money can do it as if the breach had
not occurred."

In other words, my Lords, but for the breach.

"See British Westinghouse ... Where the breach of
contract arises from loss or destruction of or damage to
property (as it does where the contract is a property
insurance policy), there are two distinct ways of
seeking to give effect to this principle."

Then the learned judge goes on to talk about
reinstatement or market values.

So the learned judge there, although I am going to
take you to other cases as necessary, doesn't refer
specifically to a "but for" test in those terms, but
it is very clear indeed that the damage or the damages
are to put the claimant in the same position, so far as
money can do it, as if the breach had not occurred. In
other words, but for the --

MR JUSTICE BUTCHER: Thank you, Mr Kealey, that is helpful.

Is there any other case in which something has been said
not to be a proximate cause because it fails a "but for"
test?

MR KEALEY: Yes, my Lord. If you could go to the case of
Blackburn Rovers. You will find that in {K/119/6}.
This is a case in the Court of Appeal. Your Lordship
will see that this is an insurance case. You will see
that a professional footballer, if I can take you to the
headnote to give you the perspective as it were, the
second paragraph, you see that a professional footballer
suffered an injury to his back and that put an end to
his professional career. His club, Blackburn Rovers,
had obtained insurance from the defendants against the
risks of injury to its players, and there was a bodily
injury provision which required --

LORD JUSTICE FLAUX: Sorry, I think, Mr Kealey, Magnum has
put up the wrong page. We are in the middle of the
judgment at the moment.

MR KEALEY: That is my fault. Page {K/119/1}. Page 1,
my Lord.

LORD JUSTICE FLAUX: Yes.

MR KEALEY: I am very sorry, it is probably my fault. It is
the second paragraph of the headnote, so you can see the
background.

LORD JUSTICE FLAUX: Yes, okay.

MR KEALEY: So there was a policy which covered accidental
bodily injury defined, if your Lordships see at (b):

"Solesy and independently of any other cause, except
illness directly resulting from ..."  
A variety of other matters, and then there is an
exclusion:

"The policy excluded 'death or disablement directly
indirectly resulting from or consequent upon ..."
The same approach to causative nexus appears in the following statement in paragraph 29 of Mr Justice Moore-Bick's judgment. We needn't go into the argument and, had he done so, it would have been manifestly unsound. Disablement cannot be said to be attributable, either directly or indirectly, to a pre-existing condition unless, at the least, the condition is a "...\(\text{causa sine qua non}\) of the disablement." In the situation postulated by the judge this was not the case. The accident would have disabled the player regardless of the pre-existing condition and, conversely, the player would not have been disabled had he not suffered the accident."

So there, my Lords, is a clear indication, in our respectful submission, that you have to have satisfaction of the "but for" test, \(\text{causa sine qua non}\), in order to recover under an insurance policy.

MR JUSTICE BUTCHER: Thank you. I will let you get on with your order of play.

MR KEALEY: Can I also take your Lordships' order of play? I understand it's very kind of you to have taken me out of the game as it were, because it enabled me to answer the same question several times.

LORD JUSTICE FLAUX: I am sorry, Mr Kealey, sorry to interrupt, but in that case, is that analysis because of the operation of the exclusion or is that independent of the exclusion? Mr Kealey: That is within the meaning of the exclusion.

LORD JUSTICE FLAUX: We get into the point, you know, the issues about concurrent independent or concurrent interdependent clauses and Wayne Tank and all of that.

MR KEALEY: Well --

LORD JUSTICE FLAUX: I just wondered to what extent that is an example of the operation of the Wayne Tank principle.

MR KEALEY: The Wayne Tank principle is obviously interdependent causes, and you won't have coverage or, rather, you only have coverage in relation to interdependent causes because both causes satisfy the "but for" test. In other words, but for the operation of the cause, the loss wouldn't have been suffered; and but for the operation of each cause, the loss wouldn't have been suffered.

So the interdependent concurrent cause analysis, and indeed principle, is based, as a matter of principled law, on the "but for" test. Therefore, if you have one interdependent cause which is covered and one interdependent cause which is uninsured, you are covered for the loss because you can prove that but for the insured cause the loss would not have been suffered.

Per contra -- I am sorry, I don't really want to go into Latin. By contrast, in relation to independent concurrent causes, in other words, two causes which independently can be said to be causative of the loss, if one is using loose language, and you are looking at one of those causes which is an insulated peril, you have no coverage because but for the operation of the insured peril the loss would still have been suffered as a consequence of the operation of the other concurrent independent cause. In fact, the other concurrent independent cause does not actually even have to be a proximate cause, although most often it is.

But the insured cause in that example is neither a "but for" cause nor, because it is not a "but for" cause, is it a proximate cause. You can only have a proximate cause if it has satisfied the "but for" test, otherwise it is simply not a cause under any concept of causation known to insurance law.

MR JUSTICE BUTCHER: That's why I was asking you. Proximate cause has been around for a very long time and I was just wondering how many times it has ever been asked: well, is this a proximate cause or is it not a proximate cause because it doesn't satisfy the "but for" test?

MR KEALEY: I will come back to that if I may, but I would answer it at this juncture if I may, my Lord, by saying you don't even get to a proximate cause, unless it is satisfied -- I am so sorry, my Lord.

LORD JUSTICE FLAUX: No, I am sorry, Mr Kealey, I am talking over you. That is the problem with this way of operating.

I am just anxious, before you leave your example of the independent causes and one insured peril and one uninsured cause, whether you have got any authority that...
is directly on the point in the insurance context.

MR KEALEY: I will have to consider that, my Lord.

LORD JUSTICE FLAUX: I understand the point there, but I wonder whether it is really right. If you have got two independent causes, and the truth is that if you only have the insured cause then there would be a loss, why does it matter if there is also another cause which is uninsured -- not excluded, but uninsured -- unless what you are really talking about is a situation where the insured cause falls short of being sufficient to be a proximate cause? Do you follow the point I am making?

MR KEALEY: I follow the point entirely that you are making.

My Lord, we say in our skeleton argument talking about two independent concurrent causes and two independent concurrent proximate causes is a little bit of a misnomer, because you can't have a proximate cause, we say, unless that cause satisfies or at least fulfills the threshold "but for" test.

But coming to your Lordship's question, the question that is asked under an insurance contract, which is absolutely vital and it seems to be not the question that the FCA has asked itself, is whether the insured peril has caused the claimed loss.

The question is not a slightly more metaphysical question, which is: what is the cause of the loss?

Because when you are in a bilateral contract, assuming a contract of insurance is bilateral for present purposes, the only question that arises for any tribunal, and indeed for the contracting parties, is: firstly, has there been an insured peril; and secondly, has that insured peril caused the claimed loss?

If there is another cause of that loss, which let us call it at the moment of equivalent weight, I am just using that as a neutral term for present purposes, in other words, if that loss would have occurred but for the insured peril, then by definition the insured peril has not satisfied the threshold "but for" test for the purposes of that insurance policy.

Now there are exceptions to that principle that apply, where there are, for example, in other areas of contract, and indeed specifically tort, but also in contract, where there are multiple wrongdoers, or let's call them two wrongdoers. I am going to come on to that later, because in fact you can have two wrongdoings by one insurer.

Actually, if one analyses the Orient-Express case correctly, where there are two operating perils, both pro tanto, if I can use the Latin tag, pro tanto causing loss, then what the insurer cannot do is rely upon its own breach of contract in failing to hold the insured harmless from one of those perils, what he can't do is, by relying upon his own breach of contract in failing to hold the insured harmless from one of those perils, say that the peril under which or in respect of which he is being sued has caused no loss.

I will take you to the Orient-Express in a moment, or perhaps not so quickly but later on, and I will show you the two clauses or the two sets of clauses that operated in relation to insured loss or operated in relation to insured perils there, and I will show you how it is that the insurers paid under the loss of attraction clause or the prevention of access clause, they didn't pay anything and indeed the dispute was in relation to the peril of damage, physical damage and whether that damage caused loss, and the answer was -- well, we know what the answer was and we will come on to that later. But what the insurer could not there do is say: well, I am not liable to you in relation to the business interruption caused by physical damage, because the loss was caused in fact by matters which create or represent another peril insured against under the same contract.

In other words, there are two perils operating, we say, and each of those perils is in the same contract, and both perils can be said to have given rise to the same loss; and what the insurer cannot say when being attacked in relation to one peril, what he cannot say is, "Well, that has not caused you a loss, because but for my breach of contract in relation to that you would still have suffered the loss under another peril". He can't rely upon his failure to hold harmless under the second peril in order to avoid liability in relation to the first.

That is quite a complicated analysis, but if you go back to --

LORD JUSTICE FLAUX: That is the explanation, you say, of why it is that they paid under the prevention of access extension. Because they couldn't be heard to say: well actually your loss is suffered under the property damage business interruption section, and therefore you can't recover under the prevention of access extension.

MR KEALEY: That is absolutely right.

LORD JUSTICE FLAUX: But non constat, when you get to the property damage business interruption section, and you are looking to recover more by way of insurance recovery than under the prevention of access extension, that the insurer can't say: well now at this stage your loss is being caused by something other than this insured peril.

MR KEALEY: Exactly so, my Lord. That is exactly the point.

In our joint skeleton we have postulated a different
example, where you have one loss insured under two policies of insurance, issued by two different insurers, and where one insurer says, “Ah well, the peril under my contract didn’t cause you loss, rather it is the peril under the other contract, and therefore you are not covered”, and the other insurer does exactly the same by way of mirror image, “My peril didn’t cause you the loss, it’s the peril under the other”. So the poor insured is actually worse off by having two insurance policies than if he had only one. And there you have two wrongdoers.

This is something I am going to come back to. The wrongdoing my Lord and the breach of contract is falling to save the insured harmless from the loss in the first instance, and that is a wrongdoing.

Once that is understood as being the breach of contract, then you are introduced into the correct analysis as to causation. Because, as I said a moment ago and I will come back to it, but as I said a moment ago... LORD JUSTICE FLAUX: It is an oddity of the way in which our insurance law has developed, but you are absolutely right that that is the wrongdoing my Lord and the breach of contract is failing instance, and that is a wrongdoing.

But for that action there was, whatever it is, Railtrack action, makes no difference to that. You are absolutely right, my Lord, to say that the reason why the train did not actually leave the station, as it were, was because it was told not to. But even if the train had been told to do so, to leave the station and run, it could not have done so, and therefore... LORD JUSTICE BUTCHER: Wouldn’t one say that the landslip was the proximate cause?

MR KEALEY: Yes. LORD JUSTICE FLAUX: And that was analysed in, I forget which case it was now, but several cases, Chandris v Argo you can go back to, and other cases since. But you are absolutely right that that is the law and we have to proceed on that basis.

MR KEALEY: That is right, my Lord. In fact Mr Anthony Clarke QC as he then was, argued before Mr Justice Hirst in Ventouris v Mountain that the moment the ship went down the insurer was in breach of contract. LORD JUSTICE FLAUX: Yes.

MR KEALEY: And Mr Justice Hirst’s analysis and decision reflected precisely that. You have to save the insured harmless from the insured peril operating to cause loss. MR JUSTICE BUTCHER: I was troubled by this example overnight, Mr Kealey, and perhaps you would help me with it. Suppose you have a railway and it insures itself against delays caused by landslip. And there is a storm which causes a landslip which delays a train. And it delays it in the sense that the reason why people don’t proceed down the line is because they think there is a landslip. But in fact, it had been probed and investigated, it could have been shown that the storm had also caused a problem with the signalling, and that there would have been a delay to that train in any event, a failure of signalling being neither covered expressly, nor excluded.

Now there, in an obvious sense, the landslip is the cause of the delay. But it is not a “but for” cause of the delay. Can the insurers escape liability?

MR KEALEY: I would put it differently by saying that the insured has no coverage in that case. It is not a question of the insurers escaping liability, it is simply that that which is the peril which is insured against has not actually, as a matter of fact, caused an insured loss.

MR JUSTICE BUTCHER: It has caused it in a real sense. It has been an absolutely pivotal part of the reason why the train didn’t run.

MR KEALEY: Yes, but the train would not in any event have run, because of the signalling problem. The fact that there was, whatever it is, Railtrack action, makes no difference to that. You are absolutely right, my Lord, to say that the reason why the train did not actually leave the station, as it were, was because it was told not to. But even if the train had been told to do so, to leave the station and run, it could not have done so, and therefore... LORD JUSTICE BUTCHER: Wouldn’t one say that the landslip was the proximate cause?

MR KEALEY: No, one would not say that the landslip was the proximate cause. One would say, in those circumstances, that the landslip certainly provoked the authority to stop the train or to say to the train “Do not run”, but actually for the purposes of the insurance contract, the public authority action or the action in those circumstances did not cause the loss, because the loss would in any event have been incurred irrespective or but for that action.

So you are absolutely right, my Lord, that technically what happened is the chain of events that you have just identified, but I am going to take you to examples which will demonstrate that either as well or as badly as your Lordship’s example. And I will take you to why it is... But under any concept of causation known to English law, under any concept of causation known to English law, unless as a Fairchild v Glenhaven or some exception, there is a threshold factual causation requirement to be satisfied, which is the factual “but for” concept.

In other words, if you would have suffered exactly the same loss but for something which was not insured, then your insurance policy does not pay.
Your Lordship asked me about cases in relation to insurance. So my Lord's example, you say, is an example of two independent causes, one of which is insured and one of which isn't, and because of the operation of the second cause, the first cause is not the proximate cause of the loss.

MR KEALEY: Yes, that is absolutely right, my Lord.

My Lord Mr Justice Butcher asked me about "but for".

Can I just take your Lordships to another case, it is actually referred to in our joint skeleton. I am happy to refer your Lordships to this because my learned friend Mr Edelman did. It is at [I/6/18] and it is a quotation from Sir Peter Webster in Callaghan v Dominion. It is in paragraph 23.2.

"The best way to define an indemnity insurance is that it is an agreement by the insurer to confer on the insured a contractual right which, prima facie, comes into existence immediately when loss is suffered by the happening of an event insured against ..."

I am not sure that I entirely agree with that, but putting that to one side, my Lord: "... to be put by the insurer into the same position in which the insured would have been had the event not occurred [that is the peril insured against, my Lord] but in no better position." So, with respect to my Lord Mr Justice Butcher's question and example, the insured is not to be in any better a position or situation than that in which it would have been had the insured peril not have eventuated.

In the example given by my Lord, although there was action which stopped, as it were, the train running, that train would never have run because it couldn't run, because there was a signalling failure which prevented it running. Therefore, the delay is not something for which the insurer is liable.

MR JUSTICE BUTCHER: Right, I understand what you say and I understand what you say by reference to Callaghan. Would you agree that in the sort of case that I mentioned, at least, if it were to be asserted that the loss would have been suffered anyway by reason of the signalling failure, it will be the insurer who has to show that?

MR KEALEY: Well, what I would say is that -- can I address it this way, my Lord, and you will now accuse me of being a politician and not answering the question directly, so I will answer it directly in my indirect way.

MR JUSTICE BUTCHER: I have taken you well out of your course already, Mr Kealey, do what you want to.

LORD JUSTICE FLAUX: We are firing questions at you that you haven't had prior notice of, so ...

MR KEALEY: The fact is, my Lord, if you have a train which would have run, and the authority says, "There has been a landslip, you are not allowed to go", and the insured puts that case to the insurer and asks for recovery, on the basis of that evidence and on that material I, for the insurer, would have to say that there is a prima facie case of coverage.

It would only be --

LORD JUSTICE FLAUX: I think sensibly the answer to my Lord's question must be that the burden would be on the insurer, in the given example, to demonstrate that in fact that prima facie case was not good because the real cause of the loss was the signalling failure, which wasn't covered.

MR KEALEY: What I would say is actually the insurer has the evidential burden of putting before the court, as it were, evidence to suggest to the contrary, and it is then the legal burden remains on the insured.

LORD JUSTICE FLAUX: We are then into that sort of abstruse area about legal and evidential burdens, which probably doesn't matter for present purposes.
In relation to my Lord Mr Justice Butcher’s question, though, if the damage as it were or the loss claimed is the failure to arrive at the destination on time, then, as we have said, the landslip is not the cause, it would be the signalling failure for the purposes of the insurance contract. In other words, but for the Railtrack or whatever it is determination, still the train would not have arrived on time. It is as simple as that.

So our analysis is not complicated. It is based upon fundamental legal principles, and in my respectful submission those fundamental legal principles have really been put to one side, deliberately of course, because they are so clever, put to one side by the FCA, as though they don’t really exist.

I would like to go back, if I may, to one or two matters which actually arise out of the questions that have been asked of me. I should say, my Lords, I am not in the slightest bit shy about being asked questions, so happy to be subjected.

LORD JUSTICE FLAUX: When you’re ready, Mr Kealey.

(11.25 am)

MR KEALEY: Thank you, my Lord.

LORD JUSTICE FLAUX: Thank you very much, Mr Kealey. We will say 11:25am, please.

MR KEALEY: Thank you, my Lord.

(11.16 am)

(Short break)

LORD JUSTICE FLAUX: When you’re ready, Mr Kealey.

MR KEALEY: Thank you, my Lord.

LORD JUSTICE FLAUX: Thank you, my Lord.

MR KEALEY: Mr Edelman said yesterday -- you needn’t look it up but it is page 12 of the transcript for yesterday (Day3/12:1) -- that insurance is something different from a normal contract. That is not true. It is a species of contract, it has specific rules that apply to it; but those rules, in terms of causation, are exactly the same rules as any other contract. It has the same rules on construction, on breach and damages.

And the "but for" principle, as I have tried to explain, is an integral part of the law of contract damages as much as insurance and as much in insurance as contract damages.

Mr Edelman said yesterday, at page 12 of the transcript Day 3, one is asking a different question for a different purpose. That is fallacious. Damages are only recoverable insofar as caused by the breach of contract of insurance and not insofar as caused by the breach plus plus plus.

It is absolutely critical, my Lords, to identify what the breach is. We have already gone there. It is a failure to hold harmless from the insured peril, no more and no less. That is why it is vital in any case properly to identify as a matter of interpretation what the insured peril is.

Contrary to everything that Mr Edelman said on Day 2 at pages 5 and following, (Day2/5:1) it is absolutely expected that the counterfactual that one applies in the application of the "but for" test will or may be different between and among different insurers who insure on different wordings in different contracts in relation to different perils.

The idea that the FCA has, that one can apply the same counterfactual in every single case, itself suggests that the FCA must have got it wrong.

Mr Edelman is also absolutely wrong when he says that in the application of the "but for" test or the application of the counterfactual, whether that be under general law or under the trends clauses, these insurers before your Lordships today do not reverse as relevant -- and I emphasise "as relevant" -- the disease or the emergency or whatever it is that is at the start or the bottom of the causal chain.

He is absolutely wrong when he suggests that insurers are cherry-picking or salami slicing or whatever comestible metaphor he wishes to choose when it comes to the counterfactual. So that your Lordships can see it, that is at (Day2/3:25) to page 4, line 6.

What he is suggesting there is completely fallacious, and I am going to take you to some examples. Before I do so, I want to emphasise the following. What is reversed, and no more than that which is reversed, is the combination that makes up the insured peril. Never any or only any individual aspect of the combination.

What you take out is the combination, and what that means, my Lords, and this is absolutely vital, all the elements of the combination to the extent that they combine and form the stated combination, but not otherwise and no more. You don’t remove every aspect of
every ingredient within the combination. That is not 
taking out the combination; it is taking out all the 
ingredients for all purposes, and that goes way beyond 
the combination.

The combination is only the ingredients and the sum 
of the ingredients insofar as they combine in the stated 
way.

Let’s just take Mr Edelman’s verminous example. You 
will see that at (Day1/108:1). The insuring clause for 
this example my Lord you can actually see in bundle 
(1/6/69), that is in the insurers’ joint causation 
skeleton.

LORD JUSTICE FLAUX: Vermin or pests at the insured 
premises.

MR KEALEY: That is right, my Lord. It is at the top of the 
page [1/6/69]. Mr Edelman gave you the example of rats 
in a restaurant.

Now let me just explain to you how this works. This 
clause covers the inability to use the insured premises 
due to restrictions imposed by a public authority 
following, in (e):

"Vermin or pests at the insured premises."

Let’s just say that there are rats in a restaurant.

Let’s say that a journalist finds out about the rats and 
writes an article saying there are lots of rats in this 
restaurant. Let’s say that his article is widely read 
by everyone in the vicinity of the restaurant, whatever 
"vicinity" might mean.

Let’s say that subsequent to that article being 
widely read, the local government hears of the rats, or 
indeed the restaurateur tells the local authorities 
about the rats, and the government or the local 
authority orders the closure of the restaurant whilst 
the rats are removed and exterminated.

If one looks at this insurance clause and one asks 
what is the insured peril, the insured peril is 
a combination of inability to use the restaurant due to 
restrictions imposed by the public authority following 
vermin at the premises; in short order, it is closure of 
the premises as caused by government action, as caused 
by rats. That is the combination you remove in order to 
apply the "but for" test and the counterfactual.

What you remove, I will repeat it, closure as caused 
by the government action, as caused by the rats. You 
don’t remove the rats, pure and simple. You remove that 
causal chain; and you work out, having removed that 
combination, what the loss is that the insured peril has 
causation.

If those rats are in another causal chain as well, 
for example disinclination of the public to visit the 
restaurant, as caused by reading the article in the 
newspaper, as caused by rats, that is another causal 
combination which exists and has caused loss, and the 
loss caused by that combination, which involves rats, is 
not covered.

LORD JUSTICE FLAUX: That is the example that we discussed 
with Mr Edelman yesterday. Let’s stick to rats for the 
moment. I mean, at the time when the restriction is 
imposed, the insured business is already suffering 
a downturn as a consequence of something which is not 
covered by the insurance, because there is no 
restriction in place. That is the trigger for there 
being cover. As I understand your case, you would say, 
in that example, the insured could only recover to the 
extent that it was able to demonstrate that there had 
been a yet further downturn in the business as 
a consequence of the imposition of the restriction.

MR KEALEY: Exactly so. But I would go even further, 
my Lord.

LORD JUSTICE FLAUX: Let’s say for the sake of argument 
there are some people who like actually seeing rats 
running around a restaurant because of its a novelty 
value, so half the tables have people sitting at them, 
notwithstanding there are rats scurrying around. The 
insurer has suffered a loss of 50% of his turnover, but 
when the restriction comes which makes it 100%, he can 
only recover the 50% caused by the restriction.

MR KEALEY: Correct.

MR JUSTICE BUTCHER: You accept that, do you, Mr Kealey? Or 
do you say he can’t recover that, because the rats would 
be there anyway?

MR KEALEY: Well, let me just put it this way. If the rats 
are known about, rather than people don’t know about 
them – I will answer this in stages. Can I answer it 
in stages?

LORD JUSTICE FLAUX: Yes.

MR KEALEY: Thank you. The restaurant is closed by the 
authorities. Someone cancels a reservation, not knowing 
of the closure but knowing of the rats, because he has 
read the article, or she has read the article, and does 
so after the closure.

LORD JUSTICE FLAUX: That is a different point.

MR KEALEY: It is a different point.

LORD JUSTICE FLAUX: That is a loss that is caused by 
something other than the closure. So in that example 
that would fall, as it were, within the first tranche of 
uninsured loss, as it were. But what my Lord is putting 
to you is: assume the restaurant is then closed, so the 
insured in my example has now lost 100% of his turnover, 
do you say nonetheless he can’t recover anything because
I am assuming for your purposes, my Lord, that the rats would have been there anyway?

MR KEALEY: No. Your example, my Lord, was about a clientele who don't actually mind rats, or like rats.

LORD JUSTICE FLAUX: I know that is an extreme example, we are just trying to test the point.

MR KEALEY: I am addressing that precise example. They would have gone to the restaurant irrespective of rats.

The government closure prevented them from going to the restaurant, and stopped the restaurant from earning money from those diners. That is covered, my Lord, because they would have gone to the restaurant irrespective of the rats. Therefore, what you have is the combination of the inability to use, due to restrictions imposed by public authority following vermin at the premises actually causing loss.

But in relation to those diners who wouldn't have gone near the restaurant because of the rats, whether they had read about the article before the closure or having read the article after the closure, in relation to those diners or those people who would otherwise have gone to the restaurant to eat, to whom the closure was an irrelevance because they wouldn't have gone near the restaurant because of the rats, there is no loss which is covered under this policy.

MR JUSTICE BUTCHER: We are getting very close to the heart of what it is that you are inviting us to determine here. Because you say, well, because of COVID, the public reaction was such that the people wouldn't have wanted to go to the restaurant because they might sit next to somebody who had got COVID.

MR KEALEY: And what your Lordships have just posed to me is a factual question to which I do not have an answer.

LORD JUSTICE FLAUX: You may be right about that.

MR KEALEY: I am right about it. I am absolutely right about it. You know and I know -- this is not me giving evidence -- there were people who were disinclined to go to cinemas before closure, because of the proximity of other people.

LORD JUSTICE FLAUX: I know that, because my wife cancelled a trip to the opera three days before the lockdown, for exactly that reason.

MR KEALEY: There you are. And irrespective of the lockdown, Lady Flaux would have cancelled a trip to the opera after the lockdown, if the lockdown hadn't occurred.

LORD JUSTICE FLAUX: Yes. In fact what had happened is that the opera house had closed anyway.

MR KEALEY: Yes, but that closure didn't cause that loss of business.

LORD JUSTICE FLAUX: That is precisely why I put the point to you, because it was a point that I was thinking about when I was looking at your skeleton argument and thinking about these points.

MR KEALEY: You see, I would, or rather Mr Edelman would cross-examine the hapless Lady Flaux and extract from her, in the same way as Amber Heard, exactly why she did what she did.

LORD JUSTICE FLAUX: Right, Mr Kealey, let's move on, shall we?

MR KEALEY: But the critical point that I am trying to make, my Lords, is that we do reverse the rats. But we don't reverse the rats for all intents and purposes. The idea that you have still got these nasty little vermin running around is actually a given. What you reverse is the chain of causation which constitutes and embodies the insured peril. No more and certainly no less.

If you remove more, then you are imposing an unjustified and unprincipled obligation and liability on insurers. If you remove less, you are depriving insureds in an unjustified and unprincipled way of coverage.

The idea postulated and put about by the FCA and on their behalf and others, that you remove more than the insured peril in order to gain more coverage, is antithetical to all accepted concepts of causation and, since they like it, common sense.
LORD JUSTICE FLAUX: If you take the obvious example, Mr Kealey, of a measles outbreak, let us say in, well let’s take the west of England. So there is a measles outbreak affecting Devon and Cornwall, Somerset, Dorset and Wiltshire, and there is a local lockdown of all the schools, local shutdown of all the schools in the west of England. If you were looking at a 25-mile radius around Dorchester say, for the sake of argument, you might be able to show that that local outbreak had caused the shutdown of the schools. But you would have to show that -- this is your case -- and it wouldn’t be easy to show that simply there had been an outbreak of measles within 25 miles of Dorchester, if in fact the outbreak everywhere else in the west of England would have led to closure of the schools within the 25-mile radius in any event.

MR KEALEY: That is correct, in our submission. And the reason why we are correct, in our submission, is because we are simple people and we apply the "but for" test, which is the basic threshold factual causation test of English contract law.

What you find is that if you have a national outbreak but it is only the 25-mile radius illness that provokes government action within that 25-mile area, then there is coverage because but for the 25-mile area there would have been no government action and no loss.

If there is, for example, COVID-19 illness in Leicester and the Central Government closes down Leicester or the environs of Leicester, then the business interruption loss was caused by what I will describe as the local disease. That is the application of the "but for" test; but for the disease within 25 miles there would have been no government action and therefore no loss, therefore there is coverage and the loss is recoverable.

But let us just say, but what you don’t ever do, my Lords, is reverse the disease, ever, beyond the 25-mile area. Because the 25-mile area is the limit and the circumscription of the insured peril.

So let’s go nearer to what the FCA would like.

Let’s take an infectious disease and someone falls ill 24 miles away from the premises. But the disease is everywhere as well outside the 25-mile area. The government closes the entire country down. It didn’t close the country -- I am making this factual assumption -- because of the one illness within the 25-mile area, but because of illness everywhere else and the threat of illness coming within the 25-mile area.

That one illness, in that example, did not factually cause any business interruption loss. And there is no legal or principled basis in the disease clauses with which we are concerned that enables the FCA to say there is such a close relationship or commonality or linkage between the one instance of the illness and the illness everywhere else in the country that enables the insured to recover, because it is contemplated that a 25-mile radius area referable to the disease might be affected by something of epidemic proportions.

That is the FCA’s case; see Mr Edelman, transcript [Day1/105:1] to 106.

LORD JUSTICE FLAUX: That is right, that as a matter of common sense, using that expression, if you have got COVID within the 25-mile range, which is a pretty big range, depending on where you are in the country, the chances are you have got it all over the place elsewhere. Unless, in my example, it is limited to the west of England, say. But you say, well, that is nothing to the point, because that is not what insurers have agreed to cover.

MR KEALEY: That is exactly right.

LORD JUSTICE FLAUX: That is why the 25-mile limit is there, because they have only agreed to cover disease within the 25-mile limit which has caused the insured a business interruption loss, together with all the other
interference as a consequence of restrictions, et cetera, et cetera.

MR KEALEY: That is absolutely right, but we also develop it only a tiny little bit more, which is to say that Mr Edelman says the insured is covered against the peril being caught up in the consequences of a wide area disease that manifests itself in the relevant area.

That is how he put it.

That is not the peril insured against or remotely the peril insured against.

If, as Mr Edelman says, and let’s just assume he is right on this one, that objectively the parties might have contemplated a disease of epidemic proportions, in other words, all over the country, then you have to ask yourself this rhetorical question: why is there a 25-mile limit?

If, on the other hand, objectively the parties did not contemplate a wide area epidemic disease, then insurers, by giving a 25-mile limit, which as your Lordship has indicated is a substantial area, were covering a lot of possibilities. Whichever way you look at it, there is a geographical limit which applies. And it is absolutely clear that both the insured and the insurers were agreeing that it is only business interruption losses caused by illness within that area which are covered, nothing more and nothing less.

MR JUSTICE BUTCHER: That is quite a narrow point in relation to actually the construction of the insuring clauses. This is rather different from your counterfactual analysis, isn’t it?

MR KEALEY: It is. You are absolutely right. But --

LORD JUSTICE FLAUX: This is a coverage point, really.

MR KEALEY: It’s both, actually.

LORD JUSTICE FLAUX: It’s both, it is. You are absolutely right that it is a coverage issue, and you say this is where the FCA’s case fails to give really any sensible meaning to the 1 mile or 25-mile limit in the contract, as a matter of construction. But then you say, well, the causation issue as to whether, in your example there, there’s business interruption losses within the 25-mile limit were caused by the illness within that limit, is ultimately a factual question.

MR KEALEY: Yes, that is absolutely right. That is absolutely right.

If you have, my Lords, one instance of illness within the 25-mile area, then the question you have to ask is: did that cause the business interruption loss? And the question you have to ask in order to answer that question is: but for that illness within that 25-mile area would the loss have been suffered?

What you can’t do, which is what the FCA seeks to do for that counterfactual, is harvest into the 25-mile area, notionally, is to harvest in every single other illness in the country, and government action responsive to everything everywhere, in order to say: well, those business interruption losses were caused by that one illness.

In fact, I should correct myself. The FCA knows it can’t say that, because it has said it can’t say that. I will come on to that later. So --

LORD JUSTICE FLAUX: Just before you move off this point, what you are saying, I think I understand it this way, is you take out the interruption or the interference or whatever it is, and the restriction and the disease within the 25-mile area.

MR KEALEY: Correct.

LORD JUSTICE FLAUX: So you have now got as it were notionally, rather like in Orient-Express, the disease-free, restriction-free area within 25 miles.

MR KEALEY: Yes.

LORD JUSTICE FLAUX: But, you then ask the question in causation terms: the loss that the insured has suffered, would the insured have suffered in any event? To which you say the answer is: yes, the insured would have suffered it in any event because of the imposition of the national lockdown.

MR KEALEY: Correct. But that is a question ultimately of fact, of course.

LORD JUSTICE FLAUX: That is what I said to you. Yes, it is a question of fact. Or it might be, going back to our example of the restaurant, because members of the public don’t want to go to the restaurant in any event.

MR KEALEY: Yes. But --

LORD JUSTICE FLAUX: And if they are not prevented by the government. But that again is a factual question.

MR KEALEY: That is again a factual question.

If one looks at the 25-mile radius, you might have, and indeed I am sure some of the hapless insurers with which we are concerned, you may have a local pub or a local shop and its clientele all come from within a mile or two miles or three miles of the premises. Anyone who is experienced with local village shops, they know that these little village shops service the village and perhaps other villages around, that is their demographic, their clientele. And you may well find, my Lord, seriously, that there is cover in respect of local disease, in the sense of disease within that 25-mile area, which brings down some form of prohibition or inhibition, whatever the wording of the contract is, which affects that shop. So for example, take the
measles and the local school, the local school is closed
down by government, and that -- depending on course of
the peril insured against, but let's say it doesn't
matter, in let's call it very wide cover, any illnesses
within 25 miles which have a causative effect or cause
business interruption at your shop. If that is what you
have got, if that is the width of your cover, then the
fact that there is measles in the local school, which
inhibits parents from coming, and therefore inhibits the
parents from going to the local shop, et cetera, then
you have got coverage.

So the idea put about by the FCA that somehow or
other, by virtue of what these insurers are doing, we
are rendering the cover illusory is itself a fantasy.
Because these insurers, they are not bad people, these
insurers may well in certain instances be wrong about
not paying up, in certain instances they will be right
about not paying up, these insurers, as Lord Sumption
said, have to be treated in exactly the same way as
insureds; in other words, fairly. I know you are going
to do that anyway, but it is something that I wanted to
mention.

LORD JUSTICE FLAUX: Our law makes that very clear, unlike
certain of the jurisdictions in the United States.

MR KEALEY: That is absolutely right. In fact, I am not

going to refer to Lord Sumption, that reference to
Lord Sumption is in our joint skeleton -- it isn't in
our joint skeleton, it is actually in Amlin and
Ecclesiastical's skeleton. But looking at our joint
skeleton, one goes way back to paragraph 21.3 (1/6/13),
and I don't want to dwell too much on aleatory bargains,
but there is a quotation from Lord Sumner in
Becker Gray, and the last four lines:

"One need only ask, has the event, on which I put my
premium, actually occurred? This is a matter of the
meaning of the contract, and not, as seems sometimes to
be supposed, of doing the liberal and reasonable thing
by a reasonable assured."

MR JUSTICE BUTCHER: In your point about the radius, and
this may just be because I am being slow, but this isn't
really necessarily tied to a "but for" point, is it?
You would say that the losses suffered by reason of
government action weren't caused by the disease in the
area in any sense at all. It wasn't that anyone
thought, for example, there is a disease here and
therefore there needs to be a restriction. In other
words, the debate we were having about the various
different types of causation, you would say, isn't
relevant here at all.

MR KEALEY: Yes.
insurer never promised to hold harmless against loss
caused by A plus B. Reversing less than the insured
peril can cause the insured harm, because you may
deprive an insured of coverage by not reversing that
which needs to be reversed ; in other words, the insured
peril .

Now, if you move away from the "but for" test or you
purport to apply the "but for" test to something more
than the insured peril , in other words, but for A plus
B, you are moving away from fundamental principles of
law. You can’t take refuge in the Fairchild enclave or
anywhere else, there is no principled basis for doing
so.

So my Lords, when the contract insures against loss
resulting from or caused by or following, or any similar
language requiring causal connection, what the parties
are doing, as they did in this case, they are adopting
traditional "but for" causation and not replacing it .
You have got to construe this contract as at the
date it was made, or these contracts as at the date when
they were made, not with the benefit of COVID-19
hindsight . So if they are saying "caused by",
* resulting from", "following ", whether you say that one
denotes proximate cause or another denotes something
less , like you might say a less significant causal
connection, you are nevertheless, or you should
nevertheless conclude that the parties are adopting
traditional causal analysis , not replacing it .

LORD JUSTICE FLAUX: You are taking links in a chain and
that some of the links may be weaker than others,
depending on the words that are being used, and where
you get to is a chain, or a combination as you describe
it , which comprises the insured peril .

MR KEALEY: Yes. That is right.

LORD JUSTICE FLAUX: The proximate cause point only really
comes in, doesn’t it , when you are asking the question:
is the loss claimed caused by the insured peril ?

MR KEALEY: Yes, yes.

LORD JUSTICE FLAUX: So in a sense the points about "arising
from", "connected to", "following ", et cetera , are all
beside the point.

MR KEALEY: That is our submission, my Lord.

LORD JUSTICE FLAUX: But still, once you put them together
in the combination and decided what the insured peril
is , then the proximate cause test applies at that stage.

MR KEALEY: That is right. There are two stages in a sense.
Firstly , are there causative links in the combination
which constitutes the insured peril ? So disease causing
disease causing that , causing the other. And you may have
to, as your Lordship has indicated , apply different
degrees of causation, depending upon the language.

LORD JUSTICE FLAUX: Sure.

MR KEALEY: But -- but -- on any of the language in our
cases, and I don’t act for other insurers , but having
seen them, on any of the language in our cases there is
never anything less than a factual causation "but for"
standard that needs to be met in any event. That is the
first stage.

The second stage, once you have identified the
insured peril , has that caused the business interruption
loss for which a claim is made? And that is
typical legal causes that apply, and the
very least of those principles is the "but for" principle.

LORD JUSTICE FLAUX: In fact it’s proximate cause at that
stage, or dominant or efficient or whatever.

MR KEALEY: It is. It is. But that is a far higher
standard, as it were, than the "but for" principle. because unless you actually overcome the "but for"
principle you are not into proximate causation anyway.

LORD JUSTICE FLAUX: No.

MR KEALEY: My Lords, I am going to turn if I may, with a
certain -- not rapidity but I am just going to make sure
that I cover everything.

We have discussed quite quickly concurrent
interdependent causes. As I have indicated, my Lords,
concurrent interdependent causes shouldn’t be something
with which we should be concerned directly in this case,
but of course it does educate us on the correct analyses
to be applied as a matter of general causation
principles. In other words, as I indicated earlier , both causes in two interdependent causes by definition
satisfy the "but for" test . Each of them does.

Your Lordships will see that not only in
MacGillivray , and I will give your Lordships the
reference , you don’t need to look at it, it is
paragraph 21-005, which is at (K/191/2), and that was in
a passage endorsed by Lord Clarke in The Kos, which is
at (J/115/29). Perhaps --

LORD JUSTICE FLAUX: Shall we have a look at The Kos?

MR KEALEY: We will have a look at The Kos. It is
(J/115/29). It is paragraph 74, my Lord. Perhaps we
should start at page (J/115/28).

LORD JUSTICE FLAUX: Yes.

MR KEALEY: Thank you so much. At the bottom. You will see
it in the left hand, paragraph 71, go through Wayne Tank
and Miss Jay Jay, Midland Mainline and Eagle Star, those
are all interdependent, my Lord.

LORD JUSTICE FLAUX: Yes.

MR KEALEY: There are quotations there. Then if we go to

the next page, and about by the letter B, this is The

Miss Jay Jay:

"It was held that the faulty design and construction
of the vessel, which was neither an insured peril nor an
excepted cause, and perils of the seas, which was an
insured peril, were both proximate causes of the loss
since they were, as Lord Justice Slade put it, 'equal or
at least nearly equal in their efficiency in bringing
about the damage'. These principles are as I see it
correctly summarised in MacGillivray ... and in McGee
and where Lord Hodge also stressed the importance of
context see I think this is just to be fair."

This is just on the question of independent and
interdependent causes that Lord Justice Clarke approves
of Orient-Express and Mr Justice Hamblen, and also the
Global Process case.

LORD JUSTICE FLAUX: But this is interdependent causes,
hence the reference to them being both --

MR KEALEY: Exactly.

LORD JUSTICE FLAUX: -- of equal efficiency.

MR KEALEY: That is exactly right, my Lord. Two
interdependent proximate causes. The cases there are
all of combinations of causes in the absence of either
of which the loss would not have occurred.

Of course, being interdependent causes it

necessarily follows that if one is excluded the "but
for" test cannot be satisfied, because both are required
in combination to produce the loss.

MR JUSTICE BUTCHER: But that shows, doesn't it, that you
can have a proximate cause which is not a "but for"
cause?

MR KEALEY: No. You have got two proximate causes, each is
a "but for" cause, but if one is excluded from coverage
then you don't have a covered loss.

So you do have two interdependent causes, it is just
that if one is insured and the other is not insured you
have got coverage, because the insured peril satisfies
the "but for" test. But if you have got one insured and
one excluded, then because you have got the exclusion,
you take out one of the necessary arms or elements which
are necessary or is necessary to produce the loss, ergo
your loss is excluded.

LORD JUSTICE FLAUX: That's obviously Wayne Tank.

MR KEALEY: That is all those cases, my Lord. It is also,
if one goes -- let me just take you to B Atlantic, that
is probably a good area to go. If your Lordship goes to
( J/139/1). It is in the Supreme Court.

LORD JUSTICE FLAUX: Yes.

MR KEALEY: The passage is in Lord Mance's judgment. If you
go to page 23 ( J/139/23) this, as your Lordships
probably know, is a case where drugs had been strapped
to the hull of a ship.

LORD JUSTICE FLAUX: I was the hapless trial judge,
Mr Kealey, so I know all about this case.

MR KEALEY: Well, there you are.

LORD JUSTICE FLAUX: Lord Mance found another way of
doing me down than the way that Lord Justice
Christopher Clarke had.

MR KEALEY: I am sorry about that.

LORD JUSTICE FLAUX: None of that is relevant for present
purposes. This is principles of causation.

MR KEALEY: If your Lordship would go to paragraph 49, just
above letter C, this is John Cory, and reference to
Lord Blackburn:

"Subsequent authority confirms Lord Blackburn's
conclusion that, where an insured loss arises from the
combination of two causes, one insured, the other
excluded, the exclusion prevents recovery, see [Samuel v
Dumas and Wayne Tank]. Here, the two potential causes
were the malicious act and the seizure and detainment.
The malicious act would not have caused the loss without
the seizure and detainment, it was the combination of
the two that was fatal."

Then it goes on. So what your Lordship sees is that
Lord Mance there is, in our respectful submission, if

not explicitly then certainly very clearly implicitly,
endorsing the proposition that where you have
a combination of causes in circumstances where the loss
wouldn't have occurred without that combination, in
other words, each has to satisfy the "but for" test,
when you have that, then if you are insured and
uninsured you're covered, and if you're insured and
excluded you're not.

That is a completely different case, of course, from
that of two so-called independent concurrent causes. I
say soi-disant in that case because that begs the
question as to causation.

I know my learned friends for the FCA refer to
a passing remark of Lord Justice Clarke in the Court of
Appeal about concurrent causes but, frankly, I am not
going to take you to that because it is not
authoritative, and your Lordships have Lord Mance in the
Supreme Court.

So concurrent independent causes. Now, I am going
to take this quite swiftly because I have already
covered much of the ground. But if your Lordships will
in your own time, if you have any, which I know you may
not, it is paragraph 56 of the joint skeleton, that is
(1/6/47). Well, it is there.

What you have is the simple application of the *but
for " test to the insured peril produces the equally
simple result that the insured peril didn’t cause the
loss as a matter of factual "but for" causation.
And by reason of being a second independent cause or
by reason of there being a second independent cause, the
insured peril did not contribute to the loss.
Now, the only answer that the FCA seems to be able
to make to this, apart from slightly ambitious arguments
on construction or connection or interlinkage or
jigsaws, is: on that logic, the loss has no cause.
Because if you ask the question whether, on the "but
for" test, the second independent cause caused the loss, the
answer would be no, because of the insured peril.
So the philosopher would answer that the loss has no
cause, and that can’t be right. That is exactly what
the FCA said, through one of its counsel, at Day 1 of
the transcript, pages 130 to 131. [Day 1/105:1] And we
submit, my Lords, that that is simply a nonanswer. It
is an irrelevance.
Because the issue on a contract of insurance is
simply not, if I can put it that way, was the cause of
the loss, but rather as between two contracting parties,
and in that context, did the insured peril cause the
loss.
The standard "but for" test answers that question
and does so perfectly satisfactorily, traditionally and
correctly. It is irrelevant to the enquiry that if you
apply the same approach to the other uninsured
independent cause you arrive at, as it were, a similar
mirror conclusion.
The only time when that is a relevant or might be
a relevant factor is the one that I have indicated
before, it’s if the other independent cause was itself
a breach of legal duty owed to the same claimant in
respect of the same loss. In other words, you have two
wrongdoings.
Now, if you have got two wrongdoers the law
recognises as an exceptional circumstance that both
cannot be allowed to escape liability by relying on the
other’s wrongdoing, so as to leave the claimant in
a worse position than it would have been in if it had
been the victim of only one breach of duty.
All the decisions relied upon by the FCA as examples
of cases where the "but for" test has not been applied
are cases where there are concurrent independent causes
involving multiple wrongdoers. I don’t want it to be
brought up now, but for your reference it is paragraphs 238 to 240 of the FCA’s trial skeleton
(1/1/94). For example, two people simultaneously but
independently shooting a victim dead, two people
independently searching for the source of a gas leak
with the aid of lighted candles; the facts of the
successive conversions in Kuwait Airways and the
decision in Greenwich Millennium involving the multiple
subcontractors who each of them or all of them were
responsible legally.
I am going to turn to the issue of multiple
wrongdoers later, as I have indicated, when looking at
the Orient-Express.
What we have done, my Lord, is to have identified
classical legal principle, and the first question then
that you will have to consider, probably later, in
relation to individual wordings is what is the insured
peril. That is a question of contract construction. I
have given you some examples.
When you have identified what the insured peril is,
your Lords, you will and should, in our respectful
submission, conclude that there is no legal or
principled reason, on the basis of the wordings with
which we are concerned, that enables the insured to say,
with a straight or other face, there is such a close
relationship or commonality or linkage between, say, one
instance of illness and the illness everywhere else in
the country that enables the insured to recover because
it is contemplated that, for example, a 25-mile radius
area referable to disease might be affected by something
of epidemic proportions.
What Mr Edelman said on [Day 1/105:1] to 106 was
effectively the same; it was to the effect that the
insured is covered against the peril of being caught up
in the consequences of a wide area disease that
manifests itself in the relevant area. And that really
says it all. All you need, according to the FCA, is the
manifestation of a disease in a relevant area for
coverage to exist.
They say, and I am going to take you to the
passages, that so long as, in other words, provided
that, there is just one case of COVID-19 in the 25-mile
radius area, the insured can recover all its losses
caused by the entire pandemic. So the one case doesn’t
even have to be a cause of the insured’s loss, the one
case is merely the gateway. And it is a gateway, my
Lords, to a different cover from that which the insured
was granted for the premium that the insured paid.
It is just like Chesil Beach. If the oil comes only
one inch into the insured area, and that one inch of oil
has no significance whatsoever, because it is manifested
within the relevant radius area, as if by magic the
insured can recover all its loss caused by the oil spill
on the beach beyond the insured area.
So what we say is that --
LORD JUSTICE FLAUX: I mean, the actual example that was given was where the area of contamination is greater than the insured area. But if the insured can demonstrate that even if it had been limited to the insured area the relevant shutdown would have occurred, then there is cover.

So, for example, going back to Leicester, let's assume for the sake of argument that there is a 1 mile limit in the policy, in fact the area that is restricted is a 3-mile limit or a 5-mile limit, but if the insured can demonstrate that the prevalence of the disease within the 1 mile limit was causative of the shutdown, then there is cover, even though the extent of the disease is greater than the 1 mile area.

MR KEALEY: I agree with that, my Lord, entirely. I would only make sure that we understand each other. In other words, but for the disease within that 1 mile area, whatever government restriction it was would not have been imposed.

LORD JUSTICE FLAUX: That was part of what I was putting to you.

MR KEALEY: How can I possibly disagree with that?

LORD JUSTICE FLAUX: Because one of the points that is taken against insurers, as I understand it, is: well, if there is a national pandemic or if there is a wider outbreak of disease then they are saying there is no cover. And that is not in fact what you are saying. What you are saying is, provided that within the relevant limit, whether it is 1-mile or 25-mile limit, there has been a restriction as a consequence of disease in that area, the fact that the overall area of the disease is greater is neither here nor there.

MR KEALEY: That is right.

Two qualifications: the insured has to prove that but for the disease within that area the restrictions wouldn't have been imposed; and secondly, the insured -- this is going to be very fact-sensitive, but the insured should not be entitled to recover, other than in respect of the loss caused by the restrictions caused by the disease within that 25-mile area.

MR JUSTICE BUTCHER: So you say, supposing turnover of these restaurants in Leicester has been at 50% of normal, because of the -- restaurants is not a good example -- the shops have been 50% of normal because of the lockdown nationally, and then there is the local closure and it goes down to nought, you are saying that it still has to be shown, in that 50% decline, that that was due to the local lockdown and not to the other effects of COVID.

85

1. is a national pandemic or if there is a wider outbreak
2. of disease then they are saying there is no cover. And
3. that is not in fact what you are saying. What you are
4. saying is, provided that within the relevant limit,
5. whether it is 1-mile or 25-mile limit, there has been
6. a restriction as a consequence of disease in that area,
7. the fact that the overall area of the disease is greater
8. is neither here nor there.
9. MR KEALEY: That is right.
10. Two qualifications: the insured has to prove that
11. but for the disease within that area the restrictions
12. wouldn’t have been imposed; and secondly, the insured --
13. this is going to be very fact-sensitive, but the insured
14. should not be entitled to recover, other than in respect
15. of the loss caused by the restrictions caused by the
16. disease within that 25-mile area.
17. MR JUSTICE BUTCHER: So you say, supposing turnover of these
18. restaurants in Leicester has been at 50% of normal
19. because of the -- restaurants is not a good example --
20. the shops have been 50% of normal because of the
21. lockdown nationally, and then there is the local closure
22. and it goes down to nought, you are saying that it still
23. has to be shown, in that 50% decline, that that was due
24. to the local lockdown and not to the other effects of
25. COVID.

86

1. the diminution by a further 70% of the 100% is
2. ostensibly covered following the insured peril unless,
3. as I have put it before in answer to a question of
4. your Lordship, it is prima facie covered because you
5. have the closure, you have the reduction, and therefore
6. there is a prima facie case. If those are the only
7. facts you have got, then there is a prima facie case.
8. If, however, there is evidence sufficient to shift
9. the evidential burden, or rather shift it back, to the
10. effect that irrespective of the closure of the church
11. you would have been deprived of the income because all
12. your congregation was dead, then the insured will have
13. to take that on the chin.
14. MR JUSTICE BUTCHER: The trouble is that the nature of these
15. events is that after the occurrence of the restriction, in
16. conjunction with all sorts of other restrictions, it
17. becomes impossible to tell.
18. MR KEALEY: Right. You assert that, my Lord.
19. MR JUSTICE BUTCHER: It might be impossible. It might be difficult to tell.
20. MR KEALEY: I don’t necessarily disagree with your Lordship
21. on the last statement. I don’t shy away from it either, because business interruption losses are quite often
22. really difficult and complicated analyses. I am not saying that as an interrorem attack on these hapless
insureds in our cases. I am just saying business
interruption losses are notoriously difficult to
calculate. In fact, my Lord, this is why loss adjusters
are so heavily -- and I am not talking about insureds in
case, I am just talking generally -- loss adjusters
are heavily engaged for both sides in trying to work out
what the answer or the answers are.
If your Lordships go to paragraph 26.6 in our
skeleton this is something that we recognise. It is not
something that we are frightened of and it is not
something that we are unaware of. It is at
paragraph 26.6 if you go to (1/6/29).

LORD JUSTICE FLAUX: Right.

MR KEALEY: Actually I don’t accept that. I don’t accept
that. I will come on to Silversea, or the Silver Cloud
in due course.

LORD JUSTICE FLAUX: That is an example of a case where the
judge had said at first instance there are two causes
but you can’t actually say which of them -- you can’t
extricate them. So it is a case of interdependent
causes.

MR KEALEY: That particular judge was inappropriately
seduced by the advocacy of the insured in that case.
But what he decided in relation to that was -- I am not
saying he was wrong to decide it, of course he decided
it -- what he decided was the impact of two
circumstances, I will call them that neutrally, which
occurred one immediately following the other which had
an influence or an effect upon the minds of individuals.

LORD JUSTICE FLAUX: Yes.

MR KEALEY: So you have a terrorist attack and a government
warning, which I think he said were, upon the basis of
expert evidence that he heard, of indivisible causative
effect.

LORD JUSTICE FLAUX: He couldn’t say that the one was of
greater causal impact than the other. That was the
point.

MR KEALEY: No, he couldn’t say that. That is on the mind
of individuals. Now that is not, if I might put it this
way, my Lord, our case.

LORD JUSTICE FLAUX: No.
MR KEALEY: It is no different from The Poggi M. I don't think -- well, anyway, it is not for me to think or not think.

LORD JUSTICE FLAUX: I don't know.

MR KEALEY: I try and think a little bit.

LORD JUSTICE FLAUX: Do you submit then that Silversea is wrongly decided?

MR KEALEY: Oh no. No, no, no. What I say is Silversea didn't decide anything of any relevance to this case.

LORD JUSTICE FLAUX: That is a different point. Yes.

I follow. Anyway, I was taking you out of your course.

MR KEALEY: Not at all. I am going to come to Silversea.

LORD JUSTICE FLAUX: You have limited time, Mr Kealey, so let's shut up now.

MR KEALEY: No, please don't, my Lord.

The important point that I was making is that -- and I am going to give your Lordships the references: it is (Day 1/101:6-14), (Day 1/104:16-22) and (Day 1/105:22) to (Day 1/106:4).

What Mr Edelman submitted was that business interruption losses caused to an insured by disease anywhere in a pandemic or epidemic are recoverable simply "so long as" the pandemic extends into the stated radius of the insured premises. I am using a disease radius clause for this example.

According to the FCA and their counsel, the insured does not have to show, apparently, that the business interruption losses were actually caused by disease within the 25-mile radius. There is absolutely no insured peril clause in any of these contracts which comes anywhere near wording to that effect. If there were it would have to read something akin to, "You are entitled to recover business interruption loss resulting from interference with the government's response, whatever that response was, to COVID-19. And by "whatever that response" I mean anything which comes anywhere near wording to that effect." The effect of doing that is actually to remove the causative requirement and to demote the disease within 25 miles to the status of a mere subsidiary trigger. It removes the in-built restriction from the scope of the disease cover.

So instead of promising to insure against disease occurring everywhere so long as one case can be proved within a 25-mile radius area of its premises, of the premises of the insured.

It transforms the promise from an agreement to insure local disease to meet the insured's aspiration after the event in this case for broad national disease cover, and for that matter threatened national disease.

Now I am not like the FCA saying, oh well, you should have excluded this or you should have excluded that. All I am saying is that if these insurers had been prepared to give cover for infectious diseases on an epidemic scale in a disease clause that would not have been the disease clauses with which your Lordships are confronted.

Now my learned friend, I can't remember, I think it is Mr Edelman in his comestible metaphors, accused us of salami slicing or cherry-picking (Day 1/97:3-4). We are not guilty. The guilt lies elsewhere with him.

Mr Edelman also argued that on our approach the more widespread the disease the less cover the insured has. (Day 1/122:17-25)

My Lord, that is just wrong. It all depends on what the disease is and what the government's approach is to that disease.

If the government only imposes restrictions where there are outbreaks and one of those areas is covered by the policy then the insured can readily show not only disease within the requisite area but also causation.

If the government imposes restrictions on all areas regardless of whether there is at the time any case or any serious number of cases, then if the insured cannot show that the disease within 25 miles, in other words the relevant area, caused him loss or caused it loss, then the insured doesn't have the coverage.

All this is because as the FCA has acknowledged in its pleadings and in its skeleton argument, it cannot prove and does not have the evidence that comes close to proving that any disease or any incident or anything happening within a particular area was causative of the government's response, whatever that response was, to COVID-19. And by "whatever that response" I mean whatever shape or form it took: whether it was advisory; imposition of regulations; whether it was on social distancing; whether it was on closures. No causation can be proved.

That, my Lords, for your reference is reply paragraph 52. That is [A/14/27]; the FCA trial skeleton, paragraph 341. That is [1/1/97].

So, my Lords, I have taken you to some examples. I have got some other examples in my notes, for example a lorry spill and other examples. I can go through those. But I just wonder whether it is of real value to you since I think I have made my points on those.

If your Lordships wish me to go through, for example, a lorry spill and causation enquiries I can do...
MR JUSTICE BUTCHER: Speaking for myself, I suspect we have covered the ground in relation to that. I think I can imagine what you are going to say about it.

MR KEALEY: Yes, I think I have covered the ground, my Lord, because I see a certain amount of repetition in my examples of the principles. So I am grateful for that.

So, my Lords, what I think I would like to do is take your Lordships now, or what I am going to try and cover now in not short order but I am not going to be trespassing too much on everybody’s time, I want to go to the Orient-Express, then to Silversea, and then back to Orient Express. Then I think I am probably done.

Your Lordships may say you have not answered all our questions. But I am going to proceed along those lines in the hope that I will have done so by the end of my submissions sometime after lunch, about an hour after lunch this afternoon.

LORD JUSTICE FLAUX: If you have not answered our questions, I will do so later.

MR KEALEY: Then I will go straight to the Orient-Express at {J/106/1}. The reason I do so at this stage is not the reason I will do so later.

So 106. The reason I go here now is to identify to your Lordship some fallacies in my learned friend’s submissions on the Orient-Express, and particularly how it worked.

What I want to do, my Lord, and the whole purpose of this exercise right now -- and you may tell me that you know the answer already -- I want to identify the insured peril in the business interruption section of the policy. Not the insured peril in the property damage section of the policy, but the insured peril in the business interruption.

Of course, in doing so I will also tell you what the insured peril is in relation to the property damage section of the policy.

On {Day2/101:7-19} Mr Edelman said that Mr Justice Hamblen reached the wrong judgment about what the insured peril was because he said “indubitably the insured peril was the hurricane.”

Now your Lordships have to look at the case rather more carefully. If your Lordships go to paragraph 12 of the judgment {J/106/3}, where it says “The Policy”, bottom right, there are two sections.

Firstly under (a):

"The insurers agree to indemnify the insured under the material damage and machinery breakdown sections against direct physical loss, destruction or damage, except as excluded herein to property as defined herein, such loss, destruction or damage being hereafter termed [capital D] Damage.”

So the subject matter of that section is damage, and the perils insured against, as indeed was accepted on behalf of the FCA, were all risks, in other words all fortuitous risks.

I want to emphasise one thing at this stage. Contrary to Mr Edelman’s suggestions on {Day2/99/1} to {Day2/100:1}, nothing that I am about to say, and nothing that Mr Justice Hamblen said, would have been any different if the property damage section of the policy that I have just read out was a specified risks policy as opposed to an all risks policy. Absolutely nothing. It wouldn’t have made any difference if every single risk, including hurricane, had been set out verbatim. That is, my Lord, because as we say at paragraph 16.3 of the Ecclesiastical skeleton, I think it is, and Amlin’s skeleton, that is {I/12/13} at footnote 7:

“As Lord Sumner said in the case of British and Foreign Marine v Gaunt: ‘An all risks policy is equivalent to a policy in which every single risk is set out and enumerated’.”

You see that at footnote 7:

“All risks have the same effect as if all insurable risks were separately enumerated.”

Back to paragraph 12 {J/106/3} you can imagine every single risk, including hurricane, being enumerated there. That is the first stage of the policy.

The second section has a different insurance coverage: under the business interruption section against loss due to interruption or interference with the business directly arising from damage.

The subject matter of I(b) is the business. The peril insured against is damage, capital D Damage as defined. In other words capital D Damage as having been caused by whichever risk falls within all risks, but whatever risk falls within all risks and causes damage...

LORD JUSTICE FLAUX: So the peril insured against under the business interruption section is damage caused by hurricane, not hurricane.

MR KEALEY: Correct, and that is the only point I am making, I am going to make it rather lengthily but unfortunately I have to because it was submitted to you that the peril was a hurricane, and that is blatantly fallacious.

If you look, my Lords, at paragraphs 57 and 58 of Mr Justice Hamblen’s judgment {J/106/11} -- one should really start at 52. It is at page {J/106/11}:
"Sixthly, OEH [that is the insured] submits that
Generali’s approach subverts first principles in that it
involves seeking to strip out from the claim for
business interruption loss, loss caused by insured
damage, not merely the concurrent consequences of the
excessive circumstances."

Et cetera:
"But the concurrent consequences of the very peril
that caused the damage which was a proximate cause of
the business interruption loss in the first place.
However the relevant insured peril is the damage; not
the cause of that damage."

If your Lordships now go to paragraph 57:
"I agree with the tribunal that the clause is
concerned only with the damage, not with the cause of
the damage. What is covered are business interruption
losses caused by damage, not business interruption
losses caused by damage or other damage which resulted
from the same cause."

If your Lordships go to the bottom of that
paragraph, the same page, in relation to the trends
clause but also actually the "but for" test:
"The assumption required to be made under the trends
cause is had the damage not occurred, not had the
damage and whatever event caused the damage not
occurred."

When he says that your Lordships should recall that
he also said that the trends clause was merely
a reflection of the general "but for" test as a matter
of general legal principle.

Then at 58 over the page, my Lords:
"I agree with Generali that OEH’s construction
effectively requires words to be read into the clause or
for it to be redrafted."

Just towards the end of that paragraph -- well,
I should read on:
"Further such a redrafting of the trends clause
which would allow for OEH to recover for the loss in
gross operating profit suffered as a result of the
occurrence of the insured event (ie the hurricanes) as
opposed to the loss suffered as a result of the damage
to the hotel, is inconsistent with the causation
requirements of the main insuring clause which OEH
accepts requires proof that the losses claimed were
caused by damage to the hotel."

Then in the next paragraph he refers to the trends
clauses providing clear support for adopting the "but
for" approach to causation.

Now what I think the FCA has done, which is wholly
inappropriate and quite wrong, is to have tried to lead
your Lordships to think that when Mr Justice Hamblen was
referring there to the insured event as the hurricane
being the insured event what he meant for the purposes
of the business interruption part of the policy was the
same as the insured peril under the BI part of the
policy.

That, my Lords, is wholly wrong, and quite wrong to
have been suggested.

Your Lordships will see that, just little bits, if
your Lordships go back to paragraph 45. I hope your
Lordships will read now this judgment from the correct
not misleading perspective (J/106/10).

"However, without an adjustment mechanism as
provided for by the trends clauses, an application of
that standard formula to the facts of a given case may
not give proper effect to the indemnity intended to be
provided under the business interruption section of the
policy, namely in respect of the loss resulting from the
business interruption suffered in consequence of the
property damage, which is itself the result of an
insured event."

"Insured event* at this juncture of my Lord
Mr Justice Hamblen’s judgment, is the cause of the
insured peril, and is not the insured peril.

Then the last couple of sentences or three
sentences --

LORD JUSTICE FLAIX: Even though it might be an insured
peril under section A of the policy, the material damage
section.

MR KEALEY: Exactly so, my Lord. That is exactly the same
point as was addressed by the Court of Appeal in
Silversea.

LORD JUSTICE FLAIX: Quite.

MR KEALEY: Exactly so. Mr Justice Hamblen is no slouch
when it comes to, you know, grammar and vocabulary and
taking the right words, he knew what he was saying and,
in my respectful submission, when you read the words
that he uses, anyone reading this judgment knew what he
was saying and knows what he was saying.

If your Lordships go to the bottom of paragraph 46
the middle:
"One cannot ignore the damage and yet pretend [this
is the submission of the insured] for the purposes of
the trends clause that the event which caused the damage
still happened. However, this does not follow. The
only assumption required by the clause is that the
damage has not occurred."

That, my Lords, is the insured peril.
"It does not require any assumption to be made as to the causes of that damage."

I am going to be referring to this case again, but since I am on it now, do your Lordships remember that -- let me check, have I taken your Lordships to paragraph 52? I think I have. Yes, I have. That is okay.

Do your Lordships remember I was talking about wrongdoers and multiple wrongdoers? Since I am here now, my Lords, it is probably not inappropriate that I should just mention the multiple wrongdoers.

Sorry, my Lords I am just losing my --

LORD JUSTICE FLAUX: It is paragraph 24, it's the reference to Kuwait Airways.

MR KEALEY: I'm grateful, my Lord.

LORD JUSTICE FLAUX: Is it from Kuwait Airways at 73 and 74, the judge quotes it at page --

MR KEALEY: Yes, it is, 73 and 74. In fact, I wanted to take your Lordships also to paragraph 39 at page (1/106/9):

"Further, it is not the case that the application of the 'but for' test means that there can be no recovery under either the main insuring clause or the prevention of access or the loss of attraction. If, for the purpose of resisting the claim under the main insuring clause, Generali asserts that the loss has not been caused by the damage to the hotel, because it would in any event have resulted from the damage to the vicinity or its consequences, it has to accept the causal effect of that damage for the POA or LOA, as indeed it has done. It cannot have it both ways. The 'but for' test does not, therefore, have the consequence that there is no cause and no recoverable loss, but rather a different cause applies.

That is because, my Lord, the losses were partly covered or potentially covered under both clauses. Therefore, because it was partially covered, or the loss was partially covered under both clauses, there was a breach of contract under both clauses, or under all three clauses actually. Because the insurer, Generali in this case, did not hold the insured harmless by preventing the loss from occurring. Ex hypothesi, the insurer was in breach of contract and was a wrongdoer. And a wrongdoer, in applying the "but for" test, cannot rely upon its own wrong.

So that is a further extrapolation of the instances or examples given in the Kuwait Airways case by Lord Nicholls and in other places about multiple wrongdoers. In fact, this is an a fortiori case, in the sense that this is one double or triple wrongdoer.

My Lords, it is now 1.00 pm. I think I have dealt with, in this context, Orient-Express as to the proper -- I really shouldn't have had to do this -- proper identification of the insured peril under the business interruption section. I am sorry to have had to take your time and it is wholly wrong that I should have been required to do so, but I have. I am now going to turn, if I may, my Lord, after lunch to the Silversea case, I think, and then revert finally to the Orient-Express.

LORD JUSTICE FLAUX: So you have got about another hour, have you?

MR KEALEY: I'm afraid I do, my Lords. I'm sorry.

LORD JUSTICE FLAUX: How the defendants divide up their time is a matter for them.

MR KEALEY: Yes indeed.

LORD JUSTICE FLAUX: No doubt your colleagues will upbraid you if they think you have been belabouring points.

MR KEALEY: I think they already have.

LORD JUSTICE FLAUX: Fortunately, they can't upbraid us for too much. But secondly, the FCA has come up with, in this context, Orient-Express as to the causes of that damage.

Earlier this morning I had mentioned that the difficulties with which the FCA is confronted, the FCA sought to get around on essentially two bases. Firstly, which I have covered, we say that they, that is the FCA, sought to rewrite the insured perils, and we have dealt with, in this context, Orient-Express as to the novel concept of inextricable linkage, which seems to have been lifted imaginatively out of The Silver Cloud decision which, as we will demonstrate to your Lordships, is not an authority for anything relevant to this case and was, for the purposes of this case, purely a decision on the facts.

Now, this inextricable linkage novel concept appears to be a concept to which the FCA says that the legal principles applicable to concurrent interdependent causes applies. So they say that the concept of interlinkage enables insureds to bring into contracts of insurance, as a form of almost unnamed peril and unnamed coverage, in this case all losses attributable to COVID-19. They say that
this new category sits somewhere between the categories of concurrent independent causes and concurrent interdependent causes. It has the characteristics of a hybrid. So one of its factual features is one that the insured peril of one part of the hybrid would not satisfy the "but for" test, but so long as one of the independent causes in this hybrid is insured and the other is not excluded, rather like interdependent causes, the insured can recover. And the way they put it is to say that this applies where the insured peril is inextricably linked or related to or connected with something else. Where they articulate their case is at a number of places in fact, at transcript (Day2/37:1) really through to page 39. We needn't go there for present purposes, because I think I have accurately summarised what they say. It is sufficient that there is an inextricable linkage or sufficient that there is some commonality or relationship. The reason why this is so important is because, as I have indicated this morning, as the FCA accepts, look at their trial skeleton page 241, that is {1/1/97}, and indeed if one looks at paragraph 241 you will see that they accept there that it would have made no difference that there was anything within any one 25-mile area, it would have made no difference to the existence of the business interruption loss. That is also accepted at paragraph 52 of the FCA's reply, in {A/14/27} at paragraph 52. They specifically say that: "It is not alleged that the advice given and/or restrictions imposed were caused by any particular local occurrence of COVID-19 but they were caused ..." then they tell you by what they were caused. So it is accepted, in our respectful submission, that the operation of any individual insured peril did not actually cause, on the FCA's own case, any insured business interruption loss. Looking back at the new hybrid concept of interlinkage, one tries to look for the principle by which it is to be assessed, whether a non-insured cause is sufficiently interlinked with an insured cause to be treated as falling within this special category. And as a matter of law there is actually no legal or principled basis for doing so. The best that it seems the FCA can offer is the decision of the High Court and the Court of Appeal in Silversea, but actually the decisions in both of those courts help the FCA not at all. Silversea is a case which you will find at {J/90/1}. That is the decision of Mr Justice Tomlinson. Before we turn to that, the new concept which is proposed by the FCA is an entirely new concept of concurrent cause. It involves identifying what loss was proximately caused by a cause other than or additional to the insured peril. So what they have done is to conjure up a gateway to an outcome where the insured peril need not actually be the cause of the loss at all. It is again reduced to a gateway to an outcome, where the insurer is fixed with a set of losses caused by something other than or in addition to the insured peril.

Now, we have dealt with the Silversea decision in some length in the joint skeleton. I am not going to turn to that, because I am just going to pick up various important points. In the joint skeleton at paragraph 60, which is {I/6/62}. You have it out, as I say, in {J/90/1}. Now, the following are quite important to note. The case came before the court on the footing that it was common ground between the experts that the events of 9/11 and the State Department warnings were concurrent causes of the downturn in bookings. Having heard the expert evidence, Mr Justice Tomlinson as then he was, decided, on the facts, that it was impossible to divorce the effects of the warnings from the effects of the events on the travelling public. He decided that it was not possible to separate out those different factors, and to assign to them a different weight in terms of their impact on decision-making. You can see that at paragraph 68 of the learned judge's judgment, at {J/90/29}. Having heard the evidence, at line 4: "... I am confirmed in that view. It is simply impossible to divorce anxiety derived from the attacks themselves from anxiety derived from the stark warnings issued in the immediate aftermath thereof." Therefore, Mr Justice Tomlinson rejected underwriters' case, as referred to at paragraph 67 further up on the left-hand side of that page, rejected underwriters' pleaded case that any diminution in business was attributable, either wholly or in overwhelming part or in part at all, to the attacks themselves. You see that: "Underwriters' pleaded case was that any diminution in business after the 11 September attacks was attributable either wholly or in overwhelming part to reaction to the attacks themselves, rather than to any official warnings issued in their aftermath." The experts suggested that 80 to 90% of the effect was actually attributable to the attacks and only 10 to
20% attributable to the State Department advisories and similar warnings. But Mr Justice Tomlinson concluded in the next paragraph that that was an impossible approach and you couldn't divorce anxiety from one from anxiety derived from another.

What then happened, my Lords, is that he thereafter proceeded, because the parties before him proceeded, upon the conclusion that on the basis of those facts the two causes were concurrent causes.

There was no indication in his judgment -- and I will tell you why in a second -- that on this conclusion, that there were concurrent causes, and therefore because of the inapplicability or inapplicability of one of the exclusions the insured was covered, there was no indication in his judgment that he was breaking any new ground.

If you look at paragraph 69 he says en passant that: "... since, as I find, and as was common ground between the two experts, the events of 11 September and the warnings were concurrent causes of downturn in bookings, including cancellations thereof, and since the consequences of the events of September 11 are not for the purposes of section A.11 excluded from the ambit of the cover, as opposed to simply being not covered, a claim under the policy must lie -- see Wayne Tank. I am not sure that, on this hypothesis, insurers contend to the contrary." Indeed, as your Lordships will see from the Court of Appeal, they did not. And they were not.

This judgment by Mr Justice Tomlinson, on the basis of a factual finding, was a judgment where there was no contest between the parties as to the application of the Wayne Tank principle. There was no argument that the causes were not interdependent, on one view, therefore the "but for" test applied.

LORD JUSTICE FLAUX: They were clearly interdependent causes. MR KEALEY: On one view they were. LORD JUSTICE FLAUX: Interdependent in that there wouldn't have been State Department warnings at all if it hadn't been for the 9/11 attacks.

MR KEALEY: That is absolutely right. That is absolutely right. In that sense they were interdependent, I do accept that.

LORD JUSTICE FLAUX: And the evidence, whilst he concluded that you couldn't disentangle them, he proceeded on the basis that they were both, in effect, causative of the loss.

MR KEALEY: He did, my Lord, he did. And the point that you make makes my submission, as it were, a fortiori.
paragraph 97. There was an exclusion clause which
excluded cover for any loss arising from deterioration
of market and/or loss of market and/or lack of support
for any scheduled cruise, unless as a direct result of
an insured event.

7 Insurers, through Mr Swainston, sought to take
legitimate advantage of that exclusion clause, and
indeed the Wayne Tank principle, by saying that one of
the causes, one of the two concurrent causes, was
excluded as a result of that exclusion clause and
therefore, on Wayne Tank principles applicable to
interdependent causes, the loss was not recoverable by
the insured. You see that, my Lords, at paragraph 100.

"On this appeal [this is Lord Justice Rix’s
judgment] the underwriters do not seek to go behind the
judge’s rejection of their factual case on causation.
They do, however, take a further point of law briefly
referred to by the judge in this passing comment [which
I have already read out]."

At paragraph 101:
"Now on appeal at any rate they do."

That is leading from Mr Justice Tomlinson’s last
sentence: "I am not sure that, on this hypothesis, insurers
contend to the contrary."

"Now on appeal at any rate they do. Mr Swainston
submits that because of the exclusion only losses caused
by government warnings are covered, not losses caused by
the underlying events. Since, on the judge’s own
findings, all the losses such as they may turn out to be
were caused as much by the underlying events as by the
warnings, it follows that the same losses would have
taken place even in the absence of the warnings. It
follows that on Dr Gibbs’ findings Silversea could
recover for only 10-20% of their claim, whereas on the
judge’s finding they could recover nothing.

"It is common ground that the law is to be found
encapsulated in this citation from Lord Phillips’
judgment in The Demetra K."

You can turn over the page. It is the Wayne Tank
principle, on the left-hand column:
"The effect of an exception is to save the insurer
from liability for a loss which but for the exception
would be covered."

Then at 103:
"Both parties, however, submit that the application
of these principles produces a result in their favour
respectively. Mr Swainston submits that the 9/11 events
themselves, because a direct cause of the losses
different from the ‘insured event’ under cover A. ii,
which has to be a warning, are excluded perils, and that
losses caused by such perils are excluded losses.

Mr Flaux, however, submits that the events of war or
terrorism which lead to warnings are not excluded
perils, but are perils covered elsewhere within the
policy and are a necessary pre-condition, actual or
threatened of the warnings within cover A. ii itself.

Then the learned judge concludes that Silversea are
right. Lord Justice Rix goes on to say:

"Cover A. ii is premised on acts of war, armed
conflict or terrorist activities, actual or threatened,
provided, however, that they generate the relevant
warnings about them. If they do, and those warnings are
not excluded perils, it is simply that they are not
covered under cover A. ii as perils in themselves."

For example, hurricane, physical damage:

"Something extra is required. However, they are an
insured event for the purpose of the contract as
a whole. There is no intention under this policy to
exclude loss directly caused by a warning concerning
terrorist activities just because it can also be said
that the loss was also directly and concurrently caused
by the underlying terrorist activities themselves."

Therefore, Lord Justice Rix concluded, turning back
to paragraph 97, that the 9/11 event was an insured

"Now, in order to understand that fully you need just
to have in mind the A. ii cover, which you will see at
page 8 of this report. {J/91/8}. In the top left-hand
column, under A. ii:

"The heading of A. ii referred to ‘loss of
anticipated income ...’ and the loss was further
described as ...”

And if your Lordships go to paragraph 12:

"To cover the ascertained net loss resulting from
a State Department advisory or similar warning by a
competent authority regarding acts of war, armed
conflict, et cetera, terrorist activities, whether
actual or threatened, that negatively impacts the
assured’s bookings and/or necessitates a change to the
scheduled cruise itinerary, subject to a maximum period
per event of 6 months ..."

That is the A. ii. The underlying causes of the
warnings, as I have indicated, were not excluded perils,
but they were not covered under A. ii as perils in
themselves. In other words, the actual terrorist
activities were not perils under A. ii, and therefore
something extra was required in that the acts of
terrorism must have given rise to a State Department
If you go to A.i...

LORD JUSTICE FLAUX: In other words, the something extra that was required was the insured peril under A.i.

MR KEALEY: The something extra that was required was in fact the insured peril under A.i.

LORD JUSTICE FLAUX: Yes. Can I answer that in the sense of your Lordship's question, which I at least infer?

Firstly, if they were interdependent causes then the answer is the classical answer provided in Wayne Tank and the Miss Jay Jay, because you have one insured and one uninsured, ergo there is coverage because one shouldn't forget that before Mr Justice Tomlinson there was no argument as to the application of any exclusion. That is the first thing.

Secondly, if that is wrong, as I indicated to my Lord Lord Justice Flaux earlier, Mr Justice Tomlinson noted en passant what the consequence was. But there was no argument before Mr Justice Tomlinson as to, if they were independent concurrent causes rather than interdependent concurrent causes, the "but for" standard had to be satisfied nevertheless and was not. In other words, the case proceeded before Mr Justice Tomlinson without adverse argument or without any opposing arguments as to the application of the Wayne Tank and Miss Jay Jay principles, which apply only to interdependent causes.

Therefore, if one is going to seek any authority from this in relation to independent concurrent causes, it does not exist. There was no argument that one can see, and that was the end of the matter.

It is instructive, my Lord, to look at Mr Justice Hamblen in the Orient-Express. If your Lordships go to 106, that is {J/106/1} and the important passage here is at paragraph 32 at page {J/106/8} of the report.

Whilst the FCA criticises Mr Justice Hamblen, I don't think they have any legitimacy in criticising him about his ability of reading cases and analysing what they say or don't say. He first mentions the Silversea case at paragraph 29. Then he says that there was some support of the approach in Silversea at paragraph 30. Then at paragraph 31 he recites what happened, and at paragraph 32 he says:

"I agree with Generali that no great assistance can be derived from this case, which largely turned on the court's factual conclusions. In particular, it did not address the specific issue of two concurrent independent causes, nor the applicability of the 'but for' causation test in such a case. Further, there is an important difference between a case involving two concurrent interdependent causes and one involving two concurrent independent causes. In the former case the 'but for' test will be satisfied; in the latter it will not."
MR JUSTICE BUTCHER: I see that, but in our case, or in the present case, whether a particular person goes to a church or whatever, there may be two causes, it may be very difficult to say whether they are independent or interdependent in a particular case.

How is that addressed? Certainly without an investigation which is prohibitively expensive, as it were.

MR KEALEY: Well, firstly addressing the point that your Lordship made towards the end, it may or may not be expensive, and it may or may not be difficult, but cost and difficulty don’t necessarily provide a legal answer to the question. In fact, in my respectful submission they don’t provide an answer at all to a completely different and very important conceptual question of law.

Secondly, the answer is that if you have two as it were indivisible causes, or rather two causes that can’t be separated one from the other, in a case where one is insured and the other is not insured but they are not interdependent, then I have to tell you that the insured fails to satisfy the burden of proof upon it.

Now, it makes no difference whether the insured is a small insured or is BP. The position of the law is the same in relation to both insureds. Interdependent causes require that each pass the "but for" test, otherwise there is no coverage.

If what your Lordship has postulated are interdependent causes, each has to pass the "but for" test, so the insured has to prove that but for that the loss would not have been suffered. That is if they are interdependent. That is, in a sense, the high watermark for an insured.

If they are independent causes, then it is exactly the same, each has to pass the "but for" test, and if that cannot be proved to the satisfaction of the court then the insured fails on the burden of proof.

Now, it is said quite often, and I acknowledge, that courts do not like determining cases on the basis of burden of proof. However, as was made absolutely plain by Lord Brandon in Popi M, and by Lady Hale more recently in that case about the BP engineer who might or might not have committed suicide in Braganza, courts should not be in the slightest bit timid or afraid or reticent about concluding, if it be the case, that the burden of proof has not been satisfied.

So for example, in The Popi M, the House of Lords, through Lord Brandon and others, concluded that despite the fact that one might say one wants to help the insured in that case, the insured failed on the burden of proof, and the court should not be shy about so concluding, even if that means that the cause of the loss is unexplained or if that means, as a necessary consequence of the legal principles, that it has not been shown that the loss was caused factually, let alone proximately, by the insured peril.

What this actually demonstrates, in my respectful submission, is there is nothing wrong with the policy language, there is nothing wrong – you may criticise the insurers for taking certain defences or not taking certain defences, I know not, that will be in the future. But there is nothing wrong with the policy language as such. But one thing is very, very clear, and that is that the FCA’s case that these insureds were insured against infectious diseases generally is simply not right.
Now if that had been, and I imagine perhaps some insurer may one day have given such wide coverage, but these are extensions to already an extension to coverage. In other words, property damage is the primary part of the insurance contract, business interruption losses which are, as it were, parasitic on property damage is the next section, and then you get additional non-damage extensions. And in those non-damage extensions, most of them are relatively circumscribed.

Why are they circumscribed? It is not because insurers had a pandemic in mind and decided not to include them; they are circumscribed because they are add-ons. So they are, as it were, not a gift but they are of benefit to the insured.

That is one big reason why, as it happens, one finds that insurers are of course, for many reasons, but one reason why insurers are anxious about cases such as this.

Anyway, what I have said is that the decision in Silversea or Silver Cloud is not an authority that actually helps you at all. And although Mr Justice Tomlinson, for better or for worse, determined that in that case, the effects of The Government State Department warnings and 9/11 attacks could not be distinguished, that is a factual finding which was not taken further, as it were, as a matter of legal analysis, by either counsel, one of them very sensibly not to and the other who knows, was not taken any further in relation to --

LORD JUSTICE FLAUX: But the important point about that, if we go back to paragraph 69 of Mr Justice Tomlinson’s judgment, is it is quite clear, which is I think the point you were making about what Mr Justice Hamblen said in Orient Hotels, that he was applying the Wayne Tank principle on the basis that what he was faced with was two concurrent interdependent causes, in the sense that they were both of equal efficacy. Hence he says at 69 that:

"The events of 11 September and the warnings were concurrent causes of the downturn in bookings."

So they were both effective causes or proximate causes, or whatever you describe them as. And you say, or insurers say that there, in effect, in relation to the disease clauses -- I mean the position may be different with the public authority denial of access clauses, as I see it anyway, but in relation to the disease clauses it is effectively accepted by the FCA that the local occurrence of the disease was not a proximate cause of the losses that were suffered. So unless they can get home as it were on concurrent independent causes, then they don't have a case, and that's what you say.

MR KEALEY: That is what we say.

LORD JUSTICE FLAUX: And what you are pointing out is that there is nothing in this case, Silversea, that helps us to conclude that concurrent independent causes, or rather the same Wayne Tank doctrine, if I can put it that way, applies to concurrent independent causes.

MR KEALEY: That is absolutely right, my Lord. That is absolutely right.

LORD JUSTICE FLAUX: Yes.

MR KEALEY: I leave that case, my Lord.

LORD JUSTICE FLAUX: Yes.

MR KEALEY: Because in my respectful submission it doesn't take you any further.

LORD JUSTICE FLAUX: No.

MR KEALEY: I want to return now, my Lord, to Orient-Express.

LORD JUSTICE FLAUX: Yes.

MR KEALEY: Which is in the same bundle, and I think I have taken you to it a moment ago, and it is in divider 106.

LORD JUSTICE FLAUX: {J/106/1}.

Before I go into this case in any detail, and your Lordships know this case pretty well by now so I am going to take it quite shortly but I don’t want to
MR KEALEY: Yes. I agree. I won’t trouble your Lordship any more on that point.

Can I take your Lordship to page 2 of the report. It is page 532, but it is page 2 of the bundle (J/106/2). Your Lordship sees there that there were two questions or two issues that arose. These were questions, my Lord, that, as addressed by Mr Justice Hamblen, were questions referable to the policy as a whole and not specifically with reference to the trends clause.

So (1) is the question:

“Whether on its true construction the policy provides cover in respect of loss which was concurrently caused by (i) physical damage to the property; and (ii) damage to or consequent loss of attraction of the surrounding area.”

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

So one is of general application as a matter of construction and, as your Lordship will see, general application of the law, and the second is the trends clause.

Now I have looked at this case with you before and I think Mr Justice Hamblen addressed. If I may, therefore, I am going to turn -- I have looked at paragraph 11 and 12, at 12 we have the wording.

Your Lordship sees that at paragraph 14 we have the POA clause and paragraph 15 the LOA clause. We need, sorry, on the screen {J/106/4}. Your Lordship sees that there were two lines there and what Mr Picken submitted was that the words are clear; the cause of the loss has to be and be shown by OEH to be interruption or interference resulting from the physical damage to the hotel and not from the damage to the City of New Orleans or, say, want of demand because of the damage to the city which the hotel would have suffered even if it had not been damaged at all.

Then it is said that:

"The third question, in Mr Fletcher’s formulation in opening submissions, was what is the loss resulting from such interruption?"

I should say that for my own part I actually regard Mr Fletcher’s arguments as really perfectly good. He lost in front of the tribunal but that is, of course, as it goes. Anyway, paragraph 19:

"It is the third question on which the parties part company. On behalf of Generali, Mr Picken submitted that the words are clear; the cause of the loss has to be and be shown by OEH to be interruption or interference resulting from the physical damage to the hotel and not from the damage to the City of New Orleans or, say, want of demand because of the damage to the city which the hotel would have suffered even if it had not been damaged at all."

"Mr Fletcher did not ... ever supply a convincing answer to this submission. He criticised the submission as one creating a false hypothesis because the cause of the damage to the city and to the hotel was the same event or events, and submitted that the policy was intended to cover losses resulting from all damage caused by the events which damaged the hotel, and only to exclude losses resulting from damage which was completely unconnected in the sense that it had an independent cause. He submitted that the law relating to concurrent causes would in any event enable the hotel to recover in circumstances where a given loss was caused both by damage to the hotel and the damage to the city. And he submitted that the effect of excluding losses resulting from damage to the city was to require an artificial and hypothetical enquiry to be made."

Pausing there, this is very much like the FCA’s arguments in this case; talking about exclusions when of course there aren’t any relevant exclusions, at least in relation to this part of the case:

"But none of these submissions, in the view of the tribunal, addresses the language used in the provisions to which we referred and which we have emphasised. That language requires OEH to establish that the cause of the loss claimed is the damage to the hotel. It is not
MR KEALEY: The Fourth Circuit includes, I think, Virginia.

LORD JUSTICE FLAUX: Yes.

MR KEALEY: Yes.

LORD JUSTICE FLAUX: The Fourth Circuit includes, I think, Texas. The Fifth Circuit. I'm sorry, this is the Fourth Circuit. I will have to get that one right. Will your Lordship bear with me for a second?

MR KEALEY: It is Texas. The Fifth Circuit. I'm sorry, the Fourth Circuit belongs to the Carolinas and possibly West Virginia.

LORD JUSTICE FLAUX: Yes. I think it is Virginia, North and South Carolina and possibly West Virginia.

MR KEALEY: I am told that is right, my Lord.

LORD JUSTICE FLAUX: Yes.

MR KEALEY: Then in the last part of the page:

"The critical question in that case was whether particular profits would have been earned had the loss not occurred. The majority of the Court of Appeals interpreted these words as requiring the court to ask whether the profits would have been earned had the hurricane not occurred, to which the answer on the facts was 'no.' The third member of the Court of Appeals dissented on the ground that 'had the loss not occurred,' to which the answer on the facts was 'no.' The majority of the Court of Appeals interpreted these words as requiring the court to ask whether the profits would have been earned had the loss not occurred. The Third Circuit Court of Appeals held that a 'but for' causation test, being a necessary but not sufficient condition, is not to be applied in cases where concurrent wrongdoers have been involved. The majority of the Court of Appeals held that a 'but for' causation test is appropriate and that it is necessary to assess the BI loss on the hypothesis that the hotel was undamaged but the City of New Orleans was devastated, as in fact it was."

So, my Lords, the tribunal concluded, on the application of the "but for" test, in relation to the insured peril in that case for business interruption, namely physical damage to the property, that it was necessary to assess the BI loss on the basis that the hotel was undamaged but nothing else was different. In other words, but for the damage to the hotel. In other words, but for the insured peril. No more and no less.

"Question 1: whether, on its true construction, the policy provides cover in respect of loss which was concurrently caused by: (i) physical damage to the property; and (ii) damage to or consequent loss of attraction of the surrounding area."

Your Lordships see, at paragraph 20, the answer to this question is most:

The tribunal has not excluded recovery of losses concurrently caused by damage to the hotel and damage to the vicinity. It has only excluded losses which would have been suffered in any event but for damage to the hotel. Such losses are not to be regarded as caused in fact by the damage. At the hearing it became apparent that the crucial issue of law dividing the parties was the appropriateness of applying the "but for" causation test in this case."

Then you have, my Lords, a reference to the normal rule for determining causation in fact being the "but for" test, being a necessary but not sufficient condition. You have Clerk & Lindsell, McGregor on Damages, and various exceptions. For example, your Lordships see at page 106/6, right-hand column, under (1) "The exceptions", that 's the tort of conversion, and then (a) "Negligence", in other words, more than one wrongdoer. Then OEH submits that this is one of those very occasional cases where fairness and reasonableness require a relaxation of the standard, and then reference is made to Lord Nicholls' judgment or speech in Kuwait Airways. Can I invite your Lordships just to read paragraph 73 and 74 from Lord Nicholls' speech. (106/7).{

At the end of Lord Nicholls' speech at paragraph 25, OEH acknowledge that the cases in which it has been held to be inappropriate to apply the "but for" test have
been cases in tort, particularly negligence and
conversion, and the same approach should be applied in
an appropriate case in contract. He says:

"This is such a case, being a case of two concurrent
independent causes in relation to which the application
of the "but for" test would lead to the untenable
conclusion that neither of the causes caused the
business interruption loss."

That, my Lords, is what I said was in fact the wrong
question being asked by OEH.

Then I am going to leave that part of the judgment
and go past Silversea and then turn to paragraph 33,
because there Mr Justice Hamblen acknowledges that as
a matter of principle there is considerable force in
much of OEH’s argument. At page {J/106/8} of the
bundle:

"As a general rule the 'but for' test is a necessary
condition for establishing causation in fact. However,
there may be cases in which fairness and reasonableness
require that it should not be a necessary condition.
This is most likely to be in the context of negligence
or conversion claims, but I would accept that in
principle it is not limited to tort or to particular
torts. I would also accept that a case in which there
are two concurrent independent causes of a loss, with
the consequence that the application of the 'but for'
test would mean that there is no cause of the loss, is
potentially an example of a case in which fairness and
reasonableness would require that the 'but for' test
should not be a necessary condition of causation
particularly where two wrongdoers are involved."

My Lords, that is not this case.

"However, whether or not this is so will depend on
all the circumstances of the particular case and
ultimately the issue is whether the tribunal erred in
law in applying a 'but for' causation approach under
this policy."

There are a number of difficulties that the judge
identified, but I want you to go through, if I may, to
paragraph 38 at page {J/106/9}, because this is
important.

"Thirdly, in any event I am not satisfied that it
has been shown that 'fairness and reasonableness' does
require that the 'but for' test should not be applied."

So, my Lords, what the judge is there doing is
addressing, quite independently of the fact that this
was an appeal from a tribunal award, whether as a matter
of principle in that case fairness and reasonableness
required -- and it is a requirement, it is not just
something that would be nice to do, it is whether
fairness and reasonableness does require that the "but
for" test should not be applied.

Can I invite your Lordships to read paragraph 38 to
yourselves because, just as in this case, anything other
than that "but for" test results in something which is
wholly inconsistent with the contractual bargain.

(Pause)

It is the first possibility that you should be
focusing on. (Pause)

LORD JUSTICE FLAUX: When you say the first possibility,
Mr Kealey, what do you mean?

MR KEALEY: One possibility --

LORD JUSTICE FLAUX: But for the damage to the hotel and the
city?

MR KEALEY: That is the one, yes. Because that is what the
FCA is contending.

LORD JUSTICE FLAUX: So no COVID in the defined area and no
COVID in the country.

MR KEALEY: Exactly so. (Pause)

Now my Lords, looking at the first possibility, one
possibility but for the damage to the hotel and the
city, in other words but for COVID-19 in the area and in
the country, that would measure the gross operating
profit that would have been made by the insureds if
COVID-19 had not struck at all, and would therefore
compensate the insureds for all business interruption
losses however caused by COVID-19, even where those
losses were not in any way caused by COVID-19 within the
specified area, and as such are not recoverable under
the main insuring clause of the policy.

In other words, just as I started earlier this
morning, and I finish as it were late at night, it would
provide cover for a peril not insured against.

Of course this covers -- I have done it in
shorthand, but of course it would provide coverage to an
insured even if that coverage was dependent upon public
authority action, in circumstances where the public
authority action made absolutely no difference.

That possibility is what the FCA is gunning for, and
I will remind you of Mr Edelman. Mr Edelman says:
provided that there is just one case, provided that the
peril insured against can be said to be activated, that
is enough to harvest in all the consequences of COVID-19
however those consequences are and wherever those
consequences are to be found.

So you have an insured peril different from that
which the insurer agreed to underwrite, and he concluded
that none of those alternatives was more fair and
reasonable than enforcing the contract according to its
terms. And we say that the most objectionable of the
possibilities was the first, because that simply
re-wrote the peril. There is nothing fair and
reasonable about rewriting the parties' contract after
the event. There is nothing fair and reasonable in
terms of common sense or public policy. The parties
have contractually agreed the framework and the
boundaries of the insurance for which an indemnity is
payable, and they have agreed that the indemnity is only
payable when a loss is caused in the traditional sense.
Now, the FCA also says that notwithstanding all this
law, in some cases you can reverse more than the insured
peril in the counterfactual. Ms Mulcahy said on
Tuesday, that is (Day2/63:6) to line 9, that the
boundaries of the peril do not need to be the boundaries
of what is subtracted for the purposes of the "but for"
test. In other words, you can reverse more than the
peril.
That is so heretical and so bad as a proposition of
law that there should be no hesitation in its rejection.
Reversing more than the insured peril gives rise to
a loss which is completely different, or is different
from the loss caused by the insured peril. You are
essentially throwing out the basic and fundamental
concepts of factual causation under English law. It is
wholly unacceptable. It is anarchic in legal terms and
fundamentally wrong.
So, my Lords, the Orient-Express, we say, was
undoubtedly correctly decided. It involved an entirely
orthodox application of principles relating to the
proper interpretation of BI policies, the "but for" test
and concurrent causes. The FCA has sought to suggest
that the decision has been widely criticised. In fact
that is far from true; there are many references to the
Orient-Express without criticism. If it has been
criticised, we would respectfully suggest that those who
are critical of it have not understood the fundamental
principles by which Mr Justice Hamblen was guided and
which compelled him to the correct conclusion to which
he came.
My Lords, those are I think, I hope, my submissions
on the fundamental principles of causation, supplemented
by specific examples, including rodents, and concluding
with an analysis of the Silversea case, on which the FCA
has placed so much reliance, which is in our respectful
submission of absolutely no value as a matter of legal
principle to your Lordships, and concluding with the
Orient-Express, which we say was correctly decided.
So, my Lords, having perhaps overstayed my welcome
by about five minutes, I hope that your Lordships are
satisfied and have no further questions at this stage.

LORD JUSTICE FLAUX: I don't know if my Lord has any
questions for you, Mr Kealey.
MR JUSTICE BUTCHER: No. Thank you very much, Mr Kealey.
LORD JUSTICE FLAUX: Thank you very much indeed, Mr Kealey.
Who is up next?
MR TURNER: It is me, my Lord.
LORD JUSTICE FLAUX: I think it might be sensible, rather
than interrupting you 15 minutes into your submissions,
if we took a break now for ten minutes, and then we can
have a clear run for the rest of the afternoon. Does
that suit?
MR TURNER: Of course.
LORD JUSTICE FLAUX: My clock says just after 5 past, so we
will say 3:15 pm. Okay?
(3.06 pm) (Short break)
(3.15 pm).
Submissions by MR TURNER
LORD JUSTICE FLAUX: Right, Mr Turner, when you are ready.
MR TURNER: My Lords, could I give you a route map.
I am going to start with a handful of preliminary
points. Then I am going to address, in not great
detail, the question of proximity requirements and
causation, without, I hope, repeating what Mr Kealey has
spent much of today saying. Then I am going to turn to
the incorporation of damage-based quantification
machinery, and I will then turn to each of the RSA
policies in turn.
The strength of English commercial law has been its
consistency, and no more so than in the field of
insurance, and in this case insurers ask the court to
adopt entirely conventional approaches to the
identification of the insured peril, the application of
long-established rules of causation, and the principles
applicable to the construction of contracts; and to do
so without recourse to jigsaws, spreadsheets, and the
wholesale rewriting of insuring clauses, trends clauses
and exclusions, according to what the FCA asserts would
be a reasonable landing point and therefore must have
been in the contemplation of the parties or the
intention of the parties at the time of contracting.
We would suggest that the court cannot determine in
this action the question of whether different causes of
loss are or are not separable. As Mr Kealey indicated,
those are classically matters for adjustment in due
course, and for a future fact-finding tribunal to
resolve should it be necessary to do so.
Yesterday afternoon my Lord Mr Justice Butcher
raised a question about the enforceability of cordons by
the police, can I deal with that very shortly.
The police have powers at common law to take action to prevent a breach of the peace, and those powers extend to the right to impose and enforce a cordon. The leading example of that is the case of Austin v The Commissioner of Police for the Metropolis, which was the case which arose out of the 2001 May Day protests, and which endorsed the legality in principle of what is now known as "kettling". There are also statutory powers to impose and enforce cordons, and an example within the authorities folder in front of you is part 4 of the Terrorism Act, which has enforcement powers within section 36, the reference is (K/11/50), along with a provision within section 36 that it is an offence to fail to comply with an order, for example, to leave the cordoned area.

Then a short word in response to Mr Edey's submission that the relevant interruption or interference is part of the peril insured.

The short answer to his submission is that the clue is in the name of the relevant cover. For a material damage cover, the loss or its occasion is the damage, and the peril is the fire, the flood or the explosion. For a business interruption cover, the loss or its occasion is the interruption or the interference, and the peril, we would say, is the notifiable disease. There will be self-evident wordings but which is a defined term, uniquely, in RSA4. The phrase "the vicinity", a term which is undefined in most reference to a specified distance or by use of the one shape or another in relation to all of RSA's wordings, as well as the wordings of most of the other insurers. The requirements can either be expressed by reference to a specified distance or by use of the phrase "the vicinity", a term which is undefined in most wordings but which is a defined term, uniquely, in RSA4.

The starting point, as Mr Kealey has identified, is that the stipulated proximity requirement is an integral part of the insured peril; and the FCA is not entitled to look outside the words used in the policy for the purposes of identifying what that peril may be.

The FCA's submissions as to peril bear no resemblance to the words used in the relevant policies and are wholly dislocated from any concept of proximate cause. Let us look at the disease clauses or just remind you, if I may, of the disease clauses in RSA1, 3 and 4 as examples.

RSA agreed only to insure against the proximately caused consequences of: for RSA1, closures or restrictions imposed on the premises or placed on the premises as a result of the manifestation of a notifiable human disease within 25 miles of the premises; for RSA3, it is a notifiable human disease within 25 miles of the premises; and for RSA4, a notifiable human disease within the vicinity of the premises.

We submit that the commercial rationale for these provisions is obvious. If there is a notifiable human disease within the specified proximity, people may be less willing to visit the area of the insured premises, they may be less willing to undertake economic activity within the relevant area, thereby impacting on the insured business. Plainly, the likelihood of people’s behaviour being so affected will increase as the distance from the insured premises decreases.

Accordingly, we say it cannot be said that insurers’ approach to the construction of the relevant perils is in any way uncommercial. And, my Lords, we would endorse or agree with, respectfully, the bread and butter disease outbreak example which my Lord Lord Justice Flaux gave on (Day1/136:12) to line 15. I think you contemplated an outbreak of mumps or measles and, as a result, schools and the like being shutdown in a particular area.

Conversely, the consequence of the FCA’s approach is to reduce each proximity requirement to no more than an arbitrary, wholly incidental and non-causal contingency which, providing it is satisfied, brings within the scope of the insured peril everything which happens beyond the specified limit.

A contract having such an effect would be the epitome of happenstance, as my Lord Mr Justice Butcher observed on (Day1/135:8). It would be what Lord Sumner referred to in Becker Gray as an *aleatory bargain*; something turning on the roll of a dice. There is no obvious reason which we can discern as to why the FCA draws a line at a specified proximity of 1 mile from the premises, since its reason would apply, if correct, just...
as much to manifestations of disease at the premises,
which would doubtless be explained as pixels on the
individual pieces of the jigsaw.

Remarkably, the FCA seeks to justify that approach
by reference to the quotation from Lord Sumner’s speech
in Becker Gray, with which it concludes paragraph 220 of
its skeleton argument. Could we turn that up, please,
it is {I/1/89}.

The suggestion in the final sentence is that the
only question with which your Lordships need to concern
yourself is: has the event, on which I put my premium,
actually occurred?

If we go over the page {I/1/90} we will see that
that is characterised as being an important feature of
an indemnity policy.

We say that the FCA’s approach is infected by
a misreading of the relevant passage in Lord Sumner’s
speech. Could we now look at that at {J/42/13}.

Can we go to that page, please. {J/42/12}. We don’t need to turn it up.

To be fair to the FCA, many of us have been standing
on the same side as them in Becker Gray, with which it concludes paragraph 220 of
its skeleton argument. Could we turn that up, please,

Canadian hospitality interveners yesterday, {Day3/169:1}, and Mr Edey at least acknowledged what he was effectively canvassing
created a postcode lottery. A classic aleatory contract
on any view.

In our submission, what both the FCA and Mr Edey
remarkably described is not a commercial purpose for imposing
a contract of contingency on insurers, but it simply
describes the effect that such a contingency would create.

One can draw a distinction between the best
known contingency in material damage policies, which is
the material damage proviso. On one view, the
requirement that there has to be in place before the
business interruption cover can respond there must be
property cover in place under which liability is
admitted, could be described or seen as a pure
contingency, a happenstance. And no doubt the FCA and
Mr Edey would say that that affects whether insurers
have to pay out a business interruption loss.

But that is not the commercial purpose for the MD
proviso. The proviso is there to ensure that the
assured can rebuild its premises, and thereby bring the
period of interruption to an end as soon as possible, thereby hopefully reducing the exposure of insurer.

That is the obvious commercial purpose which underlies
the MD proviso and nothing else, and that is in Riley at
paragraph 2.10. I will give you the reference, it is
{K/323/1}. We don’t need to turn it up.

It is, in our submission, not surprising that the
FCA’s approach to proximity requirements, thus infected,
has left it in a state of confusion. You can see this
at paragraph 951 of its skeleton argument, where in the
context of RSA1 the FCA... and that reference is
(1/1/302) please. Can we go to (1/1/302), please.
You will see in paragraph 951:
"The clause thereby requires establishing (i)
closure or restrictions placed on the premises, (ii)
as a result of COVID-19 manifesting itself within
25 miles ..." To similar effect were the submissions by Mr Edelman
on Day 3 at page 45, lines 4 to 9. (Day3/454).
We would suggest that no one could sensibly make the
submission that the wording set out in paragraph 951 of
the FCA's skeleton argument should be construed as
requiring no more than a box to be ticked. They plainly
require the policyholder to establish a proximate causal
link between the manifestation of the disease within the
specified radius and the relevant closure or
restrictions, as well as a proximate causal link between
the loss and the closure or restrictions thus caused.
LORD JUSTICE FLAUX: In commercial terms it is completely
pointless, isn't it?
LORD JUSTICE FLAUX: Because if the cover is as broad as the
FCA asserts, then the 1 mile or 25 mile or vicinity
requirement is completely pointless.
MR TURNER: That is a very fair point. That is a very fair
point, my Lord. But in relation to RSA3, where we
indemnify against loss caused by a notifiable disease
within 25 miles of the premises, the point is, in my
submission, more directly apposite, and the link into
what Lord Sumner was saying.
We would go further, and if you take the wording in
RSA3, which is notifiable disease, loss caused by
notifiable disease, in fact it is "loss following
notifiable disease within 25 miles", and I will address
you in due course as to the meaning of the word
"following", but please for present purposes assume that
I am right when I say that that requires a proximate
causal relationship, the question which would arise in
relation to that clause, if one borrows from
Lord Dunedin's speech in Leyland Shipping, (J/43/14),
and as explained by my Lord Mr Justice Butcher in
Insurance Disputes at paragraph 7.15, reference
(K/204/9), the question is whether the occurrence of
COVID-19 within 25 miles of the premises has been the
dominant cause -- and I put the words "dominant cause"
in inverted commas -- of the loss.
In answering that question, and to borrow once again
from Lord Sumner in Becker Gray, one does not take
account of the remoter causes of the loss.
That then leads me to the next feature of the FCA's
argument in relation to causation, which is the jigsaw,
or the lines on the spreadsheet.
Now, Mr Kealey has already addressed the novel
inextricable linkage concept. The other way the FCA
puts its case, albeit, we would say, as the other side
of exactly the same coin, is the jigsaw or lines on the
spreadsheet, each making its concurrent contribution to
the cause. Not to the loss, to the cause. And I am
quoting there from Mr Edelman on (Day3/140:20) to lines
25.
Perhaps it is Day 2. Could I just have one moment,
please? I am not doing very well with my references,
my Lord.
LORD JUSTICE FLAUX: Don't take up time, Mr Turner, we
recall the submission.
MR TURNER: All I am going to say in relation to this is
that this seems to be an attempt by the FCA to abolish
the law of proximate cause or the rule of proximate
cause, however one wishes to articulate it, as explained
by Lord Dunedin, as set out or summarised in
paragraph 7.15 of Insurance Disputes, to unleash the
remoter causes disapproved by Lord Sumner in
Becker Gray, and introduce the concept of material

157
1. requirement is completely pointless.
2. MR TURNER: So is...
3. LORD JUSTICE FLAUX: Other than as a trigger for being able
to say -- as you say, a box to be ticked or a trigger
that says: provided you have one case within 1 mile, or
in the vicinity, or within 25 miles, then everything
else follows.
8. MR TURNER: My Lord, exactly.
9. LORD JUSTICE FLAUX: Why on earth you would do that, why you
would feel the need to do that remains unexplained.
11. MR TURNER: Wholly. Wholly. And it goes against every
grain of construing an indemnity policy where, as
Lord Sumner makes clear in Becker Gray, the assumption
from the very start, unless you have clear words to the
contrary, is that under an indemnity policy you are
insuring loss caused in a particular way. And that
predisposition towards requiring the causal link is
reflected in section 55 of the Act.
12. MR JUSTICE BUTCHER: I have to say, Mr Turner, I'm not sure
that Lord Sumner was addressing really the same point as
you are addressing. There would be, on one view, loss
as a result of closure or restrictions. But the point
you are really focusing on is within the clause itself,
that the closure or restrictions are not as a result of
a notifiable human disease manifesting itself within the

158
25 miles.
"Damage", capital D, in the middle of the page. So, says the FCA, none of these clauses in RSA2.1, 2.2 or 3 can apply to the quantification of losses under a non-damage extension to the business interruption cover.

My Lords, the reasons for maintaining what some might say is an uncharacteristically puritan approach to policy construction can be found at paragraphs 273 to 274 of its skeleton argument, [1/1/107].

If we go on, please, to [1/1/108], this is in the context of the Hiscox wording, the trends clause doesn’t apply because it is damage-based, and it’s said to be entirely understandable or unsurprising because there is often a modest subject limit and time limit on the period of indemnity, and the parties will therefore often have been content with a simpler and cheaper quantification process. One might observe that there is a rather obvious non sequitur in the final sentence of paragraph 274. We say that the FCA approach is wrong. Indeed, we go as far as to say it should be common ground that, and I quote: "Unless one proceeds on the premise that the peril in each extension, if it does not involve Damage [capital D], is to be treated as if it were damage for the purposes of the policy, there is no indemnification provision. This cannot have been intended by the parties."

That is a quotation, my Lords, from the FCA’s own skeleton argument at paragraph 947, page 300 in this document, please [1/1/300]. This is in relation to the Argenta policy, and it is the last two sentences of paragraph 947. Now, we say those points as to mutual intention are plainly of general application and cannot be limited specifically to either the Arch or Argenta wordings, because the stem by which the extensions provide cover effectively requires manipulation of the text.

What the FCA is setting out in 947 are general propositions which are equally applicable to every single damage-based quantification clause in any of the policies before you. And that should be the end of it. The issue is a simple one of construction, easily accommodated, certainly in the context of the RSA policies, by construing the words which extend the primary business interruption cover as extending it, subject to the incidence, including as to quantification, of the primary cover.

In relation to RSA3 in particular, we can also point...
MR JUSTICE BUTCHER: They are not very well drafted, but this sort of terminological inconsistency is not unknown in insurance policies.

MR TURNER: It really isn’t, and particularly where one is looking at extensions to primary cover.

LORD JUSTICE FLAUX: You wouldn’t have any quantification provisions at all. I mean, unless you read the definition of "Loss of Gross Revenue" as encompassing within "Damage" other non-damage extensions, then there isn’t any basis for saying there is any method of quantification of the loss.

MR TURNER: There is no method, so presumably the FCA’s approach is to say -- and I make this assumption because they haven’t told us what their approach is -- that the parties just have to establish what the loss is from first principles.

How that conforms with the FCA’s submission that the parties can have been intending to make it simpler and cheaper I don’t know, because the whole purpose of the quantification machinery is to make it simpler and cheaper and to avoid argument.

LORD JUSTICE FLAUX: Yes.

MR JUSTICE BUTCHER: In fact, I suspect you would say it doesn’t make any difference whether they are included in it or not, wouldn’t you?

MR TURNER: No --

If we then go to the schedule, please, at page {B/16/20}, that will contain the reminder that the policy and any schedule endorsements, etcetera, should be read as if they were one document.

In terms of business interruption cover, could we look, please, at page {B/16/12}, and at the top of the page:

"This insurance applies only where shown as included in the schedule."

If we then go to the schedule, please, the same tab at page {B/16/82}, one sees the business interruption insurance, and what is insured is loss of gross revenue. That is a defined term, the definition of which you will find at page {B/16/73}, on the left-hand side:

"The actual amount of the reduction in the gross revenue received by you during the indemnity period solely as a result of damage to buildings."

So in other words, it is a damage-based definition.

But in our submission that has to be manipulated to encompass non-damage losses as if those non-damage losses or perils are the "Damage", capital D, for the purposes of the definition. Because otherwise the FCA gets no cover at all in relation to the non-damage extensions.

So that machinery introduces a requirement, we say, that the reduction in the gross revenue during the indemnity period must be solely as a result of the insured peril under the non-damage extensions.

If we look at the business - -
Insurance under the business interruption section, if shown within the schedule. "What is covered", item 2A: *Loss as a result of:
  *Closure or restrictions placed on the premises as a result of a notifiable human disease manifesting itself at the premises or within a radius of 25 miles of the premises.*
  So the first point to note is that there has to be a notifiable human disease at or within a radius of 25 miles of the premises.
  That disease, thus circumscribed in its geography, has to manifest itself, and the manifestation of the disease as thus circumscribed has to result in closure or restrictions placed on the premises. So that the words "as a result of" appear both as a link between the loss and the peril as a whole, and as the causal connector between the different parts of the peril. And those words, we say, require proximate causation, and they require proximate causation both at level of the cause of the loss and also the cause of restrictions.
  You can’t interpret the same words in the same clause as having two different meanings.
  There is an issue between us about manifestation.

The FCA says that "manifestation" means "occurrence"; and as long as there is an actual occurrence, either known or apprehended, then that is sufficient for the purposes of being a notifiable human disease manifesting itself at the premises.

We say that is wrong, because if the parties had wanted to say "a notifiable human disease at the premises or within a radius of 25 miles of the premises" they could have said so. They have used the word "manifesting", and that clearly indicates a requirement that the disease is apparent. And that requirement is underlined or reinforced by the fact that the manifestation of the disease, thus circumscribed, has to result in a closure or restrictions.

We say it is absurd to suggest that an unknown episode of COVID-19 can satisfy the causal test which appears within the middle of the insuring clause.

The FCA’s submission boils down to a notifiable human disease manifesting itself at the premises whether it is manifest or not. It deprives the word "manifesting" of all effect. But it may be that in the overall scheme of things this becomes an academic debate, given the required causal link.

The definition of "Indemnity Period", can I draw your attention to, is on page (B/16/72). It is on the bottom of the left-hand column: "The maximum number period from the date of the

Damage..."

So the definition of "Indemnity Period" incorporates the concept of "Damage", capital D.

But if we go back to extensions 1 and 4 on page (B/16/16), this is reinforcing the same point about machinery, so one is failure of supply, so it is a non-damage cover but again refers to the indemnity period.

The same point can be made in relation to extension 4 over the page, (B/16/17). Again, it is a non-damage cover, but clearly contemplates the application of the damage-based quantification machinery.

Can I then move on to some high level submissions as to what our position is.

First, we say that closure or restrictions are only placed on the premises by the 26 March regulations. We say that the earlier advice and directions are insufficient. Can we just take an example to illustrate that.

If one assumes that you have a customer who lives 20 miles away from the premises, he develops symptoms of consistent with COVID-19 on 12 March and he cancels a booking starting on the 15th, complying with the self-isolation advice that had already been circulated at the end of the preceding week. He subsequently tests
positive for COVID-19. We say that it could not
properly be suggested that the booking of that customer
is cancelled because of closure or restrictions placed
on the premises. The premises are not closed, they are
not restricted, no restrictions have been placed upon
them. The booking is cancelled because the customer
personally has the notifiable disease and he is
complying with the social distancing measures, the
advice, but that isn’t enough to bring the loss of the
booking within the insured peril.

We go on to say that the necessary causal link
between the closure or the restrictions and the
manifestation within 25 miles cannot be satisfied by the
FCA. We give the example of the Scilly Isles. So if
you take at this stage you can apply the counterfactual,
where you have multiple causal links within the peril,
it is both right and proper to test that causal link by
a counterfactual. If you pose the question of whether
the premises would have been subject to closure or
restrictions even if there had been no manifestation of
disease within 25 miles, the answer is yes, "but for"
causation is not satisfied, and therefore the peril has
not occurred.

One can test that also by reference to the Scilly
Isles. No known – no manifestation of disease within
25 miles, on the basis of the agreed facts, but still
subject to the closure or restrictions.

You have my submissions in relation to
quantification machinery, and so I am not going to
repeat them any more than I already have.

Your Lordship Lord Justice Flaux posed a question
yesterday in relation to an outbreak of Legionnaires’
disease at the premises, and the government contacting
the people who were planning to stay at the premises in
the next three weeks and telling them not to go, and
asking the question whether or not that would amount to
closure or restrictions placed on the premises.

We would say, perhaps obviously, that the example is
artificial, because in reality what would happen is the
public health official in the locality would direct the
premises to close until they have been deep-cleaned and
certified safe. But if it is to be treated as a closure
placed on the premises, it is because there is
a specific risk relating to the specific premises, and
so the directions given are intrinsic to the premises.
And that would be the only way by which to say that that
particular requirement had been satisfied on the basis
of that example.

If one takes a different example, if one
hypothesises that in order to slow down the spread of
the disease, the government, on 12 March, banned the use
of public transport by everyone, except for key workers,
and a booking due to start on the 15th was cancelled by
a party, because they were relying on a train from
Paddington to Penzance to get to the holiday cottage and
could no longer get there, it couldn’t be said that that
booking was cancelled because of a closure or
restriction placed on the premises; it had been
cancelled because of restrictions placed on the use of
public transport by individuals. It is not intrinsic to
the premises, and therefore the peril would not be
satisfied, even if there were outbreaks. And perhaps
not Paddington to Penzance, let’s take Truro to Penzance
or even Camelford to Penzance, 22 miles, so that might
satisfy the causal test, and one can postulate various
different scenarios. But certainly on that scenario we
would say that there is no closure or restrictions
placed on the premises.

As for the Chesil Beach example, your Lordships will
have well in mind Mr Edelman's admonition at page 3 of
the transcript for Day 1 (Day 1/3:1) that your Lordship
should not express views on issues or clauses that are
not before you. That was before he embarked on the
Chesil Beach example, the vermin example, the Buncefield
example and many other examples in order to illustrate
pre-emptive closure cannot be said to be as a result of the manifestation of a notifiable disease within the prescribed radius.

In relation to the counterfactuals, the complaint is that we subtract the whole of the clause, we subtract the closure, the restrictions and the disease manifesting itself within 25 miles, so it is said we don’t make the mistake of other insurers. Well, Mr Kealey has already dealt with that. One can apply on this clause, so I have already indicated, counterfactuals at different stages. One can apply the counterfactual to test, whether the necessary causal link for the closure or restrictions is satisfied, and we say it plainly is not, even on the FCA’s own case. One can then test the question of the counterfactual to the insuring clause as a whole by posing the question: what would have happened if, following the manifestation within the prescribed radius, or because of the manifestation, if one assumes there had been some, the closure or restrictions were imposed?

So one simply takes away, at that stage, the closure or restrictions to ask what the question would be. As I have already indicated, the social distancing measures, set out with legislative force from 26 March, would have provided a complete answer from that date.

LORD JUSTICE FLAUX: In one sense, Mr Turner, and I think this is a point my Lord made to Mr Kealey, one can move away from counterfactuals. I mean, you say your case is, as a matter of construction, you only have to cover if you can demonstrate that the closure or restriction has been placed on the premises as a result of manifestation of disease within 25 miles.

Now, it may be that in any given case that can be demonstrated on the facts. But you say that is extremely unlikely, and if it can’t be demonstrated on the facts then there isn’t any cover. So you don’t need to get to counterfactuals at all.

MR TURNER: Precisely. Counterfactuals are only really a way of testing the application of proximate cause, and if one simply poses the question and says, “Has any loss proximately been caused or have the closure or restrictions proximately been caused by the manifestation of a disease within 25 miles?”, then until we get to examples such as Leicester, the answer is no. And you are quite right, my Lord, one doesn’t need to go on to counterfactuals, they are there as a reality check if one needs one. But I would agree that on those facts one doesn’t need one.

MR JUSTICE BUTCHER: You can just ask the question: was the closure or the restriction placed on the premises as a result of a notifiable disease manifesting itself?

LORD JUSTICE FLAUX: Within 25 miles.

MR JUSTICE BUTCHER: Within 25 miles.

MR TURNER: Precisely.

LORD JUSTICE FLAUX: And if the answer to that question is no, that is the end of it.

MR TURNER: Yes, it is. We are in violent agreement.

My Lords, that is all I propose to say about RSA1.

Could I make a start on RSA2, at least to the extent of setting out the route map to the policy itself.

It is (B/17/1) and the submissions in relation to RSA2 are appendix 2 to our written submissions (1/18/28) and following, and we don’t need to go there.

Page 3 of tab 17, and this is the pubs policy -- (B/17/3) -- we have a one document provision. It is three paragraphs under the inapt heading “Insuring Clause”.

LORD JUSTICE FLAUX: These policies are in fact written by a managing general agent, are they?

MR TURNER: They are. A managing general underwriter.

LORD JUSTICE FLAUX: A general underwriter rather, I think.

MR TURNER: And they are watching anxiously.

LORD JUSTICE FLAUX: Within 25 miles.

MR TURNER: Yes, it is RSA, though it’s Eaton Gate’s wordings, and you will observe various features of their wordings in due course and we will address those as we come to them.

Let’s look at the business interruption insuring clause here. If we start, please, at page (B/17/36).

I am just checking that is -- sorry, I am in the wrong -- no, I am in the right bundle.

In fact let’s start, if we may, at (B/17/34). It is the start of the “Business Interruption” section. You have already seen the adjustments provision included...
within the definitions section, or subsection. Then we have "Subsection A -- Gross Profit ", and over the page "What is Covered":

"In the event of damage to property used by you at the premises ..." So there is the answer to Mr Edelman’s Buncefield scenario; in relation to RSA2, the peril is damage. Then below that we find the heading "Extensions":

"Cover provided by this subsection is extended to include interruption or interference with the business. "What is Covered", and we say those general words of extension are sufficient to, if you like, wrap over the quantification machinery, if you need a route by which to do so.

Subclause A or Extension A is actually a disease clause with specified diseases.

LORD JUSTICE FLAUX: It doesn’t actually use the words "caused by" or anything of that kind, but they must be necessarily implicit, mustn’t they?

MR TURNER: This wording doesn’t, so we say this is section 55 territory. One defaults to proximate cause unless the policy provides otherwise, and it doesn’t.

So we have specified diseases in A, and then in F over the page {B/17/36} we have the relevant extension, a "Prevention of Access - Public Emergency" extension:

"The actions or advice of a competent public authority due to an emergency likely to endanger life or property in the vicinity of the premises which prevents or hinders the use or access to the premises." My Lord, quite what sense one takes away from the insuring provision may depend slightly on where one draws breath as one reads it out, but as I am going to show you in due course, the parties are happily agreed as to how that provision should be construed.

And the agreement, just not to keep you in suspense, is that it should be construed as referring to an emergency in the vicinity of the premises likely to endanger life or property, and I will make that good in due course.

Then "What is not Covered", we start with a time deductible.

Then we have exclusion (b), on which Mr Edelman made submissions yesterday, and on which we rely as delineating the cover or restricting the scope of cover to the period of actual prevention. It is an unusual approach to policy wording, but there are a number of unusual features to the approach to this policy’s wording.

(c) is labour disputes; (d) is Northern Ireland; and (e) is specified diseases, so extension A sub(a); and then finally there is a freestanding inner limit, "Any amount in excess of £10,000". One can see that a number of these extensions have freestanding inner limits thus expressed, so extension A, extension B, extension C, F we have just looked at, G, H, all have freestanding inner limits.

The equivalent provisions within RSA2.2, the business interruption insuring section, starts at (B/18/49). The extension starts on page 50 (B/18/50).

Disease is again nominated or specified diseases, in B(a), freestanding and a limit in B(a). I ask you to note the freestanding limits in C as well, and G.

The extension with which we are concerned is the "Public Emergency" extension at F, which is in identical terms to that in RSA2.1, subject to two features, at least as a matter the text. The first is that the exclusion --

LORD JUSTICE FLAUX: We need to go to the next page.

MR TURNER: Sorry, {B/18/51}. I ask you to note the inner limit on G on that page, and then go back to F. The insuring provision, the "What is Covered" provision is identical.

Then the "What is not Covered" provision, again we have the time deductible and so on, and it is all really the same until we get to (e). The first difference in relation to (e) is that the exclusion in respect of infectious or contagious diseases is unqualified by reference to the specified diseases in A, on {B/18/50}; and the second point is that the "any amount in excess of £10,000" has found itself onto or into sub-exclusion (e), where previously it has been a freestanding inner limit.

I am going to address that exclusion and our approach to it, if I may, on Monday morning. Just before we break, so that I do make use of the time, can I identify some points of agreement.

We accept that there is action or advice by a competent public authority.

We accept that the closure measures hindered use, but say they did not prevent access.

We accept that COVID-19 was a general public health emergency. But we are not insuring general public health emergencies; we say we are insuring emergencies in the vicinity of the premises likely to endanger life or property.

MR JUSTICE BUTCHER: Yes. You will have so show me how that works grammatically.

MR TURNER: Grammatically, if one were using punctuation, and it is fair to say that the draftsman is sparing in his use of punctuation, one would put a comma after the
word "emergency" in the second line of the "Public
Emergency" extension, and another comma after the word
"property" in the next line.

MR JUSTICE BUTCHER: Right. Thank you.
MR TURNER: That appears to be common ground. And can I now
make good, as perhaps one of my last points for today,
that that appears to be common ground. It is the FCA's
skeleton argument at paragraph 610, reference {I/1/209}.

MR JUSTICE BUTCHER: Where are you referring to, Mr Turner?

MR TURNER: The opening words of 610:
"[Their] primary case is that the emergency was
within the vicinity of the premises ..."
I may be reading too much into it, but we suggest
that that indicates that there is common ground between
the parties, certainly on their --

LORD JUSTICE FLAUX: I'm not sure about that. Because they
have a very wide definition of "in the vicinity ".
There are two ways in which you could look at it,
aren't there? One is to say, as Mr Edelman does: well
"in the vicinity " means the whole of the UK.
Yes.

LORD JUSTICE FLAUX: The other is to say: wherever there is
COVID in the vicinity, in the sense of within a distance
closed down.

MR TURNER: "In the vicinity" here, we don't have
a definition.
LORD JUSTICE FLAUX: No, you don't have RSA4, it is true.
MR TURNER: It is natural meaning of words. We adopt what
Hiscox say about the Latin derivation of "vicinity ". It
means "close to", and it doesn't need elaboration, which
is the creation solely of lawyers and can't represent --

MR JUSTICE BUTCHER: Without your commas, you could say that
the emergency was likely to endanger life, the life
being in the vicinity of the premises, anyone near the
premises was endangered by COVID. On one view, it
doesn't say that the actions have to come from the
danger to the life near the premises.

MR TURNER: Yes, but the actions have to come from something
close to the vicinity, close to the premises, to put it
into paraphrase, and we say the natural way to deal with
that is to say it is an emergency in the vicinity. So
an emergency likely to endanger life or property in the
vicinity of the premises.

LORD JUSTICE FLAUX: Why don't we return to issues of
punctuation on Monday morning, Mr Turner.
MR TURNER: I shall look forward to it, my Lord.

LORD JUSTICE FLAUX: I think that is probably enough for one
day. Thank you very much.

Unless there is anything that anybody wants to raise

unless there is anything that anybody wants to raise
with the court, we will rise now, metaphorically, if not
in fact, and resume again at 10.00 am as requested on
Monday morning.

Can I just say to all of you that I hope you all
have as good a weekend as you can in the middle of
a difficult and long case.

MR TURNER: Thank you, my Lord.

(The hearing adjourned until 10.00 am on Monday
27 July 2020)
July 23, 2020
The Financial Conduct Authority [ltd]

Day 4
July 23, 2020

The Financial Conduct Authority [LTC] v nederwaard Limited and Others