

OPUS2

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

Day 6

July 28, 2020

Opus 2 - Official Court Reporters

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1 Tuesday, 28 July 2020
 2 (10.00 am)
 3 Submissions by MR GAISMAN (continued)
 4 LORD JUSTICE FLAUX: Yes, Mr Gaisman.
 5 MR GAISMAN: My Lords, a few concluding remarks on
 6 causation. I have limited time, as Mr Kealey has just
 7 reminded me.
 8 I don't need to spend any more time on the
 9 counterfactual. The position is set out in
 10 paragraphs 330 and 332 of our skeleton and your
 11 Lordships have read it; your Lordships know where the
 12 battle lines are drawn. But the question I want to ask
 13 is this: what is actually the justification for the
 14 FCA's case?
 15 My learned friend Mr Kealey on Day 4 dealt with some
 16 of the purported justifications put forward, and I have
 17 a few supplementary points.
 18 The first one I am going to call the trade off. One
 19 question which the FCA has completely failed to grapple
 20 with is this: since these are composite perils, with
 21 several defined steps all of which have to be satisfied,
 22 including their causal relations, in other words, quite
 23 limited perils, why, objectively, would the parties have
 24 agreed carefully to circumscribe the insured peril as
 25 they have, only to throw away the rule book by allowing

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1 the causation exercise dramatically to widen it?
 2 This question, as I say, is not even identified by
 3 FCA, let alone answered. At least, and to its credit,
 4 the Hiscox interveners see the need to proffer some
 5 justification. The trouble is it's no justification at
 6 all. In my skeleton at paragraph 90, {1/3/32} which
 7 I understand my Lord, Lord Justice Flaux may not be able
 8 to access, but -- I'm sorry, your Lordship's mute is on.
 9 LORD JUSTICE FLAUX: I've got it in hard copy.
 10 MR GAISMAN: I'm not sure your Lordship really needs it.
 11 What they say is, it won't take long:
 12 "That is the trade off the insurer must make in
 13 return for forcing the insured to prove a long chain of
 14 matters and the causal relationship between each of
 15 them. The insurer can ask the insured to prove many
 16 things but then, when considering whether 'but for'
 17 causation is established, those matters must all be
 18 stripped away in the counterfactual."
 19 With deference to my learned friend Mr Lynch and
 20 however often I re-read that short paragraph, I can
 21 discern the operation of no known legal principle to
 22 underpin or justify that suggestion.
 23 So much for the trade off. The next justification
 24 is alleged absurdity and I have dealt with this, because
 25 the charge that is made, it is an incorrect charge, is

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1 that the cover has no content if Hiscox is right.
 2 Now I addressed this in my opening remarks. In the
 3 paradigm situation at which the clause is aimed, the
 4 restaurant closed as a result of food poisoning, the
 5 suicide in the adjacent building, there will be no
 6 difficulty in saying that the restrictions themselves
 7 were the cause of the loss, and the objection is simply
 8 chimerical.
 9 Then it is said, thirdly, that there is a problem of
 10 artificiality. Your Lordships again know the submission
 11 that I am going to make here.
 12 The insured peril is removed and, depending on the
 13 facts, that may lead to an artificial hypothetical. In
 14 a professional negligence case where the court, having
 15 anathematised the serial negligence and incompetence of
 16 the hapless solicitor or accountant, then reinvents the
 17 world in which, impossibly, one considers the
 18 counterfactual of him having competently done the very
 19 job which he has failed to do competently.
 20 That is simply an exercise of causation that is so
 21 natural that one hardly considers it. In a sense it's
 22 artificial. But as my learned friend Mr Kealey said,
 23 what could be more artificial than imagining a country
 24 without COVID or a world without COVID? Counterfactuals
 25 in one sense are always artificial, they require an

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1 artifice. They require one to imagine something that
 2 never happened and, given what did happen, never could
 3 have happened. But in any event, if it is relevant, for
 4 reasons again which your Lordships are familiar with, we
 5 say that the counterfactual proposed by Hiscox is far
 6 from artificial; it happened in Sweden, it happened
 7 previously in the case of prior pandemics in the UK, and
 8 it might have happened here in relation to COVID-19 had
 9 Lord Sumption won the day in the public arena. We have
 10 dealt with these points in our joint skeleton on
 11 causation in paragraph 25.
 12 Now another alleged justification that I have
 13 already covered in my opening remarks is the alleged
 14 difficulty of proof point and, again, I don't need to go
 15 back through it. Even if it were made out, it is no
 16 sufficient basis to rewrite contracts or ignore legal
 17 principle.
 18 But may I just dwell on one point, my Lords. Anyone
 19 who has had anything to do with business insurance knows
 20 how complicated it can be when it comes to
 21 quantification of indemnity. We gave a reference in
 22 footnote 364 to chapter 14 of Riley on Business
 23 Interruption Insurance; unhelpfully we didn't include
 24 the citation, and I am not asking your Lordships to look
 25 at it now because I haven't got time. It is {J/154/43}.

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1 What one sees, if one simply leafs through that
 2 chapter, which is called "Claims calculation " and the
 3 ensuing chapter, "Claims, settlements and other
 4 considerations " is that this is an area, especially with
 5 trends clauses, of inescapable complexity. But the
 6 various things which have to be taken into account on
 7 the trends clauses, even on my learned friend
 8 Mr Edelman's construction, statistical trends,
 9 comparison with budget, comparative performance,
 10 ie comparing the performance of other outlets,
 11 post-indemnity period trading, none of this is easy.
 12 But the point is that it completely undermines my
 13 learned friend Mr Edelman's argument that these are
 14 insureds with low limits who couldn't be expected to
 15 have gone to the trouble of appointing loss adjusters
 16 because the game wouldn't be worth the candle. That
 17 point is simply not available to him.

18 But furthermore, can I just stress, which I know is
 19 code for repeat, something I said in my introductory
 20 remarks. These clauses, public authority clauses and
 21 the like, have been around for a long time and there is
 22 no evidence, there is no evidence that they have caused
 23 any particular difficulty and, with the greatest of
 24 respect to your Lordships, your Lordships are in no
 25 position to assume that they do.

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1 I have already argued that in the ordinary case
 2 there is no particular reason to suppose that they will.
 3 Of course, if loss adjusters are appointed there will no
 4 doubt be the usual toing and froing and the reaching of
 5 a compromise, especially where there are low limits, but
 6 that is a fact of life in all sorts of insurance claims.
 7 None of this can change the meaning and the effect of
 8 the contracts.

9 Thirdly and related to that, my Lords, the FCA
 10 approach, insofar as it justifies it at all, is entirely
 11 premised on this supposed difficulty of extricability.
 12 There is no factual or legal basis for this premise at
 13 all. Nobody has attempted in this trial or in this
 14 arena to do the exercise of working out what loss has
 15 been caused by what; it is not an issue in the action.
 16 It is therefore entirely without foundation to suppose
 17 that it will be of especial difficulty. There has been
 18 no evidence of the sort that Mr Justice Tomlinson heard
 19 in The Silver Cloud. And there are obvious ways in
 20 which one can approach the point: one looks at the
 21 matters before restrictions were in place; one looks at
 22 what happens afterwards, that may well provide a guide;
 23 one may look at other countries such as Sweden, where
 24 the anecdotal evidence is that businesses didn't do much
 25 better than over here.

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1 Now, this is an extreme and unprecedented situation
 2 and it may be a situation where all or most of the loss
 3 sustained by individual insureds would have been
 4 incurred anyway. But that is for a later date. What is
 5 for today is that there is no basis whatever for
 6 assuming that the enquiry as to what caused loss is so
 7 difficult that it's not worth embarking on. And I do
 8 ask your Lordships simply not to be influenced by such
 9 a concern, because there is no basis for it.

10 Fourth and lastly under this heading, although it
 11 will depend on the facts, if an assured is able to prove
 12 the elements of the clause and to raise a prima facie
 13 case that its loss has been caused by the insured peril,
 14 as your Lordship finds it to be, then the evidential
 15 burden may shift to the insurer. And if one looks at
 16 the skeletons on the other side, they don't really deal
 17 with that point, they just say rather limply: that isn't
 18 going to make it any easier or the difficulties we
 19 pointed out -- non-existent difficulties -- aren't
 20 significantly mitigated by the fact that the burden of
 21 proof may be on the insurer. Why not?

22 That brings me on --

23 LORD JUSTICE FLAUX: Sorry, Mr Gaisman, in a very real sense
 24 I think you have put your finger on the point that has
 25 troubled me in relation to this whole causation debate,

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1 that normally causation is an issue which one would be
 2 exploring on given facts; facts that either were going
 3 to be established at trial or had already been
 4 established. Because we are looking at this on issues
 5 of principle, in one sense, you know, it is difficult to
 6 engage in the causation exercise. It may be that the
 7 coverage issues that we have to address actually deal
 8 with many of these points in themselves, which I think
 9 is just another way of putting the same point as you
 10 were making a moment ago, which is that if any given
 11 assured actually makes good all the various elements of
 12 the insured peril in your case, then it may be that you
 13 reach a situation where prima facie a loss has been
 14 suffered and if the insurer wants to say that a loss
 15 hasn't been suffered for whatever reason, then the
 16 evidential burden shifts to the insurer. But that is
 17 all for another day.

18 MR GAISMAN: My Lord, I didn't quite say that. What I said
 19 was that if the elements of the peril are established
 20 and the assured establishes a prima facie case that the
 21 loss was caused by those insured perils, then the burden
 22 to say, oh, something else, would have shifted,
 23 I certainly don't say that the burden is shifted to the
 24 insurer merely by the insured establishing the operation
 25 of an insured peril, because causation is always for the

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1 insured to prove.
 2 LORD JUSTICE FLAUX: I understand the point you're making.
 3 MR GAISMAN: My Lord, it is the FCA in this case which is
 4 inviting what we have submitted, and I won't go back
 5 over it, is a radical departure from the normal approach
 6 to "but for" causation in the context of insurance, and
 7 that is, more than any other single issue, the issue
 8 which in a sense divides the parties.
 9 I am sure Mr Edelman won't mind me saying that when
 10 the FCA first launched the idea of this test case, the
 11 causation issue was very much at the forefront of the
 12 things which it wanted to have resolved, as one can see
 13 from the framework agreement, where there are two
 14 fundamental issues which are identified as dividing the
 15 parties, one of which is the causation issue.
 16 So I would certainly hope, whether we are right or
 17 wrong in the debate which Mr Kealey and I have been
 18 having with Mr Edelman over the last several days,
 19 I hope that your Lordships will feel able, as it were,
 20 to address those questions, because they are absolutely
 21 fundamental to the divisions that have arisen.
 22 Mr Edelman tendentiously calls them "road blocks", but
 23 that is just another way of saying they are issues
 24 between the parties. All we are saying about this is
 25 that causation in these cases is to be determined

1 according to orthodox principles.
 2 Mr Edelman, on behalf of the FCA, is inviting your
 3 Lordships to undertake some unorthodox and heretical
 4 procedure and he has no justification for doing so, and
 5 it is the justifications that I am dealing with at the
 6 moment.
 7 That takes me on almost to my last substantive
 8 topic, which is the question of divisible loss which
 9 I said I wanted to come back to. It is inherent,
 10 although implicit, in the FCA's case that everything is
 11 indivisible, that the different elements of loss cannot
 12 be separated. We say there is simply no warrant for
 13 treating the loss as indivisible as a matter of fact.
 14 Quite apart from anything else, there is no evidence
 15 that it is.
 16 It can't simply be asserted, it would have to be
 17 proved. If my learned friend wants to argue that
 18 a particular legal result follows from a particular
 19 fact, the first thing he needs to do is to prove the
 20 fact.
 21 Now, I mentioned in my opening remarks the case of
 22 Rahman v Arearose, {K/99/1} and it is instructive to
 23 spend a minute on that. That was a case, as your
 24 Lordships may remember, where a man was assaulted in
 25 a fast food restaurant and he suffered serious injuries.

1 One of those injuries was to his eye, and due to
 2 negligence in a subsequent hospital procedure he lost
 3 the sight in that eye. He also developed complicated
 4 psychological disabilities. He sued both his employer
 5 and the hospital, and the question was which defendant
 6 was responsible for what.
 7 It is instructive to go to paragraph 6 of the
 8 judgment on page {K/99/6}, where Lord Justice Laws sets
 9 out the trial judge, Mr Justice Rougier's findings.
 10 Your Lordship sees that between letters D and G. The
 11 detail doesn't matter, but what the learned judge,
 12 Mr Justice Rougier, says at G is this:
 13 "The effects of the two separate incidents, [namely
 14 the incident in the fast food restaurant and the
 15 incident at the hospital] which have led to the
 16 condition I have outlined with entwined around each
 17 other like ivy strands round a tree. The court is faced
 18 with the daunting task of trying to disentangle various
 19 causes and effects and to determine at which door they
 20 are to be laid."
 21 That being obviously a case of two wrongdoers.
 22 Mr Justice Rougier didn't give up, he reached an
 23 apportionment. The Court of Appeal disagreed with the
 24 apportionment, but reached its own apportionment. It is
 25 in that context that the line of Lord Justice Laws that

1 we quote in our skeleton, at paragraph 19 of the
 2 judgment, the line that loss qualifies as indivisible
 3 only where there is "simply no rational basis for an
 4 objective apportionment of causative responsibility for
 5 objective responsible for the injury between the
 6 tortfeasors".
 7 Therefore, indivisible loss is matter of last
 8 resort, and we are not in any such territory in this
 9 case.
 10 Now, for example, it is perfectly possible to
 11 conceive, over an episode that has lasted already for
 12 several months, that different loss will be capable of
 13 being analysed as being caused by different things at
 14 different times. What could be more normal than that?
 15 Now, my learned friend half recognises the
 16 possibility of some form of temporal division, because
 17 in the discussion with your Lordships on Day 3 about the
 18 approaching hurricane, he recognised that the reduction
 19 in turnover before the hurricane has finally hit is not
 20 insured, although he argued that it could somehow be
 21 recovered in different ways. All I think I need to do,
 22 whether that is in advance on the skeleton or not
 23 doesn't matter, but can I show your Lordship, the last
 24 thing I want to show your Lordship of my learned
 25 friend's skeleton is paragraph 276.1 is {1/1/108} in my

1 learned friend's skeleton argument. 276.1.
 2 Now, this is a most peculiar paragraph. I may well
 3 not have understood it. The language has that tortured
 4 quality which is more eloquent than anything I could
 5 say, so this is by way of illustration. My learned
 6 friend says:
 7 "If, in a public authority clause, the trigger
 8 public authority action is preceded by a downturn or
 9 closure (eg due to voluntary behaviour or government
 10 advice [et cetera]) the government action ..."
 11 Then we have a (i) and a (ii), I'm not quite sure if
 12 they are the same thing or different things:
 13 "... (i) is the sole cause of any additional
 14 interference, interruption or loss not suffered prior to
 15 the action, but in any case [and one takes a deep breath
 16 here] (ii) takes over or encompasses/absorbs (as an
 17 interlinked and so not truly concurrent cause) the prior
 18 disease-related causes as the sole proximate and 'but
 19 for' cause of interference, interruption or loss."
 20 Now, I think I haven't really got time to do more
 21 than leave that paragraph with your Lordships, but
 22 either what is being said is that one ignores temporal
 23 divisibility and so the interruption has retrospective
 24 effect to cover the previous, as it were, approaching
 25 hurricane, or alternatively, as we interpret it, in

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1 a case where the necessary causal link between the
 2 public authority action and the interruption cannot be
 3 shown because the interruption preceded the public
 4 authority action. But what the FCA is doing is
 5 retrospectively interposing a causal link which never
 6 existed. Either way, my Lords, the FCA is, with
 7 respect, in a world of its own.
 8 Two more topics, one of which --
 9 LORD JUSTICE FLAUX: Speaking for myself, Mr Gaisman, if the
 10 business has closed before the public authority action,
 11 I just don't understand how coverage gets off the ground
 12 at all, either as a matter of causation or in any other
 13 way, because the interruption simply is not caused by,
 14 doesn't follow or result from, or whatever the linking
 15 word is, any action of the public authority.
 16 MR JUSTICE BUTCHER: Mr Gaisman, you are on mute, so I have
 17 missed the last sentence at least.
 18 MR GAISMAN: Yes. But if one looks at (ii), what appears to
 19 being said is that once the interruption happens it sort
 20 of takes over. But even though -- I am not going to
 21 spend my precious last few minutes. There are some
 22 paragraphs which it is only necessary to read to
 23 your Lordship, even if they are in one's opponent's
 24 skeleton argument.
 25 Can I then say something very quickly about trends

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1 clauses. We have explained how these work in our
 2 skeleton argument, we have explained how they fit in
 3 with the general law, and we have explained in both that
 4 and the joint skeleton how the Orient-Express is right
 5 both on the general law and the trends clauses, it
 6 having considered both.
 7 I have only got to mention I think, and only
 8 briefly, the FCA's big point on some of our trends
 9 clauses, it is in a minority of the wordings in fact, 14
 10 out of 40, which don't mention restrictions, but do
 11 mention damage.
 12 It is hard to think of a clearer case of what, in
 13 the high and far off times, we were allowed to call
 14 a falsa demonstratio, but I am going to pose a question
 15 that we pose in our skeleton at paragraph 397, for which
 16 I am still waiting for an answer from the FCA, and it is
 17 this: what possible reason could there be why the
 18 parties would have wanted the trends clause to apply
 19 differently to claims involving material damage and
 20 claims involving non-damage business interruption?
 21 Because unless there is an answer to that question, this
 22 is a non-point.
 23 To borrow a phrase of my learned friends, I would
 24 ask the FCA to consider its position, because these
 25 clauses can work both ways, and whilst the FCA submits

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1 in a fit of literalism that the clause doesn't apply to
 2 a non-damage case unless it mentions restriction, what
 3 will it say to an insured restaurant, in a paradigm case
 4 in six months' time, that wishes to rely in its claim
 5 against one or other of the insurers on a clause which
 6 only mentions damage, which wishes to rely upon the fact
 7 that it hired a star chef and business was rising by the
 8 week?
 9 This is a terrible point, and the fact that the same
 10 mistake occurs not only in some of our clauses but in
 11 those of several other insurers shows what a bad point
 12 it is.
 13 That is all I want to say about trends clauses; the
 14 whole position is set out in the skeleton.
 15 My Lord, that leaves me two minutes, which I am not
 16 going to occupy, on "solely and directly". As
 17 your Lordship knows, those words are in the stem.
 18 I made one submission about the relationship between the
 19 interruption and the loss, and there having to be
 20 a relationship of sole cause. There are other points
 21 and they are contained in our skeleton in paragraphs 421
 22 to 439. If one could imagine a situation in which your
 23 Lordships have nothing better to do, I would ask
 24 your Lordships to read those for yourselves.
 25 Thank you, my Lords.

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1 (10.28 am)
 2 LORD JUSTICE FLAUX: Thank you, Mr Gaisman.
 3 Who is next? Mr Kealey.
 4 MR KEALEY: I'm afraid it is, my Lord, yes. Can your
 5 Lordships hear me?
 6 LORD JUSTICE FLAUX: Yes, thank you.
 7 (10.28 am)
 8 Submissions by MR KEALEY
 9 MR KEALEY: Good. My Lords, I can hear an echo. I think
 10 that's -- very well. Thank you, my Lord.
 11 As you know, I appear for the Ecclesiastical and for
 12 MSAmclin. My submissions are going to cover both of
 13 those insureds.
 14 Your Lordships already, of course, know that I have
 15 dealt in part with causation on behalf of all insurers,
 16 and I shall be making some separate submissions on
 17 causation in relation to both of my insurer clients.
 18 I am going to turn first to the Ecclesiastical, my
 19 Lords. For your bearing, as it were, if you could get
 20 your bearings, you need to look at our skeleton
 21 argument, which is in divider 12 {1/12/1}. We begin in
 22 relation to Ecclesiastical EIO at page {1/12/38}.
 23 I don't know if your screens are now working so you
 24 can see it online as it were, as well as on paper in
 25 writing.

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1 LORD JUSTICE FLAUX: Yes, they are now, thank you.
 2 MR KEALEY: At page 38 you will see the beginning of the
 3 wording, and it may be more convenient to turn to one of
 4 these wordings which is in {B/4/1}.
 5 The loss of income section, my Lords, is at page 42.
 6 {B/4/42}. You will want to turn to page {B/4/45} for
 7 the relevant coverage provision. What you see there, my
 8 Lords, at the top of the page is that this is an
 9 extension:
 10 "The insurance by this section is extended to cover
 11 loss resulting from interruption of or interference with
 12 your usual activities as a result of the following."
 13 Then if you look at the left-hand column you will
 14 see "What is covered" and in the right-hand column "What
 15 is not covered".
 16 I should mention, my Lords, that in some of the
 17 policies what you find is that these columns don't
 18 appear, but what you find is what is covered is then
 19 followed by an exclusion, excluding that which appears
 20 on the right-hand side of this page. It is item 3, my
 21 Lords, "Prevention of access -- Non-damage". This
 22 covers:
 23 "Access to or use of the premises being prevented or
 24 hindered by
 25 "(a) any action of government, police or a local

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1 authority due to an emergency which could endanger human
 2 life or neighbouring property."
 3 If you look on the right-hand side of the page to
 4 see what is not covered, you will see that item (iii),
 5 what is not covered, is:
 6 "Closure or restriction in the use of the premises
 7 due to the order or advice of the competent local
 8 authority as a result of an occurrence of an infectious
 9 disease (or the discovery of an organism resulting in or
 10 likely to result in the occurrence of an infectious
 11 disease) food poisoning, defective drains or other
 12 sanitary arrangements."
 13 So you have on the left that which is covered, and
 14 on the right that which is carved out of that which is
 15 covered.
 16 Now, for better or for worse, we have in our
 17 skeleton argument described clause 3 in the right-hand
 18 column as the infectious disease carve out. That is
 19 a misnomer because it doesn't just carve out infectious
 20 diseases, it carves out food poisoning, defective drains
 21 or other sanitary arrangements, and also closure or
 22 restriction in the use of the premises due to vermin and
 23 a few other items as well. But I hope you will forgive
 24 us if we continue to use the term "infectious disease
 25 carve out".

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1 My Lords, the first point that we make is that you
 2 can't construe the left and the right-hand columns on
 3 their own, you also have to construe them in the context
 4 in which they appear in the contract. In this context
 5 could I take you to {B/4/46}, where you have the
 6 specified disease, murder, food poisoning, defective
 7 sanitation and vermin coverage clause. If you have a
 8 look at the left-hand column of page 46, you will see
 9 that the specified diseases are identified.
 10 Now, most of those specified diseases, I should
 11 mention to your Lordship, are in the list of notifiable
 12 diseases scheduled to the Health Protection
 13 Notifications Regulations of 2010; most of them, but not
 14 all of them. If I could tell your Lordships which are
 15 not, they are dysentery, legionellosis, leptospirosis,
 16 meningitis, although a form of meningitis is in the
 17 notifiable disease list attached to the regulations of
 18 2010, ophthalmia relapsing fever and viral hepatitis.
 19 All the rest, my Lords, are notifiable diseases in the
 20 list; and you will find that list, incidentally, at
 21 bundle {J/11/8}.
 22 The list also, my Lord, includes some diseases which
 23 are not included in the list attached to the notifiable
 24 diseases regulations; those include dysentery,
 25 meningitis, relapsing fever and scarlet fever.

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1 But if your Lordships turn to page {B/4/47}, in
 2 relation to specified diseases, and other matters, you
 3 will see what is covered. At the top of page 47 on the
 4 left-hand column you will see that what is covered is:
 5 "Any occurrence of a specified disease [as we have
 6 just seen] being contracted by a person at the premises
 7 or within a radius of 25 miles of the premises."
 8 Then if you could go just after (d):
 9 "Which causes restrictions in the use of the
 10 premises on the order or advice of the competent local
 11 authority."
 12 So we have in the specified disease clause,
 13 clause 6, a clause which provides coverage in respect of
 14 certain specified diseases in relation to occurrences
 15 contracted by persons not only at the premises but also
 16 within a radius of 25 miles of the premises.
 17 We also know that it is not just any occurrence
 18 which is covered, it has to be an occurrence, as the
 19 clause goes on to say, "which causes restrictions in the
 20 use of the premises on the order or advice of the
 21 competent local authority".
 22 Just so that you have it well in mind, those last
 23 words are not an exact but an almost exact echo of
 24 similar words in the infectious disease carve out at
 25 page {B/4/45}. Those last words were:

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1 "Which causes restrictions in the use of the
 2 premises on the order or advice of the competent local
 3 authority."
 4 And the words at page 45 in clause 3 are:
 5 "Closure or restriction in the use of the premises
 6 due to the order or advice of the competent local
 7 authority as a result of an occurrence of an infectious
 8 disease ..." et cetera.
 9 There is a clear echo, as it were, between the
 10 infectious disease carve out and clause 6, the specified
 11 disease clause.
 12 Now turning back to the prevention of access -
 13 non-damage clause, my Lords, I should just tell you that
 14 the ordinary principles of construction apply. You
 15 don't treat the clause which is under the heading "What
 16 is not covered" or even if it were to be described as an
 17 exclusion clause, you don't treat that clause as an
 18 exemption clause, exempting an insurer from liability
 19 for negligence or something like that. The clause on
 20 the right, under the column on the right, is there, as
 21 much as is the clause on the left, to define and
 22 circumscribe the scope of the coverage under the policy.
 23 LORD JUSTICE FLAUX: Delineation of cover.
 24 MR KEALEY: Delineation of cover. I am not going to take
 25 your Lordship to the cases because time doesn't permit,

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1 but Impact Funding, Lords Hodge and Toulson, {J/132/7},
 2 and you will see an excellent analysis by Mr Peter
 3 MacDonald Eggers, sitting as a Deputy High Court Judge
 4 in Crowden v QBE, which is at {J/135/13}, paragraphs 63
 5 to 65. Delineation of cover.
 6 Now, the Ecclesiastical says, relying upon the
 7 column of what is not covered in conjunction with the
 8 specified disease clause, that that which has been
 9 carved out is closure or restriction in the use of the
 10 premises due to the order or advice of the competent
 11 local authority where the words "competent local
 12 authority" in that context, and also in the context of
 13 clause 6, means the authority with competence in the
 14 relevant locality.
 15 We say that for a variety of what we consider, in
 16 our respectful submission, to be very good reasons. But
 17 before going there I should mention that the FCA
 18 suggests that our preferred meaning is, in their words,
 19 very challenging". That is in the FCA skeleton at
 20 paragraph 531, which is {1/1/185}.
 21 But in our respectful submission, the challenge that
 22 Ecclesiastical faces is more apparent than real. That
 23 doesn't make it not challenging, but it is a challenge
 24 which is and readily should be overcome. We say this
 25 for the following very simple reasons.

23

1 First, it is perfectly obvious that there was an
 2 infectious disease carve out from the prevention of
 3 access coverage, and the types of infectious diseases to
 4 be carved out were unrestricted; they were any and all
 5 infectious diseases. It is also apparent that there is
 6 a clear connection between the infectious disease carve
 7 out in clause 3 and the specified disease coverage in
 8 clause 6.
 9 Clause 6, as I have mentioned before, contains an
 10 almost but not quite verbatim rendition of the same
 11 words in the infectious disease carve out: closure or
 12 restriction in the use of the premises due to the order
 13 or advice of the competent local authority. So it is
 14 apparent that it was recognised that the coverage
 15 provision in clause 3 was wide enough, unless
 16 qualified, to include access to or use of premises being
 17 prevented or hindered by action due to any infectious
 18 disease emergency.
 19 But it is, we say, clearly to be implied that:
 20 firstly, there was no wish on Ecclesiastical's part to
 21 provide such wide infectious disease coverage, hence the
 22 carve out; and secondly, that there was a wish and
 23 intention on the part of Ecclesiastical to provide some
 24 infectious disease cover, but limited to those diseases
 25 identified in clause 6 and within the circumscriptions

24

1 provided by clause 6, for example, the 25-mile radius
2 limit.

3 Before going further into the detail, we would
4 suggest to your Lordships that these clauses should be
5 construed against the relevant legal background.
6 I don't think that that should be too controversial
7 a submission, but I am afraid it has proved to be so.
8 Therefore, I am going to make it good with some very
9 short references, my Lord.

10 Firstly, if one goes to Lewison at {K/202/20} you
11 will see the first substantive paragraph under the
12 heading "6. The Legal Background", what should be
13 a relatively uncontroversial observation:

14 "Parties do not make contracts in a legal vacuum.
15 They always negotiate against the background of law. It
16 is, therefore, reason to suppose that they take into
17 account the general law in reaching their ultimate
18 consensus. And, accordingly, the proper interpretation
19 of their agreement is properly influenced by the legal
20 background against which it is made."

21 Now, that is a question of negotiated contracts, but
22 it is a proposition that applies equally to contracts of
23 insurance which might not specifically have been
24 negotiated, and it is perfectly sufficient as a matter
25 of legal principle that the legislative background was

25

1 reasonably available to the parties.

2 If you go on to page {K/202/26}, the first main
3 paragraph at the top which says:

4 "It is not considered that proof of actual knowledge
5 of the parties is necessary in all cases. Where the
6 legal background in question is English law, it is
7 considered that the principles of English law, if not
8 actually known to the parties, would at least have been
9 reasonably available to them."

10 That is of course, my Lords, consistent with the
11 principle that the factual matrix includes all the
12 relevant and admissible background that was known or
13 reasonably available to be known to the contracting
14 parties. Your Lordships need only be referred to
15 paragraph 56.4 of the Ecclesiastical skeleton at
16 {1/12/43}. You don't have to go there.

17 But one thing is certain, contrary to what the FCA
18 says in its trial skeleton at paragraph 535.3 {1/1/186},
19 what is certain is that Ecclesiastical does not have to
20 show that the legislative framework was actually known
21 by the insurer or by the average insured. That's what
22 the FCA suggests at paragraph 535.3., and that is wrong
23 as a matter of legal principle.

24 Now it is of course a fortiori, my Lords, that the
25 legal background will include the legislative

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1 background. In fact, we would respectfully suggest that
2 the legislative background is much more part of the
3 acceptable and acknowledged factual matrix than perhaps
4 legal decisions, which may or may not be very well
5 established. But the legislative background and the
6 legislation of this country, that is to say
7 England and Wales for present purposes, is something
8 which is readily accessible and therefore readily known
9 or deemed to be known to the parties.

10 Your Lordships can see that from a very simple case
11 in {K/137/1}. It is a case called *Doleman v Shaw*. I am
12 not going to take this over long, my Lords. You can
13 have a look at the headnote because it is particularly
14 easily read. If your Lordships could read the first
15 paragraph of the headnote, and take into account that
16 the judge at first instance held that the guarantee in
17 question fell to be construed in the context of the
18 Insolvency Act 1986. (Pause)

19 So this is a case of a guarantee in relation to the
20 assignment of a tenancy of a shop. If your Lordships
21 could turn to the judgment of Lord Justice Elias at
22 page 12 of the bundle {K/137/12}, page 1186 of the
23 report, at paragraph 55, you will see there it says:

24 "Mr Fancourt QC, counsel for the landlord, contends
25 that in the context of the guarantee agreement, the

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1 assignee must be deemed still to be bound by the
2 tenant's covenants even though he was not so bound in
3 fact. The guarantor is liable as though the assignee
4 were bound. That is the effect of section 178(4) of the
5 Insolvency Act as construed in the *Hindcastle* case by
6 Lord Nicholls."

7 Then going to the next paragraph -- well, one should
8 go on:

9 "It is of course open to the parties to limit the
10 guarantor's liability so as to terminate on disclaimer,
11 but very clear words are necessary to achieve that
12 objective. Insolvency or bankruptcy are precisely the
13 circumstances when the guarantee is likely to become
14 operative.

15 Then 55:

16 "When construing the guarantee agreement, the words
17 used must be read in the context of the common law and
18 the statutory background with the consequences that the
19 liabilities of the assignee are deemed to continue even
20 though they do not continue in fact."

21 So it was against the context of the Insolvency Act
22 that the legal liability of the guarantor was evaluated
23 and ascertained.

24 So what is the position of the legislative
25 background in this case, involving Ecclesiastical and

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1 infectious diseases?
 2 Now, I don't have the time to go through it all, but
 3 it is set out in detail in our skeleton at paragraphs 59
 4 to 69; that is {1/12/44} to 53. But there are one or
 5 two matters that I need to take your Lordships
 6 specifically to. Perhaps the most significant in this
 7 context is the Civil Contingencies Act of 2004, and you
 8 will find that in {J/8/1}.
 9 As you look at that Act, my Lords, can I just remind
 10 you that the infectious disease carve out is a carve out
 11 to a clause, that is at {B/4/45}, which talks about:
 12 "Access to or use of the premises being prevented or
 13 hindered by ...
 14 "Any action of government, police or a local
 15 authority due to an emergency which could endanger human
 16 life or neighbouring property."
 17 If you go to the Civil Contingencies Act 2004, to
 18 page 1, you will see straightaway that in relation to
 19 local arrangements for civil protection -- not directly
 20 relevant, but it doesn't matter -- the meaning of
 21 "emergency" means an event or situation which threatens
 22 serious damage to human welfare in a place in the United
 23 Kingdom.
 24 Then subparagraph 2:
 25 "For the purposes of subsection 1(a), an event or

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1 situation threatens damage to human welfare only if it
 2 involves causes or may cause loss of human life, human
 3 illness or injury."
 4 Likewise, if you go to part 2, which is the most
 5 relevant part, at page {J/8/12}, you will see at
 6 section 19 exactly the same relevant definition, or
 7 almost exactly the same relevant definition, of an
 8 emergency.
 9 But in this context what I need to draw to your
 10 attention is section 20, {J/8/13} "Power to make
 11 emergency regulations". Firstly, subsection (1):
 12 "Her Majesty may by order in council make emergency
 13 regulations if satisfied that the condition of
 14 section 21 are satisfied."
 15 A senior minister of the Crown may similarly do so,
 16 my Lords, and that includes the Prime Minister and any
 17 of Her Majesty's principal secretaries of State; that is
 18 in subsection (3).
 19 Regulations under subsection (5) must be prefaced by
 20 a statement by the person making the regulations:
 21 "(a) specifying the nature of the emergency in
 22 respect of which the regulations are made, and
 23 "(b) declaring that the person making the
 24 regulations ...
 25 "(ii) is satisfied that the regulations contain only

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1 provision which is appropriate for the purpose of
 2 preventing, controlling or mitigating an aspect or
 3 effect of the emergency in respect of which the
 4 regulations are made."
 5 Then turning the page {J/8/14} the conditions are
 6 set out in section 21 and the scope of the emergency
 7 regulations are set out in section 22.
 8 If one looks at sub-section (2):
 9 "... emergency regulations may make any provision
 10 which the person making the regulations is satisfied is
 11 appropriate for the purpose of:
 12 "(a) protecting human life, health or safety.
 13 "(b) treating human illness or injury."
 14 Further, my Lords, under the Public Health (Control
 15 of Disease) Act 1984, section 45C, the relevant minister
 16 may by regulations make provisions to protect against,
 17 control or provide a public health response to the
 18 incidence or spread of infection. If your Lordships
 19 could be taken to {J/5.1/15} you will see at
 20 section 45C.
 21 (1) The appropriate minister may by regulations make
 22 provision for the purpose of preventing, protecting
 23 against, controlling or providing a public health
 24 response to the incidence or spread of infection or
 25 contamination in England and Wales ...

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1 (2) The power ... may be exercised:
 2 "(a) in relation to infection or contamination
 3 generally or in relation to particular forms of
 4 infection or contamination, and
 5 (b) so as to make provision of a general nature, to
 6 make contingent provision or to make specific provision
 7 in response to a particular set of circumstances."
 8 Now it is apparent, my Lords, from that
 9 legislation -- that is the 1984 Act and I'm not going to
 10 take you through it, you can see it at paragraph 67.4 of
 11 our skeleton -- that the architecture of the legislation
 12 contemplates action by central government, local
 13 government and other authorised persons, for example
 14 Justices of the Peace.
 15 As our skeleton indicates at paragraph 95.3, the
 16 legal background shows, firstly, it has never been the
 17 case that the only authority competent to act in
 18 relation to public health protection, including in
 19 relation to infectious diseases, is a local government
 20 authority. Secondly, the power to make the most
 21 intrusive and invasive orders in fact lies with the
 22 courts, particularly magistrates, and thirdly, central
 23 government has always been an authority with competence
 24 to act in relation to local and indeed wider public
 25 health matters and national public health matters.

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1 My Lords, there is no dispute between the parties
 2 that this is the effect of the legislative framework.
 3 I refer your Lordships, you needn't look it up, to
 4 transcript {Day3/145:4} to line 5. Your Lordships can
 5 also see the reply, that is the FCA's reply, at
 6 paragraph 55, which is in {A/14/28}.

7 So what we say is that at the time of this contract
 8 being entered into, the parties are to be taken as
 9 having had reasonably available to them the legislative
 10 framework to which I have just referred. Firstly,
 11 because that is necessary to understand which
 12 authorities were competent to issue orders or advice as
 13 a result of the occurrence of infectious disease, and
 14 therefore what the policy meant by "competent local
 15 authority"; and secondly, because obviously an
 16 understanding of the statutory framework was vital to
 17 understanding what cover was provided under clause 6 and
 18 what cover was being carved out under the infectious
 19 disease carve out in clause 3.

20 MR JUSTICE BUTCHER: I am no doubt being slow, Mr Kealey,
 21 but why doesn't the carve out just say "the competent
 22 authority", why does it say "the competent local
 23 authority"?

24 MR KEALEY: It could have said the "competent authority",
 25 I accept. I think what it was doing, my Lord, was

1 identifying the authority which had jurisdiction in the
 2 locality, wherever that was and however extensive it
 3 was, in the locality where there was an infectious
 4 disease. But it could have said, you are absolutely
 5 right, my Lord, it could have said "the competent
 6 authority". Equally, my Lord, it could have said "the
 7 local authority". It didn't have to have the word
 8 "competent" there at all. What we would ask
 9 your Lordship to do is enquire of yourself, what is the
 10 purpose of the additional adjectival qualification of
 11 "competent"? Why was the word "competent" added?

12 If I might answer that straightaway before going on
 13 to something else, if I could add that straightaway, if
 14 you look at the left-hand column what you find is
 15 a variety of authorities; you have got the government,
 16 you have got the police and you have got a local, a
 17 local authority, with an indefinite article.

18 So why do you have "the competent local authority"
 19 in the right-hand column? Well, the reason why you have
 20 the definite article "the", the reason why you have the
 21 adjectival qualification "competent", and the reason why
 22 you have those two grammatical qualifications to a local
 23 authority is because you are not confining yourself to
 24 either the government or the police or local authority,
 25 it is whatever is the competent local authority. It is

1 not necessarily confined to those three entities or
 2 forms of authority in the left-hand column; it is
 3 whatever it is which is the competent local authority.

4 But your Lordship's question is entirely apt. Why
 5 didn't it say "the competent authority"? It would make
 6 my task much easier had it done so. Regrettably, or not
 7 regrettably, depending on one's perspective, it didn't
 8 say that. But what it did say was "the competent local
 9 authority" and that is exactly, and this is the reason
 10 why clause 6 is so important, that is exactly the same
 11 phraseology as in clause 6.

12 LORD JUSTICE FLAUX: Just following the point through,
 13 Mr Kealey. If COVID-19 was a specified disease in
 14 clause 6, you would accept that the restrictions which
 15 are being imposed by the government, for example closing
 16 churches, would fall within the definition "restrictions
 17 in the use of the premises on the order or advice of the
 18 competent local authority". Because, in context, the
 19 authority which was competent to impose such
 20 restrictions in the locality was the government.

21 MR KEALEY: I would. And I would go further, my Lord. Let
 22 us just say that COVID-19 had been mentioned in
 23 clause 6. Let's say --

24 LORD JUSTICE FLAUX: The irony is, of course, the FCA will
 25 be arguing like Billy-o that the government was

1 a competent local authority.

2 MR KEALEY: They might or might not. They have hedged their
 3 bets here, and I am going to cover that in a second,
 4 about. But you are absolutely right.

5 Let us just say that some insured in Leicester made
 6 a claim under this policy, with COVID-19 being one of
 7 the infectious diseases. I wonder what the FCA would
 8 say if my clients, the Ecclesiastical, said: ha, too
 9 bad, I'm afraid the central government is not the
 10 competent local authority. The regulations that apply
 11 to Leicester which have just been made don't give you
 12 any coverage at all, because those were central
 13 government regulations so "tant pis", as they say in
 14 Swaziland or wherever.

15 Now, the first person who might say that that simply
 16 is wholly inappropriate would, in our respectful
 17 submission, be the FCA. In fact, the Financial
 18 Ombudsman may say: come on, give us a break here. And
 19 no doubt some person would come along and say: well,
 20 what does "the competent local authority" mean in that
 21 context.

22 In my respectful submission, what it means is when
 23 you have a list of infectious diseases, and I am going
 24 to come on to the fact that some of them were notifiable
 25 diseases, but when you have a list of infectious

1 diseases and you know that regulations can be made and
 2 restrictions can be imposed and closures can be
 3 enforced, by a whole variety of competent authorities,
 4 including local government but not exclusive to local
 5 government, someone will say in relation to clause 6,
 6 "Well, that must include a Justice of the Peace or
 7 a magistrate, it must include a Crown Court on appeal
 8 from a magistrate, it might even include the High Court
 9 in London by way of case stated on appeal from a Crown
 10 Court, and why on earth wouldn't it include the
 11 appropriate minister?" Is really the insured's coverage
 12 under clause 6 going to be really dependent upon whether
 13 the closure or restriction came from some bureaucrat in,
 14 say, the middle of Leicester as opposed to some
 15 government minister in London? And the poor old insured
 16 would say, "My goodness me, why didn't that minister
 17 look at my policy and direct someone in Leicester to do
 18 it instead of doing it himself?" Or herself, as the
 19 case may be.

20 So we do say, my Lord, that clause 6, which does
 21 echo, as we have said, restrictions in the use of the
 22 premises on the order or advice of the competent local
 23 authority, clause 6, which is a clause not very much
 24 dealt with by the FCA, they don't dwell on it too much,
 25 they dwell it on a tiny little bit but not very much at

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1 all, clause 6 in a sense is vital to understanding
 2 clause 1.

3 As soon as one identifies the, as it were,
 4 unfairness in clause 6 of confining the competent local
 5 authority to some local executive, as soon as one
 6 identifies that unfairness, one realises that what
 7 happened, in our respectful submission, is that one has
 8 a broad phrase "causing restriction on the use of the
 9 premises on the order or advice of the competent local
 10 authority", a broad phrase in clause 6 which is almost
 11 a mirror image of the carve out in clause 1, are, in our
 12 respectful submission, intended to mirror each other.
 13 In other words, that which is carved out of clause 1 is
 14 intended to be mitigated by that which is included in
 15 clause 6.

16 What one finds is that in a different context or in
 17 the context of other disease clauses the phrase
 18 "competent local authority" seemingly is accepted by the
 19 FCA as including central government. Not in the case of
 20 the Ecclesiastical, but in other cases.

21 So, for example, if you go to paragraph 44.5 of the
 22 amended points of claim or particulars of claim, or
 23 whatever they are to be described as nowadays, at
 24 {A/2/29}, and you go there to paragraph 44.5 -- if we
 25 start at the beginning of 44:

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1 "All of the advice, instructions and regulations
 2 referred to above in paragraph 18 above were actions of
 3 the UK Government and accordingly were ...

4 "44.5 not of themselves orders or advice of
 5 a competent local authority for the purposes of (but
 6 only for the purposes of) the exclusion in
 7 Ecclesiastical 1.1 and 1.2, where the words 'competent
 8 local authority' are used in the exclusion in the
 9 context of a clause addressing action of 'government,
 10 police or a local authority'. That contextual
 11 construction does not dictate the meaning of a similar
 12 or the same phrase when used in denial of access cover
 13 clauses in Arch1 ('local authority') and MSAm1in1, RSA4,
 14 and Zurich1-2 ('competent local authority')."

15 If you were to go for example to Am1in1 --
 16 MR JUSTICE BUTCHER: That is actually a fair point, isn't
 17 it? It is one of the difficulties of looking at lots of
 18 different policies. But here the point against you is
 19 based simply on the fact that the terms of 3(a) use the
 20 word "local authority" and so does the carve out. That
 21 is the point.

22 MR KEALEY: Yes. That is absolutely right. I would have
 23 greater sympathy for that approach and your Lordship's
 24 question if the carve out had said "the advice of the
 25 local authority". Why did it have to say "the competent

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1 local authority"? Why didn't it say "a local
 2 authority"? So in fact, whilst I obviously take the
 3 point, I am not a complete fool sometimes and I do
 4 actually see the force of the submissions against me.
 5 Whilst I ask myself, I say to myself, well, if there was
 6 intended to be a reference in the carve out to exactly
 7 that which appears in the coverage, then it would say
 8 "closure or restriction in the use of the premises due
 9 to the order or advice of a local authority". That's
 10 what you would actually find.

11 So whilst of course I understand the tension that
 12 your Lordship has just drawn my attention to, for the
 13 very first time, I would actually say that that tension
 14 is, as I have said originally, more apparent than real.

15 LORD JUSTICE FLAUX: In a sense I understand your answer to
 16 my Lord's question, but another way of putting it would
 17 be to say that last sentence of 44.5, if it were the
 18 case, going back to the point I was putting to you, that
 19 COVID was a specified disease in clause 6 of the
 20 Ecclesiastical policy, the FCA would be saying that list
 21 of policies using the words "competent local authority"
 22 would include Ecclesiastical on 1.1 and 1.2.

23 MR KEALEY: Yes, it would.

24 LORD JUSTICE FLAUX: And you would say, or you do say, if
 25 "competent local authority" in clause 6 must include,

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1 for example, magistrates or a government minister or
 2 whoever imposes the relevant restrictions, then those
 3 words "competent local authority" must or should at
 4 least mean the same in the carve out in clause 3.
 5 A fortiori if what we are dealing with is delineation of
 6 cover rather than exclusion.
 7 MR KEALEY: That is exactly right, my Lord. It is very
 8 difficult to improve on the point.
 9 LORD JUSTICE FLAUX: Yes. It is actually a short point,
 10 really.
 11 MR KEALEY: It is a very short point. It is very difficult
 12 for the FCA to improve on its point as well, in the
 13 sense that you just look at both columns and you say: oh
 14 my goodness me, impressionistically that is not the
 15 government or the police.
 16 LORD JUSTICE FLAUX: It is very badly drafted, with respect.
 17 MR KEALEY: It is.
 18 Can I just make one or two points before moving on,
 19 because you are either, as it were, I hope persuaded or,
 20 if I am unlucky, unpersuaded. But Mr Edelman or the FCA
 21 mentioned in his submissions that Ecclesiastical
 22 clause 6 is confined to local diseases and local
 23 outbreaks of disease. Now, I am not going to get into
 24 that very much, because when I look at the plague, for
 25 example, and measles and rather nasty things which

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1 appear in the specified disease list, it may be that
 2 they might be confined and it may be, for some reason or
 3 another, there are an awful lots of rats, we seem to
 4 have a lots of rats in this case, but there are an awful
 5 lot of itinerant rats and their fleas, which may go way
 6 beyond 25 miles, I have absolutely no idea. But what
 7 Mr Edelman also said at {Day3/146:1} to page 148 -- and
 8 it is probably worth having a quick look at that.
 9 If you go to page 146 first, he firstly, at line 7,
 10 agreed with an observation by my Lord
 11 Lord Justice Flaux, that the carve out covers a whole
 12 lot of more local things like food poisoning, defective
 13 drains and other sanitary arrangements. Pausing there,
 14 your Lordships probably now have quite a lot of
 15 experience of these clauses, and what you find is that
 16 infectious disease clauses are commonly included with
 17 suicide, murder, sanitary arrangements and a whole lot
 18 of unsavoury things like that, so you shouldn't in any
 19 way be influenced or badly influenced by that.
 20 Then he goes on at line 17:
 21 "If you had a clause which had 'competent local
 22 authority' and a 25-mile radius in the insuring clause,
 23 then you might say: oh well, does that really mean
 24 'local'?"
 25 Well, that is what you have got in clause 6,

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1 my Lord. So I would in fact ask myself: does that
 2 really mean "local". He goes on to say:
 3 "So I am making it clear that this is purely
 4 contextual for this exclusion in this particular policy.
 5 Other policies, where it is in the insuring clause,
 6 a different context may have a different meaning,
 7 because Mr Kealey is right about the authorities that
 8 can deal with disease."
 9 Then he says:
 10 "There is really no clue to it being different.
 11 I know he relies heavily on extension 6, but one has to
 12 look to see whether a reasonable reader of 3 would think
 13 that it meant something fundamentally different from
 14 what it appears to say. And 6, it has got diseases, but
 15 if you are now assuming a reader with intimate knowledge
 16 of all the public health legislation, you would think:
 17 yes, well these correspond to the notifiable diseases
 18 list, but hang on a minute, what is the most recent
 19 epidemic disease of a type that could, if it resurrected
 20 itself, spread across the country, it's SARS. And it's
 21 not there.
 22 "I'm not saying that it would be conclusive, but
 23 there is nothing here that drags you into saying that
 24 it's not local. If the list was unspecified in 6 and it
 25 was an insuring clause, one might say -- and that was

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1 a unitary clause, only dealing with disease, then you
 2 might say: if it is only purporting to cover notifiable
 3 disease and it's not limiting it, well maybe it could
 4 extend to something else. But that is not what we have
 5 here. We don't even have in the exclusion to the
 6 extension 3, we don't even have a reference to
 7 "notifiable disease" ..."
 8 Then if you go to page 148 at line 8, {Day3/148:8}:
 9 "What I was saying was if you have a notifiable
 10 disease, an unspecified notifiable disease list, and
 11 25 miles and this, it might be open to it."
 12 In other words, if you had in clause 6 an
 13 unspecified notifiable disease clause, then you might
 14 say that the competent local authority being referred to
 15 there was not confined to local government. But
 16 actually, in the specified disease list we have
 17 a multitude of notifiable diseases which are on the 2010
 18 regulations list, we have also a variety of other
 19 diseases which are not. And Mr Edelman is absolutely
 20 right, we don't have SARS, no doubt because
 21 Ecclesiastical didn't want to insure against SARS. But
 22 that is its choice and it might be said, well, it has
 23 made its bed, it must now lie on it.
 24 But what we are saying in relation to clause 6,
 25 my Lord, is that clause 6 is not confined, other than by

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1 reason of the 25-mile restriction , to something which is
2 necessarily local . Of course the 25-mile restriction is
3 terribly important, in another context. That is the
4 first thing .

5 Secondly, even if it were confined to local or
6 locality , it may be hindsight but hindsight is sometimes
7 a very useful indication of what could have been
8 contemplated at the time, just look at Leicester ,
9 central government can make any variety of fairly
10 draconian orders in a locality within 25 miles or
11 smaller .

12 LORD JUSTICE FLAUX: If there were an outbreak of the
13 plague, one might expect that central government would
14 be involved with, let alone some of these other
15 diseases .

16 We had this debate at the second case management
17 conference, and Mr Edelman is right that some of these
18 diseases would be unlikely to lead to as it were
19 widespread outbreaks. Legionnaires' disease is
20 a classic example; that is likely to be localised , isn't
21 it? But some of the others at least have the potential
22 to lead to quite serious outbreaks, and we know that,
23 for example, from measles and mumps, let alone anything
24 else . I mean, I don't know about scarlet fever . TB, if
25 there were a serious outbreak of TB somewhere in the

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1 North of England, say, that is something one would
2 expect to be dealt with not by the local council
3 necessarily but by central government.

4 MR KEALEY: What I can say is that one can reasonably expect
5 that it won't necessarily be confined to local
6 government.

7 LORD JUSTICE FLAUX: That's your point.

8 MR KEALEY: So I can't positively say that central
9 government will be involved, but it might be
10 a dereliction of duty on the part of the
11 Secretary of State for Health, Mr Hancock, if the plague
12 broke out in Newcastle and if he rang up the head of the
13 council in Newcastle and said, "Oh well, you're probably
14 a member of the Labour Party, I will let you get on with
15 it and see how well you do". I suspect Mr Hancock would
16 say, "This is really quite serious, I am going to send
17 people up there and I am going to take a personal
18 interest ". If he didn't, I am sure that The Guardian
19 would tell him off.

20 LORD JUSTICE FLAUX: Is that a convenient moment, Mr Kealey?

21 MR KEALEY: Yes, it is, my Lord.

22 LORD JUSTICE FLAUX: Ten minutes.
23 (11.20 am)

(Short break)

24
25 (11.30 am)

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1 MR KEALEY: My Lord, many thanks.

2 I am going to go on to causation in relation to the
3 Ecclesiastical , if I may. I have dealt with the
4 application, in our respectful submission, of the
5 exclusion or the disease carve out, but before I go on
6 to causation, my Lord, there is one matter I need to
7 address arising from my submissions on Thursday.

8 I have a concern that in the course of my
9 submissions in relation particularly to the
10 Orient-Express, I might have suggested that Mr Edelman
11 was somehow deliberately misleading the court in some of
12 his submissions on the insured peril , and I am concerned
13 about that. That certainly was not my intention.

14 I have looked at the transcript --

15 LORD JUSTICE FLAUX: I didn't pick up any such sense at all.

16 MR KEALEY: Good.

17 LORD JUSTICE FLAUX: I am pretty certain that (a) I don't
18 think you would have dreamt of saying anything of the
19 kind and (b) if you had, I am sure one or other of us
20 would have picked it up and upbraided you. So I don't
21 think you need have a concern about that. And if
22 concern has been expressed by others, then any fears can
23 be allayed by the fact the court doesn't -- I can't
24 speak for my Lord, but I am sure he would agree with me.

25 MR JUSTICE BUTCHER: I certainly didn't understand that you

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1 were making any such suggestion.

2 MR KEALEY: Good. I'm very grateful, my Lords.

3 I will continue with causation. My Lords, last week
4 I explained, on Thursday, how one reverses only the
5 causal chain that embodies the insured peril , and in the
6 rat example I explained one doesn't reverse the rats for
7 all intents and purposes, you only reverse the closure
8 as caused by government action as caused by rats . And
9 you certainly don't reverse the rats insofar as they
10 feature in a different causal chain; and that is because
11 a different combination in which the rats feature may
12 exist and may cause loss, and the loss caused by that
13 combination is not covered. So you distinguish between
14 the loss caused by one combination and compare it with
15 the loss caused by another combination.

16 If one looks at the EIO wording, my Lords, the only
17 combination to be reversed is loss caused by prevention
18 or hindrance of access or use, as caused by action of
19 government, police or local authority , as caused by the
20 emergency. No other combination featuring the emergency
21 is to be reversed .

22 If I could take you very briefly to paragraph 71 to
23 paragraph 80 of the Ecclesiastical 's skeleton, which is
24 in {1/12/54}. I am not going to read all of this out,
25 of course, but I will ask your Lordships to bear in mind

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1 some rather important paragraphs.
 2 At 71, we have broken down the clause into its
 3 constituent elements. You will see that there are three
 4 critical elements. And we say in 72 that the scope of
 5 the cover and what triggers the cover is to be discerned
 6 by a process of construing the clause, and you have to
 7 identify the specific role performed by each phrase
 8 within the clause, having regard to its relationship
 9 with every other.

10 Then what you find at 75 -- I think this was
 11 criticised by Mr Edelman, because we talk about the
 12 essence of the insured peril; we don't in any way
 13 apologise, because it is the essence of the insured
 14 peril -- is:

15 "... access prevention [as defined] where that has
 16 occurred by the specified reason (viz by reason of the
 17 action of government etc) in specified circumstances
 18 (viz due to an emergency etc)."

19 So we say that the interrelationship and the
 20 connections between the different parts of the clause
 21 are very straightforward.

22 This is a point that Mr Gaisman made, I think, that
 23 you look at the clause, and each part essentially
 24 narrows the clause as it goes along. So for example,
 25 phrase 1 requires access prevention, but it is not every

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1 access prevention which qualifies for cover. Phrase 2
 2 defines and qualifies phrase 1, in that it is only
 3 prevention or hindrance of access or use which is by
 4 reason of action of government that can trigger the
 5 clause. But it is not all action of government which
 6 counts; phrase 3 has been included to qualify and define
 7 the type of phrase 2 action. So it is not just any
 8 action of government, police or local authority, it has
 9 to be action due to an emergency which could endanger
 10 human life or neighbouring property. We give an
 11 example, and I needn't go to that now.

12 At 77 we say, in a paragraph which has attracted
 13 criticism by the FCA, or by Mr Edelman, {1/12/56}, we
 14 say:

15 "... the scheme of the clause is tolerably clear.
 16 The essence of the insured peril is stated at the outset
 17 of the clause (viz access prevention, et cetera ...) but
 18 the remainder of the clause serves to ..."

19 He didn't like all of these verbs. He doesn't like
 20 the fact that I am a vocabularist by nature, but it:

21 "... serve to define, refine, qualify and restrict
 22 the type of access prevention etc which qualifies ..."

23 In fact, my Lords, if one looks at all those four
 24 verbs, they are all apposite and they don't completely
 25 all overlap, so they are totally appropriate.

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1 So starting again, it is access prevention; but
 2 it is not just any old access prevention, it is access
 3 prevention due to action of government; but it is not
 4 any old action of government, it is action of government
 5 due to an emergency. So definition, refinement,
 6 qualification and restriction.

7 If you go to paragraph 79, there is what we say,
 8 perhaps a little self-servingly, it's a limited
 9 sub-category of access prevention, but it is access
 10 prevention when caused by action of government and then
 11 only where the action of government is in response to
 12 a specified type of emergency.

13 My Lords, if we could read paragraph 30, where we
 14 embody our submissions, yet again, it might be said, if
 15 one wishes to be overcritical.

16 LORD JUSTICE FLAUX: Paragraph 30 or 80?

17 MR KEALEY: I meant 80, not 30. Forgive me, my Lords. 80.
 18 (Pause)

19 LORD JUSTICE FLAUX: We need to go over the page.

20 MR KEALEY: Right, thank you. {1/12/57}.

21 Then we make a number of what we would suggest are
 22 compellingly obvious points, my Lord. But they are so
 23 obvious that maybe they haven't been necessarily picked
 24 up by our opponents.

25 Firstly, at paragraph 82, the insured peril is not

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1 the emergency. That is the first point.

2 The emergency's function, as we say in 82.3, was to
 3 identify that to which the action of government must be
 4 a response if it is to be a qualifying action within
 5 phrase 2. That is it. So, for example, there could be
 6 an emergency with no government action; not covered. Or
 7 government action, et cetera, with no emergency; not
 8 covered.

9 As we say at 82.4, it is only where there is
 10 government action, et cetera, which is due to the
 11 emergency and such action causes access prevention,
 12 et cetera, that the cover is triggered. The second
 13 point, obvious.

14 The insured peril cannot become the emergency by the
 15 back door. In other words, just because it is mentioned
 16 in the clause doesn't mean to say that it is the insured
 17 peril or that it has to be altogether reversed by
 18 applying the counterfactual.

19 So the peril can't be converted just because it is
 20 mentioned. Secondly, paragraph 83.2, it can't be
 21 converted into the emergency by the back door of
 22 causation. In other words, you can't say because the
 23 emergency is mentioned therefore it is part of the
 24 counterfactual and the whole emergency has to be
 25 reversed:

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1 Then we say, thirdly, at page 61, paragraph 83.3
 2 {1/12/61}:
 3 "... the insured peril cannot be converted into the
 4 emergency by the back door of the facts."
 5 For example, 83.3(c), it is a point that Mr Gaisman
 6 kindly addressed, I think possibly even this morning:
 7 "According to the FCA, none of the disease, the
 8 public authority action [et cetera] can be separated out
 9 from any other."
 10 It is all part of some indivisible and interlinked
 11 strategy and package of national measures.
 12 My Lords, that is a highly controversial statement,
 13 and not least because I think some people would suggest
 14 that the government reactions have hardly been part of
 15 any one strategy. Quite apart from the fact that even
 16 if they are part of a strategy, they can somehow or
 17 other be determined as being indivisible.
 18 But if you look at (e) at the bottom, the public
 19 authority actions are clearly not indivisible among
 20 themselves, any more than the actions are not
 21 indivisible from disease, and distinctions can and must
 22 be made.
 23 The third obvious point, at paragraph 84:
 24 "The insured peril must ultimately be determined by
 25 construing the policy wording carefully."

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1 We refer to Lord Justice Clarke in AstraZeneca, in
 2 an appeal from my Lord, Lord Justice Flaux, where his
 3 judgment was upheld, speaks about the occurrence being
 4 the shell within which the pearl of liability is to be
 5 found.
 6 But if the peril were to include the emergency in
 7 its own right, as the FCA suggests, then insurers would
 8 be taken to have provided insurance for all the
 9 consequences of the emergency. But that is not what we
 10 agreed to insure, the Ecclesiastical agreed to insure.
 11 It is rather like saying the more elements you include,
 12 in the chain of causes, the more you agree to insure.
 13 Whereas in fact it is the contrary that is normally the
 14 case. The more elements in the chain of causation which
 15 qualify and narrow the peril, the narrower the insured
 16 peril.
 17 Now, in our opening, my Lords, at paragraph 86 at
 18 page 63 {1/12/63} we pose the example of a wealthy donor
 19 whose giving to the church stopped because his
 20 restaurant had been closed due to COVID-19. If your
 21 Lordships look at paragraph 86 and paragraph 86.1, we
 22 postulated the donor making the donation by standing
 23 order. The donor was the owner of the local restaurant.
 24 In fact, when the church had been closed in the
 25 preceding year, the donation had continued. In other

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1 words, the donor didn't have to go to church to make his
 2 donation, he did it electronically at a distance.

3 At the end of March 2020 the generous donor wrote,
 4 stopping the monthly donation and attributing it to his
 5 own loss of income caused by his restaurant being shut
 6 down by COVID-19. His donation represents 25% of the
 7 church's income and we asked the question: was that
 8 caused by the insured peril?

9 Now Mr Edelman, on the first day of this trial,
 10 page 112 at lines 6 to 17, {Day1/112:6} was politely
 11 dismissive of this example. He said that this example
 12 failed at the first hurdle because the interruption or
 13 interference, that is the closure due to the emergency,
 14 was neither a "but for" nor a proximate cause of
 15 stopping the donation; lines 8 to 10.

16 Now, in our respectful submission that is actually
 17 a very important concession. In our example, the church
 18 was closed at the time when the donation was stopped, so
 19 there was hindrance of use caused by government action
 20 caused by an emergency.

21 As Mr Edelman would suggest, the trigger conditions
 22 for recovery were all met. Then, on the FCA's pleaded
 23 case, since all the elements of the trigger have been
 24 met, the correct counterfactual is a situation in which
 25 there was no COVID-19 in the UK, no government advice,

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1 orders, laws or other measures in relation to COVID-19.
 2 That, my Lords, is paragraph 77 of the particulars of
 3 claim. {A/2/45}. It is also paragraph 10.3 of the
 4 FCA's trial skeleton, {1/1/10}.

5 So according to the FCA's counterfactual, you assume
 6 that there is no emergency. Of course, if there were no
 7 COVID-19 in the UK, no government action of any kind,
 8 the church would still be open, the restaurant would be
 9 open, the restaurant owner, the restaurateur, would
 10 still have its income, so the church would still be
 11 receiving the monthly donation by standing order.

12 So the loss of income was caused by the COVID-19
 13 emergency and wouldn't have been suffered if you assume
 14 no COVID-19 in the UK and no government action.
 15 Therefore, on the FCA's pleaded case it ought to be
 16 recoverable.

17 But Mr Edelman accepts that it is not recoverable
 18 because, as he puts it, the closure due to the emergency
 19 had nothing to do with the church losing this income.

20 So the insured peril is not a mere trigger; it is
 21 not a gateway which, when crossed, permits the recovery
 22 of broader losses. If that were true Mr Edelman would
 23 permit the church to recover the lost donation.

24 It also reveals Ms Mulcahy's mistake. She said that
 25 the boundaries of the insured peril do not need to be

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1 the boundaries of what is subtracted for the purposes of
2 the "but for" test {Day2/63: 6} to line 9. In other
3 words, you reverse more. But if you reverse more, if,
4 as the FCA pleads, you reverse the entire emergency, the
5 church would recover the lost donation, because the
6 church was closed and the loss of the donation was
7 caused by the COVID-19 emergency.

8 But when Mr Edelman dismisses this example, he
9 actually concedes his pleaded case. He concedes that
10 first you have to work out what loss was actually caused
11 by the closure due to the emergency. And secondly, in
12 order to do that, you don't reverse all the effects of
13 the emergency; what you do, and all you do, is reverse
14 the closure as caused by the government action, as
15 caused by the emergency. When you reverse that
16 combination, that single causal strand, you don't
17 reverse the emergency if and insofar as the emergency
18 was the source or the beginning of a different causal
19 strand. You don't reverse that, so you don't reverse
20 loss of donation, caused by donor's loss of restaurant
21 income, caused by the COVID emergency.

22 Let's change the example slightly. Assume the same
23 wealthy parishioner never gave by monthly standing order
24 but actually attended church every Sunday and put money
25 into the collection plate at the weekly service. This

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1 is the collection at the service example given by
2 Mr Edelman at {Day1/115:1}. The church was closed, the
3 services didn't take place and so the wealthy
4 parishioner stopped giving money, putting the money in
5 the plate. But the wealthy parishioner had lost his
6 income because his restaurant was closed because of
7 COVID-19. So he wouldn't have given any money in the
8 collection plate even if the church had remained open.
9 Can the church recover the loss? It is no surprise to
10 find that the church can't. The insured peril is not
11 the emergency but is prevention of access caused by
12 government action caused by the emergency, and the loss
13 of income had nothing to do with the church being
14 closed.

15 MR JUSTICE BUTCHER: Suppose had he been there, had he been
16 in church, he would have thought: even though my income
17 has gone down I will actually make the effort and, as it
18 were give, my widow's mite, but as he is not there he
19 never does that.

20 MR KEALEY: You're postulating the possibility that if he
21 were there in person, he would have given something,
22 let's call it 10% of what he normally gives. Well, if
23 that were the case then it might be the case that the
24 10% that he would otherwise have given, which has been
25 denied the church as a result of the closure, as caused

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1 by the government, as caused by the emergency, is
2 recoverable. But the 90% which represents, say, the
3 greater proportion of the donation less the widow's mite
4 is not recoverable.

5 MR JUSTICE BUTCHER: We are here talking about then an
6 analysis of each and every member of the congregation's
7 motivation and what they would have done differently.

8 MR KEALEY: Well, what you are talking about is, it's rather
9 like the question that you asked me on Thursday last,
10 and indeed asked in a different way Mr Gaisman either
11 yesterday or this morning, which is that what the church
12 will have to do is identify what it says its loss of
13 income is and explain how its loss of income has been
14 caused by the closure. But if it turns out, my Lord,
15 that the loss of income has not been caused by the
16 closure, then it doesn't recover pro tanto that loss of
17 income.

18 It is all very well to say that it all depends upon
19 what each parishioner or whatever it happens to be or
20 what each congregant would have done, of course it does,
21 because what you are looking at is the collection plate,
22 and the collection plate and its contents will depend on
23 is what is given at the service. And of course it might
24 be said that if no one can attend a service, nothing
25 will be in the collection plate. But if nothing would

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1 have been in the collection plate irrespective of the
2 service, then no loss of income has been suffered.

3 LORD JUSTICE FLAUX: If in any given case the church is
4 closed, just assume the church is closed and as a result
5 there is no collection and nobody gives anything, the
6 church makes a claim for loss of income of £1000 a week
7 for whatever period of time it is, on the basis that
8 nobody has given any money, and they have not given any
9 money because the church is closed, and the church is
10 closed because of the restriction imposed by the
11 government as a result of the emergency.

12 Why isn't that, at least on the face of it,
13 sufficient to establish a loss resulting from the
14 interruption or interference with the insured
15 activities?

16 MR KEALEY: Well --

17 LORD JUSTICE FLAUX: And why doesn't the burden then pass to
18 the insurer? If the insurer wants to say, "Well,
19 actually, nobody would ever have given any money anyway,
20 even if the church had remained open throughout, because
21 they were all down on their uppers as a result of
22 COVID", why isn't the burden on the insurer to say that,
23 rather than on the insured to, as it were, make good
24 what is otherwise a prima facie case of loss?

25 MR KEALEY: My Lord, on Thursday I think I was asked almost

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1 the same question by my Lord Mr Justice Butcher.
 2 LORD JUSTICE FLAUX: Yes.
 3 MR KEALEY: And the answer I gave Mr Justice Butcher
 4 I myself remember vaguely and therefore I will try and
 5 repeat it without --
 6 LORD JUSTICE FLAUX: Yes. No, in all seriousness, this is
 7 a point in relation to your clients, specifically your
 8 clients, Ecclesiastical, which troubles both of us. It
 9 is a matter we have discussed. So I would welcome your
 10 assistance on this point, Mr Kealey.
 11 MR KEALEY: Well, my Lord, as I indicated on Thursday, if
 12 for example there is a prima facie case so that let us
 13 just say that the church regularly received €1000 per
 14 week and did so through its collection plate. The
 15 church was closed, so no one attended church. So each
 16 week the church was closed the church did not receive
 17 €1000.
 18 The church, in those circumstances, would be able to
 19 establish a prima facie case that there was an emergency
 20 that caused police or authority action, that prevented
 21 or hindered access. And assume that the emergency
 22 didn't affect the situation of the parishioners in any
 23 other way than that they couldn't attend church and did
 24 not, therefore, give their donations. In that case,
 25 I would accept that the loss of income is highly likely

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1 to have been caused by the prevention of access caused
 2 by the action, because there is unlikely to be any
 3 alternative cause, on those very simple facts where the
 4 emergency has not affected the situation of the
 5 parishioners in any other way.
 6 In other words, the insured would be able to make
 7 out a prima facie case of coverage and that the insured
 8 peril had not only operated but also had caused the
 9 church loss, the €1000 a week.
 10 However, if you have a situation which is slightly
 11 different, where you have a widespread situation
 12 affecting the whole of society and not just the insured
 13 church, which has separate and independent effects on
 14 the lives and the financial situation of many
 15 parishioners, it may be that the church will not be able
 16 to make out a prima facie case. And even if it does
 17 make out what on the face of it looks like a good case
 18 for (a) coverage and (b) caused loss, causation may
 19 become a real issue.
 20 MR JUSTICE BUTCHER: Let me understand that. You are saying
 21 that if the takings had gone down, let's say, from last
 22 year, down to 80% by 23 March, and then fall from 80% to
 23 zero on 23 March, you are saying there won't be
 24 a prima facie case, or Ecclesiastical's position is that
 25 there won't be a prima facie case of loss because of the

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1 extent of the economic effects of COVID in the country.
 2 MR KEALEY: I will take it in stages.
 3 If the income had fallen from 100 to 80 by the time
 4 of the closure of the church, firstly, the best that the
 5 church could seek to recover is 80% of the 100.
 6 LORD JUSTICE FLAUX: Subject to Mr Edelman's ingenious
 7 point, I think we both follow that.
 8 MR KEALEY: Right.
 9 LORD JUSTICE FLAUX: It is the difference between the 80 and
 10 the zero in my Lord's example.
 11 MR KEALEY: Let's just say that the church comes along and
 12 says: well, it was down to 80%, I was then closed,
 13 I couldn't recover anything, I couldn't get anything
 14 from my parishioners, they all stopped coming because
 15 I couldn't receive them, therefore there was nothing in
 16 the collection plate. That might give rise to an
 17 eventual burden, as I have said before, on the insurer
 18 to say: yes, that certainly ostensibly appears to be the
 19 case, but in fact what we can show or what we have
 20 evidence to show is that even if the church had remained
 21 open and the parishioners had all come into church,
 22 nevertheless, for example, 25% of your income was
 23 attributable to the restaurateur, well he hasn't got any
 24 business left, in fact, so far as we can see he has
 25 actually put up his restaurant for sale and he might

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1 even go into administration, and therefore, if you
 2 actually ascribe 25% of your income to the wealthy
 3 parishioner, we, the insurer, will suggest to you that
 4 the reason why you are not getting his 25% is not
 5 because of the closure of the church, but actually is
 6 because of the fact that --
 7 MR JUSTICE BUTCHER: I understand that, Mr Kealey. What
 8 I was trying to get at was: are you saying that there
 9 won't even be a shifting of the evidential burden
 10 because of the general effects of COVID on the economy,
 11 and that Ecclesiastical can as it were say: no, there
 12 isn't even a prima facie case, because of these general
 13 effects? That is what I was rather falteringly trying
 14 to get at.
 15 MR KEALEY: I am sorry, it was probably my fault. No, I am
 16 not saying that necessarily. And I want to make it
 17 absolutely plain it is not necessarily. Every single
 18 case will depend upon its facts, obviously, and it may
 19 be that some cases are much clearer than others. Some
 20 cases will have, cases where you have got a parishioner,
 21 et cetera, who accounts for 25%, and let's say he's
 22 noticeably without funds. So I am not saying
 23 necessarily that in every case the evidential burden
 24 will shift, totally, and I am not saying that in every
 25 single case, just because there is a situation of an

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1 emergency there, that the evidential burden will not
 2 shift. These are exactly the points that arise in any
 3 business interruption case where there are possible
 4 reasons why the losses have been sustained, which are
 5 not those attributable to the insured peril. That is
 6 precisely why you have loss adjusters.

7 And by the way, your Lordships think that this may
 8 be Ecclesiastical 's, the church is a small relatively
 9 small insured, but actually there are wordings which are
 10 being discussed in this case, for example the Resilience
 11 Marsh wording, which have, not in this case but have
 12 insureds whose insurances are tens of millions or
 13 hundreds of millions of pounds here. So you shouldn't
 14 think that, oh, this is a case where loss adjusters are
 15 coming in and there is a poor little church out there,
 16 and how can a church have a loss adjuster and incur all
 17 this money. You should take that out of your mind for a
 18 minute. Business interruption losses are a highly
 19 complex area of administration and of insurance.

20 Disputes arise often -- or issues arise, let me put
 21 it that way. Issues arise often between insureds and
 22 insurers as to what losses have genuinely been sustained
 23 as a result of the insured peril and what losses would
 24 have been sustained in any event.

25 This is one of the main reasons why you have such

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1 a complex trends clause. This is one of the main
 2 reasons why Riley has such complicated chapters, one of
 3 which Mr Gaisman alluded to this morning, on how you
 4 work out trends clauses and their application.

5 So the answer is that there are causation issues
 6 that can and will arise. And my Lords, I should say
 7 this is not just me spouting this. The FCA accepts that
 8 there are and can be perfectly legitimate causation
 9 issues. If you look at Mr Edelman's submissions,
 10 Mr Edelman accepted, for example -- we gave an example
 11 in our opening of the social group for elderly people in
 12 the church hall. Do your Lordships recall that? It is
 13 paragraph 87 at {1/12/64}. Yes, page 64. It is
 14 paragraph 87.

15 There was a social group for elderly people in the
 16 church hall, for which rental income was paid. We
 17 postulate there the organisers deciding to suspend their
 18 meetings before the government regulations, and we
 19 postulate the suggestion that even were the church to
 20 re-open, the group's leader suggests that it is unlikely
 21 that the group will ever reconvene, not only because
 22 some of them don't exist any more, but also because of
 23 shielding.

24 If your Lordship could look at transcript
 25 {Day1/113:1}. We can start at 113 at line 18:

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1 "Now that poses a straight causal question ... it is
 2 simply a question of 'but for' the interruption or
 3 interference, would the rent payments have been
 4 received? And it is going to be a question of fact
 5 where there is a casual income like this, and the answer
 6 will depend on the facts. If the 16 March order to stay
 7 at home and minimise travel and shield amounts to
 8 qualifying interference or interruption or interference,
 9 and the cancellation was after 16 March, then the loss
 10 may result from the interruption or interference,
 11 depending on the reasons of the group for cancelling.

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

15 Then he goes on to look at collections, and I have
 16 already discussed collections.

17 But what we are acknowledging among ourselves,
 18 including the FCA, my Lord, is that you have to ask
 19 yourself whether as a matter of fact the loss actually
 20 was caused by the interruption or interference.

21 As Mr Edelman says at line 4 on page 114, it depends
 22 on the reasons of the group for cancelling. And
 23 Mr Edelman himself, my Lord, gave the example of the
 24 restaurant whose Michelin starred celebrity chef gave in
 25 his notice the day before a fire. It is {Day2/114:21}.

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1 He says:

2 "The classic example of a restaurant would be the
 3 head chef had already given in his notice.

4 "He had already given in his notice but he was
 5 working out his notice when the fire happens, and the
 6 insured presents to the insurer his turnover figures for
 7 the period up to the fire and says: look how well I was
 8 doing. But there had been a circumstance before the
 9 fire, the chef that was the main attraction, his
 10 reputation had spread far and wide, has just been
 11 poached by a Michelin star restaurant.

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

21 So it is accepted, my Lord, that in assessing the
 22 insured's BI loss, caused by damage caused by the fire,
 23 there has to be a stripping out of the indemnity the
 24 extent of the turnover that would have been attributed
 25 to the loss of the celebrity chef. That may or may not

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1 be an easy exercise, it may be that the loss adjusters
 2 would have to ask themselves what attraction precisely
 3 was represented by this chef, how many people actually
 4 went to this restaurant because of the chef, or because
 5 of the nouriture produced by the chef, or because he
 6 used to be at the door with his huge great chef's hat
 7 with typical bonhomie and saying in typical French "Do
 8 come in", or whatever it happens to be. But he is not
 9 there any more, so the loss adjuster is going to say:
 10 how do I calculate this? And no doubt the loss adjuster
 11 for the insured will say, "Actually he wasn't that
 12 good", et cetera, "and we have a very good chef", or
 13 whatever it happens to be. But these are matters that
 14 have to be gone into in the ordinary, typical business
 15 interruption evaluation and ascertainment of loss
 16 exercise.

17 Coming back to my Lord Mr Justice Butcher's
 18 question, and looking at Mr Edelman's own example,
 19 Mr Edelman would be able to say: fire, loss of income,
 20 compare it with last year, I have suffered, I made
 21 10,000 a day, I am now making nothing per day, I want
 22 10,000, a day. The insurer gets to learn or is told
 23 that the chef was leaving anyway, the insurer says: hang
 24 on a second, your chef was leaving, therefore your
 25 10,000 would immediately have reduced to 2, after people

1 got to know that the chef wasn't there, then you might
 2 have brought in a new chef, et cetera. There would be
 3 a debate, a discussion, an evaluation. That is exactly
 4 what happens.

5 So is there a prima facie case? Well, coming back
 6 to my Lord Mr Justice Butcher's example, or question:
 7 you have the service being interrupted, in other words,
 8 stopped, closed; you have what might be described as
 9 a prima facie loss because the collections simply are
 10 not being collected. And I have to say, if I were
 11 advising the insurer, I would have to say, well,
 12 ostensibly it looks as though that which the church
 13 previously received is not now being received because of
 14 the closure of the church. However, I would also have
 15 to advise the insurers that you have to take into
 16 account that even though the church was closed, we all
 17 know that people were not going to be gathering socially
 18 together and, moreover, people were not permitted to
 19 gather socially together, and so even if the church had
 20 remained open and therefore people could have gone
 21 there, members of the congregation would not have gone
 22 there, or if they had gone there, they would have gone
 23 there in vastly reduced numbers.

24 Therefore, the closure has not caused the insured
 25 the loss for which it claims, and the loss adjusters

1 would get into it and if there is a dispute the evidence
 2 at trial would determine the issue.

3 The one thing that is terribly important in relation
 4 to the questions that I am now being asked is that it is
 5 not legitimate to conflate issues of fact with issues of
 6 legal principle.

7 Of course evidential issues may arise, and indeed
 8 they may be difficult to resolve. But they don't
 9 necessarily arise, firstly; and secondly, even if they
 10 do or are likely to arise, that is not any justification
 11 for expanding the limits of the insuring clause or, for
 12 that matter, changing the rules of causation that do
 13 apply.

14 And we say a fortiori this is a case where the court
 15 is being asked to deliver -- and I really don't envy
 16 you -- a judgment for legal certainty. If you are
 17 looking for legal certainty, the one thing that you
 18 shouldn't be doing is delving into hypothetical facts
 19 like that and basically saying: can the insured prove,
 20 or show, rather, a prima facie case because of the
 21 existing situation of COVID-19 in the country? I don't
 22 know in any given case whether the insured can show
 23 a prima facie case unless and until the insured makes
 24 a claim and shows what case it has and what evidence it
 25 has.

1 But taking the very basic church closure case, if
 2 a church is able to say, "On average I made £10 a week
 3 and now I am making nothing because nobody is turning up
 4 because they can't turn up", then I would probably have
 5 to accept that that looks like a prima facie case. It
 6 is then, as I indicated on Thursday, I am not saying
 7 that it is necessarily correct totally but it would then
 8 probably be for the insurer to say, "Well, actually your
 9 congregation had all died of COVID-19 and therefore your
 10 closure is an irrelevance".

11 I can't go into --
 12 LORD JUSTICE FLAUX: Or postulating another example, if you
 13 had an inner city church in a deprived area, the insurer
 14 might be able to say "Well, in actual fact even if your
 15 church had remained open and people could have come to
 16 it, all the people in the town who would have come to
 17 your church are now unemployed as a result of COVID".

18 MR KEALEY: That could well be right, my Lord, and indeed
 19 the insurer would be entirely within his rights to say
 20 that and have it investigated.

21 LORD JUSTICE FLAUX: As you rightly say, those are all
 22 factual issues with which we are not concerned.

23 MR KEALEY: That's what you shouldn't be concerned with, and
 24 I don't see how you can be concerned with. As
 25 Mr Gaisman said, we have worked long and hard on assumed

1 facts, none of which has actually broken through the ice
2 to get to your Lordships. But if one wanted to have
3 a whole lot of assumed facts and one could make those
4 assumptions, you could therefore deliver a judgment on
5 the basis of the assumption, for example, that half of
6 the congregation were deprived of their income and
7 therefore did not turn up and therefore even if the
8 closure of church had not occurred they wouldn't have
9 given much, if any, money.

10 These are all assumptions that can be made, but your
11 Lordships cannot determine at this trial that either an
12 insured can make out a prima facie case or that an
13 insured can't. For my part, I think it is quite
14 difficult for a court to do that.

15 Of course the court can say that in the very simple
16 example, closure of church, no income, no collection
17 plate, therefore on the face of it, on that evidence
18 alone, if there is nothing else, then the insured may
19 have a prima facie case and may succeed. But ...

20 LORD JUSTICE FLAUX: It seems to me, obviously, you know,
21 I'm open to persuasion, we are both open to persuasion,
22 but I think this is a point that I made to Mr Gaisman
23 this morning -- on reflection, rather badly I think --
24 that what I had in mind was really the fact that we are
25 not dealing with any given factual scenario, and

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1 actually it might be said it would be dangerous for us
2 to stray into assumed factual scenarios. All we can
3 really do is to deal with the issue of principle in
4 relation to causation, which is essentially whether you
5 are right in the submission you, on behalf of the
6 insurers, made on Thursday as to what it is, for
7 example, that you reverse out of any counterfactual
8 exercise. Then when the court has determined what the
9 answer to that question is, it will be for the
10 individual insureds and insurers hereafter to make of
11 that what they will in relation to individual claims.

12 MR KEALEY: I would suggest that, and that is vitally
13 important. And it shouldn't be thought that that is in
14 any way not doing as much as you can. In fact, it is
15 doing exactly what a court should do in these
16 circumstances, where the essence of the FCA's case is
17 that on the counterfactual you reverse everything, and
18 the essence of insurers' case is that that simply is
19 unprincipled and unthought out, and you have to be
20 slightly more intellectually logical and astute and
21 actually work out what these contracts are about.

22 That is the key issue in this case, in fact. I mean
23 there are of course other issues on particular wordings,
24 what does "interruption" mean, what does "interference"
25 mean and things like that, but one of the key issues in

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1 this case, this is what this case is likely to be
2 referred to hereafter for, is the question of causation
3 in insurance law with reference to these contracts. In
4 other words, not just -- it will be what are the
5 relevant insurance principles that apply and contractual
6 principles that apply, and then, having established as
7 it were the academic side, which is absolutely critical,
8 then how do you apply that to the particular words with
9 which one is confronted.

10 LORD JUSTICE FLAUX: But you might say, or one might say
11 that that question, at least in part, is determined by
12 identification on the particular wording that one is
13 considering and what the insured peril is. And once you
14 have identified what the insured peril is, you would
15 submit and you did submit on Thursday, applying normal
16 principles of causation in contract law generally, never
17 mind in insurance law specifically, you reverse out of
18 your "but for" consideration, if I can put it that way,
19 the insured peril, but you don't reverse out everything
20 else.

21 MR KEALEY: That is correct, and that is a fundamental issue
22 in this case.

23 LORD JUSTICE FLAUX: Yes.

24 MR KEALEY: It is not answered in the way that the FCA might
25 suggest sometimes, which is: oh well, we don't have to

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1 go there, we can just look and see what the insuring
2 clause says, and we can envisage what it contemplated,
3 and we can identify the insured peril but do what
4 Ms Mulcahy says, which is add on a little bit to the
5 insured peril for the purposes of reversals. Those are
6 fundamental issues with which this court is confronted.
7 They are fundamental law, not just construction of
8 contracts.

9 LORD JUSTICE FLAUX: No, understood.

10 MR KEALEY: My Lord, there is one last point on causation on
11 Ecclesiastical before I move to Amlin, if I may. It is
12 a very short point.

13 The EIO clause with which we are concerned, my Lord,
14 related to prevention or hindrance due to a certain
15 character of government action, namely action due to an
16 emergency. I paraphrase. But the reference to the
17 emergency, as I have said really ad nauseam, is a form
18 of qualification, and the FCA says the emergency should
19 be reversed in the counterfactual, we say that is wrong.

20 But let's test it just briefly in another way.
21 Assume that the clause gave much broader coverage to the
22 insured, and let's say that the clause covered
23 prevention, losses, et cetera, resulting from prevention
24 or hindrance due to any government action. Full stop.
25 That would be a clause providing really quite wide

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1 coverage. Now, that clause wouldn't refer to any
2 emergency at all. It is nowhere near the clause. No
3 reference to it at all. Presumably, therefore, the FCA
4 would accept that for the purposes of the counterfactual
5 you don't reverse the emergency, you only reverse,
6 according to the FCA, the elements to which the clause
7 refers. Therefore, in what would be a far broader
8 clause for coverage purposes, the emergency and all the
9 other effects of the emergency remain.

10 Now, what is paradoxical is that if the coverage is
11 narrower, because the clause says "prevention or
12 hindrance caused by government action caused by an
13 emergency", and therefore the coverage is far narrower,
14 the FCA says you reverse the emergency just because it
15 is referred to. And by reversing the emergency, in what
16 was a far narrower coverage clause, you actually give
17 the insured a hugely increased scope of coverage.

18 What you have done is made the insured peril even
19 bigger than the insured peril produced by a coverage
20 clause covering prevention or hindrance due to any
21 government action, full stop. Because in that last
22 clause, if you wanted to work out what but for the
23 government action or but for the closure caused by
24 government action, what loss was caused by that, you
25 would necessarily take into account everything of the

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1 emergency and all the effects of the emergency. And if
2 the effects of the emergency therefore meant that the
3 insured had suffered no loss, then the insured would
4 recover nothing. But under the narrower coverage
5 clause, the FCA says: a ha, the emergency is referred
6 to, we reverse the entirety of the emergency. And
7 therefore the insured ends up with hugely expanded
8 coverage.

9 That proves that the insured, in this case the FCA,
10 has simply got its wires crossed.

11 I hope I have made that point clear, my Lords.

12 MR JUSTICE BUTCHER: Very clear, Mr Kealey.

13 MR KEALEY: Then I am going to move on from the

14 Ecclesiastical to Amlin, if I may.

15 Now, my Lords, there are as it were two clauses in
16 Amlin1 that are relevant, they are clauses 1 and 6. My
17 Lords will find those in {B/10/65} and 66. I think
18 I have got things mixed up here, my Lords. No, 65 and
19 66, I think that is right. It is right. 65 and 66.

20 LORD JUSTICE FLAUX: Yes, business interruption cover in
21 Amlin1.

22 MR KEALEY: That is right.

23 What your Lordships find is that in clause 1 you
24 have "Action of competent authorities" and in clause 6
25 you have "Notifiable disease, vermin defective sanitary

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1 arrangements, murder and suicide". My Lords, I am going
2 to take clause 6 first because it is common to Amlin1
3 and Amlin2.

4 My Lords, clause 6 says:

5 "consequential loss as a result of interruption of
6 or interference with the business carried on by you at
7 the premises following ..."

8 (a)(iii):

9 "Any notifiable disease within a radius of 25 miles
10 of the premises."

11 I addressed the significant causation issues that
12 arise in relation to this clause on Thursday.

13 The Amlin clause defines "Notifiable Disease" or the
14 Amlin contract defines "Notifiable Disease" at page 58
15 {B/10/58}. Notifiable disease is:

16 "Illness sustained by any person resulting from ...

17 "(b) any human infectious or contagious disease ...
18 an outbreak of which the competent local authority has
19 stipulated will be notified to them."

20 So this clause, my Lord, clause 6, requires actual
21 people with actual illness within the 25-mile radius.
22 It is not looking to the situation beyond the 25-mile
23 radius area, there may or may not be people there with
24 the same or a different disease, the policy is simply
25 not interested in them.

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1 The issue that arises, my Lord, is whether the loss
2 in this case was following the proved cases of the
3 disease within the 25-mile radius area. If one applies
4 the "but for" test, one simply removes the proved cases
5 of the illness within the 25-mile radius area. That
6 assumes, my Lord, that the word "following" is causal.
7 And we say it is at least causal, and the FCA agrees
8 that the word "following" requires a degree of causal
9 connection. We say that because it is causal and
10 requires at least a degree of causal connection, it
11 requires at least the satisfaction of the "but for"
12 test, otherwise it is not a cause, let alone
13 a contributing cause, it is no cause at all.

14 Now as I have said, the FCA accepts that the word
15 "following" requires some degree of causal connection;
16 it doesn't contend that the word only provides
17 a temporal requirement. You can see that, my Lords, if
18 your Lordships go to bundle {A/2/40}, paragraph 60 of
19 the amended particulars of claim of the FCA:

20 "Further or alternatively, the word 'following'
21 deliberately connotes an event which is part of the
22 factual background and represents a looser causal
23 connection than 'resulting from' and similar."

24 If your Lordships could go, please, to
25 {Day3/112:10}, you will see there:

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1 "Now Hiscox, and we would say rightly, accepts that
2 'following' is a looser causal connection, although it
3 requires more than simply a temporal successiveness or
4 a temporal connection."

5 Then it tells you what Zurich would suggest it
6 means.

7 If you go then to the FCA's trial skeleton and you
8 go to paragraph 893 at page 287 {1/1/287}, the FCA says
9 at 287:

10 "MS Amlin assert that in respect of prevention of
11 access clauses 'following' means proximately caused by
12 or, alternatively, having a significant causal
13 connection with. The latter is closer to the correct
14 position, which is that there must be a temporal
15 connection and a causal connection looser than proximate
16 cause; see paragraphs 325.3 and 385 above. The 'jigsaw'
17 idea -- that the government was responding to all actual
18 and anticipated cases of COVID-19 in the country -- is
19 sufficient for these purposes to link the case within
20 25 miles to the interruption or loss."

21 So what seems to be suggested there is that,
22 firstly, "following" does not mean proximately caused
23 by, according to the FCA. It has a meaning which is
24 closer to significant causal connection, it is looser
25 than a proximate cause, but the jigsaw idea, which is

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1 that when the government was promulgating its
2 regulations or taking action or giving advice, it was
3 responding to all actual and anticipated cases, and that
4 is sufficient, for those purposes, to link the case
5 within 25 miles to the interruption or loss.

6 Ms Mulcahy developed the FCA's case further during
7 her oral submissions, when she said that "' following '
8 imports a causal connection". But it is not one that
9 requires a direct and "but for" link, rather it is more
10 of a causal contribution. That is {Day3/113:6} to line
11 8. That appears, my Lords, to be a refrain from
12 paragraph 215.2(b) of the FCA's skeleton at {1/1/87}.

13 At the top of page 87 in {1/1/87}:

14 "They fail [that is insurers] to apply the correct
15 causation analysis in that they fail to recognise that
16 the presence of COVID-19 in each locality is an integral
17 part of one single broad and/or indivisible cause, being
18 the COVID-19 pandemic, or alternatively that the
19 outbreak in each locality made its own concurrent
20 causative contribution to the overall picture of
21 a pandemic which prompted the government response."

22 In fact, my Lords, and I just mention this for your
23 note, it was not until the FCA's trial skeleton at
24 paragraphs 779 and 899, that it was suggested by the FCA
25 that the word "following" while requiring some degree of

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1 causal connection, did not import a "but for" test.
2 That is not part of the FCA's pleaded case.

3 Now, what we say, my Lord, is that in reality this
4 issue does not turn on the difference between proximate
5 cause and some less strong cause than proximate cause;
6 it turns on the difference between cause and non-cause.
7 By non-cause I mean something that has not even passed
8 the "but for" test.

9 MR JUSTICE BUTCHER: But you are begging a very big question
10 there. Suppose you had an outbreak in the locality and
11 the competent authorities, wherever they are, said: yes,
12 we are going to respond to that, that is what we are
13 responding to, that is our motivation in imposing these
14 restrictions. And yet it could also be said that they
15 would have done the same thing a bit later because of
16 other outbreaks. There is at least a significant
17 argument that the restrictions were imposed following
18 and because of the local outbreak, even though they
19 don't actually meet the "but for" test.

20 MR KEALEY: Well, I think, firstly, if you have a causal
21 connection like making a causal contribution, then what
22 you need to have is something that if it did not exist,
23 would not have resulted in whatever it is it is said to
24 have produced.

25 LORD JUSTICE FLAUX: Putting that another way, what you are

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1 really saying, do I get this right, is that however
2 loose the causal connection can be said to be, it has to
3 satisfy the "but for" test otherwise it is not causal at
4 all?

5 MR KEALEY: That is exactly what I am saying. It makes no
6 causal contribution at all.

7 LORD JUSTICE FLAUX: Well, that is a point that has troubled
8 me, that was puzzling me, because "but for" is certainly
9 not the same thing as proximate cause.

10 MR KEALEY: No, it is very much not.

11 LORD JUSTICE FLAUX: So what is something that is more than
12 temporal successiveness or connection, but as it were
13 some looser causal effect that doesn't satisfy the "but
14 for" test? It is very difficult to discern what that
15 would be.

16 MR KEALEY: I don't believe it is -- or there is.

17 LORD JUSTICE FLAUX: No.

18 MR KEALEY: In our submission, even if you look at the cases
19 which talk about material contribution, like Bonnington,
20 which is in the bundle, which is a tort case, if you
21 look at anything which is described as making a material
22 causal contribution, it is either something which
23 satisfies the "but for" test or, in the tortious
24 context, is something which falls within the Fairchild
25 Enclave or an acknowledged and recognised exception to

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1 the "but for" test. But to say that something has
2 a causal contribution in circumstances where, if it did
3 not exist, it would make absolutely no difference to the
4 result, is in our submission misusing the words. It's
5 not making any causal contribution at all.

6 If one is talking about a question of temporal
7 succession, then one would be in a completely different
8 area of investigation. But since we are not purely in
9 an arena of temporal succession, we are in an arena of
10 causation, cause and consequence, if something makes
11 absolutely no difference to the consequence, then it is
12 not a cause of that consequence.

13 That is the whole debate about "but for" in, for
14 example, areas like Fairchild and everywhere else, where
15 it is acknowledged it could not be proved, in that very
16 exceptional area of investigation, that the negligence
17 of the manufacturer or whoever it was, the employer, had
18 any causal connection with the ultimate disease, and
19 because the "but for" test could not be satisfied.

20 What we submit, my Lord, is that what I was
21 suggesting, and my Lord Mr Justice Butcher took issue
22 with me, is that if you can't even get over the "but
23 for" test you are not into cause.

24 MR JUSTICE BUTCHER: That I do have difficulty with. There
25 are various different ways you can look at cause, and

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1 one is to have a direct effect. The hypothesis I was
2 putting to you, there is a direct effect; it is the
3 disease within the locality which leads the authority to
4 impose the restriction.

5 MR KEALEY: Then that --

6 MR JUSTICE BUTCHER: That is the effect. It could actually
7 be shown, though, that that restriction might have been
8 imposed or would have been imposed for other reasons
9 later. There, you can say that there is a direct effect
10 even though it is not a "but for" cause, because the
11 restrictions would have been implemented later.

12 MR KEALEY: I would answer that in a variety of ways.

13 It depends which area of law you are in. That's the
14 first thing. For example, if you are in the area of
15 fraudulent representation or fraudulent
16 misrepresentation, then what the law does is to say that
17 you don't have to prove, for cases of fraudulent
18 misrepresentation, that but for the fraudulent
19 misrepresentation the representee would have done
20 something other than that which the representee did. It
21 is sufficient for fraudulent misrepresentation, for
22 example, that that which was fraudulently misrepresented
23 was in the forefront or in part of the representee's
24 mind when determining what to do or what not to do.

25 But here we are in a completely different area of

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1 legal investigation. Here we are in the area internally
2 to a contract, before one even gets to proximate
3 causation, of asking oneself whether, as a matter of the
4 proper interpretation of this contract, the word
5 "following" has a causative connotation and requires
6 a causal connection; and if so, what that causal
7 connection is required to be. And in a contractual
8 framework such as the framework with which we are
9 confronting, we say that the word "following" has
10 a causal connection and must therefore satisfy the "but
11 for" test.

12 I am going to take you to the contract in a moment
13 and to the word "following" so you can see it in its
14 proper context, because our primary case is that the
15 word "following" in the contract is the same as "as
16 a result of" or "in consequence of", in other words, is
17 the same as a proximate cause or a direct cause.

18 Your Lordships --

19 LORD JUSTICE FLAUX: This wording doesn't in fact mention
20 government action at all, does it, clause 6?

21 MR KEALEY: No, this wording doesn't, my Lord. This
22 wording --

23 LORD JUSTICE FLAUX: Interruption or interference with the
24 business following any notifiable disease within
25 a 25-mile radius.

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1 MR KEALEY: Yes, that is right, my Lord. That is exactly
2 what --

3 LORD JUSTICE FLAUX: It may be that government action, or
4 whatever, leading to interruption or interference is to
5 be inferred, but it is not actually referred to at all.

6 MR KEALEY: No, it is not. Government action is not
7 referred to in this particular clause. Nevertheless,
8 what we say is that "following" in this clause means,
9 means, and your Lordships will see how we put it, means
10 "directly or proximately caused by the notifiable
11 disease within that radius". And what you are looking
12 at is the consequential loss as a result of interruption
13 or interference with the business following that
14 disease.

15 We say that there has to be a direct causal
16 connection between that notifiable disease, in other
17 words, as we have mentioned, the sickness, the actual
18 sickness, sustained or contracted by a person or persons
19 within the radius of 25 miles of the premises, and the
20 interruption of or interference with the business
21 carried on at those premises.

22 It is not good enough, in our submission, that the
23 notifiable disease or the sickness within that area was
24 something which occurred but which doesn't have the
25 satisfactory or necessary causal connection with the

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1 interruption .
 2 Just because the government in London says, on
 3 a jigsaw basis, as the FCA suggests, "Well, we have got
 4 to stop the disease from spreading" or "We've got to
 5 stop the NHS from being overrun or overwhelmed", that
 6 doesn't mean, in our respectful submission, that
 7 a sickness within that radius had the impact which it is
 8 required to have for the purposes of satisfaction of
 9 that clause.
 10 Now, as I have mentioned, we say that "following",
 11 in the context in which it appears, is intended to
 12 equate to direct or proximate cause.
 13 Mr Edelman suggested that the word "following" and
 14 "resulting from" had only been used interchangeably on
 15 one occasion, on the Welcome page and in the BI insuring
 16 clause. He said that at {Day3/130:1}.
 17 Can I take your Lordship to the contract more
 18 specifically. If you go to {B/10/59} you will see that
 19 "Insuring clause" says:
 20 "For each item in the schedule, we will pay you for
 21 any interruption or interference with the business
 22 resulting from damage to property used by you at the
 23 premises for the purposes of the business ..."
 24 So there the words "resulting from damage" are used.
 25 If you go down on the same page to the basis of

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1 settlement provision, and you go to gross profit, you
 2 will see that under paragraphs 1 and 2, "for reduction
 3 in turnover" and "for increase in cost of working", the
 4 use of the word "following the damage".
 5 So, for example, if you look at 1:
 6 "For reduction in turnover, the sum produced by
 7 applying the rate of gross profit to the amount by which
 8 the turnover during the indemnity period will following
 9 the damage fall short of the standard turnover."
 10 If you go to paragraph 2:
 11 "For increase in cost of working, the additional
 12 expenditure necessarily and reasonably incurred for the
 13 sole purpose of avoiding or diminishing the reduction in
 14 turnover which, but for that expenditure, would have
 15 taken place during the indemnity period following the
 16 damage but not exceeding the total of ..."
 17 What we say, my Lord, is that the word "following",
 18 used there in both contexts of paragraphs 1 and 2,
 19 reflect the same causation requirement as appears in the
 20 main business interruption clause imported by the use of
 21 the words "as a result of" or "resulting from".
 22 The word "following" in the "Claims Basis of
 23 Settlement A -- Gross Profit", is not intended to have
 24 a different or looser causal connecting meaning. It is
 25 the different word of course, but it means the same in

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1 the context.
 2 If you go to page {B/10/60} and you go to "Rent
 3 Receivable" under paragraph 1:
 4 "For loss of rent receivable ... the amount by which
 5 the rent receivable during the indemnity period will,
 6 following the damage, fall short of the standard rent
 7 receivable."
 8 It is the same causal connection link. It is also
 9 the case, as Mr Edelman pointed out, that we rely on
 10 what is said at the Welcome page, which is {B/10/3}.
 11 This is a Welcome page. This is your instant,
 12 et cetera, policy, and it sets out the details of your
 13 insurance contract:
 14 "It must be read [this document] ... any
 15 endorsements, et cetera, must be read together as one
 16 contract as they form your policy. In return for
 17 payment of the premium shown in the schedule we agree to
 18 insure you against ..."
 19 The second bullet point:
 20 "Loss resulting from interruption or interference
 21 with the business following damage."
 22 Just to remind your Lordships about the top of
 23 page 59 {B/10/59}, when it comes to the actual insuring
 24 clause, at the top of 59:
 25 "We will pay you for any interruption or

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1 interference with the business resulting from damage."
 2 There is no intention, my Lords, to have a different
 3 causal requirement. As you see there, the Welcome page
 4 says "following damage"; the top of 59 says "resulting
 5 from damage"; the bases of settlement clauses refer to
 6 "following damage".
 7 These are words that we say are used
 8 interchangeably.
 9 It is also relevant, in our submission, to have
 10 regard to the definition of "consequential loss". The
 11 definition, my Lord, is at page 11 {B/10/11}:
 12 "Consequential loss is defined as loss resulting
 13 from interruption or interference with the business
 14 carried on by you at the premises in consequence of
 15 damage to property used by you at the premises for the
 16 purpose of the business."
 17 Now, the words "resulting from" were not used.
 18 Rather the phrase "in consequence of" was used.
 19 "Resulting from" was in the first line. Perhaps for
 20 elegance of prose it decided, or the person drafting
 21 this, decided not to use the words "resulting from
 22 damage" in the second line having used it in the first
 23 line. I know not.
 24 But if you go to clause 6, the clause with which we
 25 are concerned {B/10/59}, you will see -- perhaps one

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1 should start at the top of page {65}:
 2 "Additional cover provided as standard.
 3 "We will pay you for ", and then go to clause 6:
 4 "Consequential loss as a result of interruption of
 5 or interference with the business carried on by you at
 6 the premises following any notifiable disease."
 7 Now if you transpose the words from the definition
 8 "consequential loss ", there is a certain element of
 9 duplication and superfluity because "consequential loss "
 10 means:
 11 "Loss resulting from interruption of or interference
 12 with the business carried on by you at the premises in
 13 consequence of damage to property", and then one would
 14 continue:
 15 "As a result of interruption of or interference with
 16 the business carried on by you following any notifiable
 17 disease."
 18 Of course as one reads that out one recognises that
 19 if the definition of "consequential loss " was applied
 20 strictly in accordance with its terms clause 6 would
 21 never be triggered, because notifiable disease would
 22 never have caused damage to property. So that can't
 23 have been intended.
 24 So what must have been intended is that some deft
 25 and sensible verbal manipulation should take place such

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1 that "damage" is read as referring to the insured peril .
 2 And indeed that appears to be common ground: FCA's trial
 3 skeleton {1/1/259}.
 4 So on that basis it is clear, we would respectfully
 5 suggest, that the phrase "in consequence of" in the
 6 definition of "consequential loss ", is being used
 7 interchangeably with the word "following" in the disease
 8 clause, MSA 1, clause 6.
 9 So you have there clear indications wherever the
 10 word "following" is used, that it is used in the same
 11 sense as "as a result of" or "resulting from", or "in
 12 consequence of". All three phrases or words have the
 13 same meaning.
 14 The same analysis, my Lords, I should say applies to
 15 Amlin2. I can deal with this I suppose more quickly
 16 because I have just dealt with it in Amlin1. But if you
 17 go to {B/11/44} what is covered is at the top:
 18 "For each item in the schedule we will pay you for
 19 any interruption or interference with the business
 20 resulting from damage to property used by you for the
 21 purposes of the business occurring during the period of
 22 the insurance caused by an insured event ..."
 23 Then you go down to the "Gross Profit ", and you see
 24 under paragraphs 1 and 2 the same use of the words
 25 "following the damage".

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1 We again refer your Lordships to the Welcome page,
 2 which is at page 4, the second bullet point:
 3 "Loss resulting from interruption or interference
 4 with the business following damage."
 5 I will refer you again to the "consequential loss "
 6 definition at page 42 {B/11/42}:
 7 "Loss resulting from interruption ... [et cetera]
 8 carried on by you following damage."
 9 So we say again that these clauses reflect the cover
 10 provided under the main BI provision and use the word or
 11 the term "following" interchangeably or meaning the same
 12 as "resulting from".
 13 So our primary argument on the wording is that
 14 "following" is the same as proximate causation. It is
 15 not a looser causal connection. But if it is a looser
 16 causal connection than proximate cause then we make the
 17 submission that it still doesn't assist the FCA in
 18 displacing the "but for" test.
 19 MR JUSTICE BUTCHER: Even if it does displace the "but for"
 20 test, does it make any difference?
 21 Wouldn't you say that whatever causal significance
 22 you give to the word "following", it is not met by the
 23 disease within the 25-mile radius, because to take --
 24 and I have put the point about but for to you before,
 25 Mr Kealey and I am not going to do it again -- but this

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1 is not a case where you can even say that, that because
 2 of the 25-mile radius that had any specific effect in
 3 relation to the interference with the business.
 4 MR KEALEY: That is exactly what we say. We respectfully
 5 adopt, and your Lordships will see it in QBE's skeleton,
 6 I think it is, I think it is QBE's skeleton, which
 7 really dispatches the point, if I might very
 8 respectfully say so, with huge skill and elegance all at
 9 the same time, QBE's skeleton despatches any idea that
 10 any disease within any particular radius -- I should
 11 mention it is in {1/17/36} -- it despatches any idea
 12 that anything going on, any of these illnesses, whatever
 13 they were, within whatever radius it is, and the
 14 greatest one is a 25-mile radius, had any causative
 15 impact whatsoever on any interruption or interference,
 16 any interruption of or interference with the business of
 17 any insured.
 18 I was going to let Mr Howard make his submissions in
 19 due course, of course. But if one looks at {1/17/37}
 20 for a moment. If we could go to page 37, one should
 21 read really -- one should actually read paragraph 85 of
 22 my learned friends', who acts for QBE, their skeleton.
 23 You should read 85 through to 90.
 24 LORD JUSTICE FLAUX: Why don't we read those to ourselves
 25 over the lunch break. We can break now until 2 o'clock.

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1 How much longer have you got, Mr Kealey?
 2 MR KEALEY: I have got probably another hour or so, I think,
 3 an hour to an hour and a half.
 4 LORD JUSTICE FLAUX: Is that in accordance with the plan or
 5 is there a slip?
 6 MR KEALEY: I think -- that is my allowance.
 7 LORD JUSTICE FLAUX: Right, okay. Fine, jolly good.
 8 2 o'clock then.
 9 MR KEALEY: Thank you, my Lord.
 10 (1.00 pm)
 11 (The short adjournment)
 12 (2.00 pm)
 13 LORD JUSTICE FLAUX: When you are ready, Mr Kealey.
 14 MR KEALEY: Thank you, my Lord.
 15 I am going the move to Amlin, clause 1, which
 16 my Lords you will find in {B/10/65}.
 17 LORD JUSTICE FLAUX: I think you mean clause 3.
 18 MR KEALEY: I hope not.
 19 LORD JUSTICE FLAUX: No, you are quite right. I beg your
 20 pardon, I am looking at the wrong thing.
 21 MR KEALEY: That's lucky, because I was thinking maybe I had
 22 spent the last few days researching the wrong clause.
 23 LORD JUSTICE FLAUX: That would be really unfortunate.
 24 MR KEALEY: Still, I could make it up as I go along.
 25 Clause 1, my Lord, headed "Action of competent

1 authorities":
 2 "Loss resulting from interruption or interference
 3 with the business following action by the police or
 4 other competent local, civil or military authority
 5 following a danger or disturbance in the vicinity of the
 6 premises where access will be prevented ... "
 7 It obviously speaks of authority action where access
 8 will be prevented.
 9 We say the words "will be prevented", the tense used
 10 is simply looking to the result or the effect on the
 11 premises of the authority action. That, we say, is the
 12 only significance of the tense used.
 13 Now, in terms of the necessary result or effect of
 14 the action, it doesn't talk about access being hindered,
 15 it only talks about access being prevented. It doesn't
 16 talk about use being prevented and it doesn't talk about
 17 use being hindered; in fact, it doesn't talk about use
 18 at all. So the only concept in terms of the effect of
 19 the action with which we are concerned is access being
 20 prevented.
 21 If you compare that with clause 7, at page 67 of the
 22 same file {B/10/67}, you will see under the heading
 23 "Prevention of access":
 24 "Consequential loss as a result of damage to
 25 property near the premises which prevents or hinders the

1 use of the premises or access to them will be deemed to
 2 be damaged."
 3 So clause 7 envisages both access being prevented or
 4 hindered, and also use being prevented or hindered. The
 5 parties obviously know the difference between access and
 6 use, and the difference between prevention and
 7 hindrance. Out of the four possibilities envisaged in
 8 clause 7, only one appears in clause 1, namely access
 9 will be prevented.
 10 Therefore, when the parties used only one of the
 11 four possibilities in clause 1, we would respectfully
 12 suggest that that has to be given effect to as a matter
 13 of construction. We make these points, for your
 14 reference, my Lords, at paragraphs 144 to 145 of our
 15 skeleton. You needn't look it up, it is in {1/12/94}.
 16 So we are not talking about hindrance and we are not
 17 talking about use. We say that in that context
 18 "prevention", prevention of access that is, means an
 19 impossibility of gaining physical access to the
 20 premises. That impossibility may be the physical effect
 21 of the authority action or a legal effect, but nothing
 22 short of impossibility will do.
 23 Now, if that provides only limited cover, then so be
 24 it. That is not a reason for expanding the cover. If
 25 a situation arises in which it is made more difficult

1 but not impossible to gain physical access to the
 2 premises, that is not prevention of access, that is
 3 hindrance of access. That is not covered.
 4 If a situation arises in which you can get to the
 5 premises and access them, but you can only use some part
 6 of the premises when you get there, because use of some
 7 part of the premises is impossible when you get there,
 8 that is not prevention of access; that is prevention or
 9 hindrance of use. That is not covered, because nothing
 10 short of prevention of access is.
 11 The fact that loss has to result from interruption
 12 of or interference with the business, with the emphasis
 13 in this context on interference, does not dilute the
 14 meaning of prevention of access. A business may well be
 15 interfered with, and not interrupted, as a result of
 16 prevention of access to its premises. For example,
 17 a business may have several premises. One of those
 18 premises might suffer from enforced prevention of
 19 access. That might interfere with a carrying on by the
 20 insured of its business as a whole. For example, if
 21 access is prevented to warehouse A, containing raw
 22 materials which are required by the factory at location
 23 B, the factory at location B may be interfered with but
 24 not interrupted, because it can still receive some
 25 materials from warehouse C.

1 "Business", I should mention is defined at
 2 {B/10/10}. The business is:
 3 "The business specified in the schedule conducted
 4 solely within the territorial limits ..."
 5 So "Business" there contemplates a business with
 6 just one premises or with several premises. So as
 7 I say, if one of those premises cannot be accessed, in
 8 other words, access is prevented, if it has raw
 9 materials required by the factory at premises B, the
 10 inability to gain access to A and extract raw materials
 11 for the purposes of the business carried on at premises
 12 B will interfere or may interfere with the business, but
 13 will not necessarily interrupt it.
 14 Moreover, perhaps a simpler example, a business to
 15 whose premises access is prevented may nonetheless be
 16 capable of being carried on away from the premises.
 17 A professional services business, for example, may be
 18 able to work from home, but because access to its
 19 premises might be prevented that might affect its
 20 turnover. That is interference with the business as
 21 a result of prevention of access.
 22 Now in our case, my Lords, in our submission, for
 23 much the same reasons as given by Mr Gaisman earlier
 24 yesterday, there was no prevention of access to the
 25 premises even insofar as the lockdown regulations meant

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1 that customers were not allowed to go there.
 2 Mr Gaisman gave the example of the tailor who was
 3 able to conduct her tailoring business from home.
 4 Because the materials and equipment are essential, she
 5 can't conduct her business -- sorry, she can't conduct
 6 her business from home because the materials and
 7 equipment are essential and they are only at the
 8 premises. That business, my Lord -- that is {J/16/4} --
 9 was never required by the regulations to close. It was
 10 always permitted by rule 6(2)(f), always permitted for
 11 the tailor to travel to work because she couldn't
 12 undertake her business at home.
 13 We take into account in making these submissions,
 14 my Lords, that none of the government advice was
 15 mandatory or compulsory. We make that point at
 16 paragraphs 31 and following in our opening skeleton
 17 {I/12/23}. It is worth just reminding ourselves what
 18 Lord Sumption said. What he said was in The Times
 19 newspaper, it is in {I/12/28}, that is paragraph 33.6.
 20 At the foot of the page, at 33.6 he says:
 21 "... in his press conference Boris Johnson purported
 22 to place most citizens under virtual house arrest
 23 through the terms of a press conference and a statement
 24 on the government website said to have 'immediate
 25 effect'. These pronouncements are no doubt valuable as

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1 'advice', even 'strong advice'. But under our
 2 constitution neither has the slightest legal effect
 3 without statutory authority."
 4 Then if you could read the rest of the passage from
 5 his piece at page 29, I would be grateful, my Lord.
 6 {I/12/29}.
 7 My Lords, we say, therefore, for access to be
 8 prevented by any action of any authority within the
 9 meaning of this clause, that means any action, generally
 10 speaking, having the force of law. So nothing done by
 11 any authority by way of advice, instructions or
 12 announcement legally prevented access to any premises.
 13 Now, as you know, the FCA says, see its reply at
 14 paragraph 13.1, that is {A/14/8}, that prohibition does
 15 not require legal force, it requires that something is
 16 forbidden by someone with authority. The FCA continues
 17 and says that the government did prohibit through
 18 guidance and announcements, and would have been so
 19 understood by Mr Gaisman's Jacobean reasonable citizen.
 20 They go so far as to say that:
 21 "All the advice [et cetera] given on 16 March and on
 22 many occasions subsequently amounted for all businesses
 23 to prevention of access to the premises."
 24 That is paragraph 46 of the amended points of claim,
 25 that is {A/2/30}.

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1 Now, we have dealt with that in considerable detail,
 2 mainly by reference to constitutional law and very high
 3 authority, at paragraphs 33 and following of our opening
 4 submissions; that is {I/12/23} and following. It is
 5 worth just remarking that Boris Johnson is not
 6 Maximilien Robespierre or Georges Danton, he is not the
 7 president of the Committee of Public Safety, we don't
 8 live in a dictatorship or a totalitarian regime. The
 9 idea that Boris Johnson, also known as Robespierre, can
 10 issue an instruction without any legal validity or
 11 force, and that is translated as a legal prohibition or
 12 a prohibition by someone with authority, has only to be
 13 stated, we say, to be rejected.
 14 Now, the fact that some members of the citizenry of
 15 this country, if one wants to borrow from the French
 16 revolution, might have been taken in and might have
 17 chosen to live by the Prime Ministerial announcements or
 18 guidance rather than by the regulations is neither here
 19 nor there. There was government guidance that went
 20 beyond the government regulations, and the latter are
 21 binding and the former are not. It is as simple as
 22 that.
 23 If one takes the documents in the bundle, that is
 24 just for your reference {C/2/287}, according to what
 25 Mr Edelman would say, all citizens were prohibited from

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1 exercising more than once a day because the government
2 said so. But actually the regulations said absolutely
3 nothing about how many times a day you could exercise.
4 You can have a look at that, it is regulation 6(2)(f),
5 {1/16/4}.

6 Moving on from the legal perspective, if one is told
7 to close one's business that does not prevent access to
8 the premises. What it does is it prevents the use of
9 the premises for that business. The proprietor could
10 still gain access to the premises, even if there was
11 a complete prohibition or prevention of use from or at
12 those premises for the purposes of conducting the
13 insured business. What you cannot do is transform
14 a prevention of access cover into a prevention of use
15 cover. If, however, we are wrong on that --

16 LORD JUSTICE FLAUX: So you would say this clause doesn't
17 bite at all.

18 MR KEALEY: No, we say that exactly.

19 LORD JUSTICE FLAUX: I mean, if one looks at it and tries to
20 think about what it really directed at, and again it is
21 very much a local cover, isn't it, "danger or
22 disturbance in the vicinity of the premises", so it is
23 looking, for example, if there were, I don't know, an
24 oil spill which caused a danger, and government or the
25 police say you are -- issue instructions, leaving aside

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1 your point about what has as it were legal effect, but
2 assume they issue some form of instructions that is
3 legally binding that requires someone not to go to the
4 premises.

5 MR KEALEY: Correct.

6 LORD JUSTICE FLAUX: Provided that it lasts for at least
7 24 hours, then there is cover.

8 MR KEALEY: That is exactly right, my Lord. So you have
9 a bomb scare, you have a gas leak, you have a terrorist
10 event, you have a water main bursting, a flood, whatever
11 it is.

12 LORD JUSTICE FLAUX: Actually on the face of it, it is
13 fairly narrow cover, isn't it?

14 MR KEALEY: Yes, it is.

15 If we are wrong about all of that, which we are not,
16 but perchance we might be, and this is really
17 a prevention of use cover, despite what it says, then
18 the position becomes much more detailed and complicated,
19 because it will turn upon what the regulations said
20 about different types of business. There were many
21 businesses about which the regulations were silent
22 because they were neither required to close nor
23 expressly essential to remain open. That is very
24 important to us, my Lord, because Amlin1 was
25 predominantly, though not exclusively, used for

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1 businesses of a type which in the event were not
2 required to close; barristers' chambers, solicitors'
3 firms, accountancy firms and the like.

4 The reason we say that clause 1 is actually narrow
5 is because it is to be inferred that Amlin was only
6 prepared to offer limited non-damage cover. This, of
7 course, is an extension to the extension.

8 LORD JUSTICE FLAUX: So in the case of those, as it were,
9 typical insured, you say the FCA doesn't even get to
10 first base.

11 MR KEALEY: Correct, my Lord.

12 LORD JUSTICE FLAUX: Because there is no question of anybody
13 being prevented from going into your chambers or into
14 your solicitor's office or whatever. The fact that you
15 choose not to, and choose to work from home is your
16 choice.

17 MR KEALEY: That's right. Yes. I'm afraid we take a very
18 simple approach to this. When it says access is
19 prevented, we think access is prevented. I can't really
20 say it more than once. You can't gain access.

21 If it is suggested: oh well, maybe you can -- there
22 are instances where -- this is I think one of
23 Mr Edelman's examples: well, you can get into the
24 premises but the fifth floor, for example, is closed.
25 We say that is not prevention of access to the premises,

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1 that is a prevention or hindrance of use of the fifth
2 floor.

3 We give some examples, there are two of them. I am
4 not going to take your Lordship to them now because we
5 don't have the time and you probably, just like I, won't
6 have the interest. But at paragraph 159 of our opening
7 submissions at {1/12/96}, we give two examples which are
8 relevant, including one applying all category five
9 businesses mutatis mutandis.

10 So my Lords, that really deals with the essential
11 kernel of this clause. We can't pass by completely
12 without saying that a danger in the vicinity is
13 something that obviously you have to look at. We say
14 a danger requires an acute risk of harm. I mean, a risk
15 we appreciate or a threat we appreciate. We also
16 recognise that in the vicinity requires that the acute
17 risk of harm be in the neighbourhood of the premises.
18 But in terms of neighbourhood, that is an elastic
19 concept.

20 LORD JUSTICE FLAUX: For example, the example we have looked
21 at or talked about many times, a measles outbreak in the
22 town, and the local authority impose a prevention of
23 access on all the schools in the town or something of
24 that kind, that would probably be a danger in the
25 vicinity of the premises.

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1 MR KEALEY: I think we would accept that, my Lord, yes.
 2 LORD JUSTICE FLAUX: Yes.
 3 MR KEALEY: We would. The fact that it is a disease or an
 4 illness doesn't make any difference.
 5 LORD JUSTICE FLAUX: It doesn't stop it from being a danger.
 6 It is not a disturbance but it is a danger.
 7 MR KEALEY: That is absolutely right, my Lord. Equally, an
 8 outbreak of weasels as opposed to measles could be
 9 a danger, depending on the ferocity of the weasels
 10 concerned.
 11 LORD JUSTICE FLAUX: Not so likely, Mr Kealey.
 12 MR KEALEY: What we can say is set out in our written
 13 submissions at paragraphs 177 to 185, including as to
 14 the causation requirement; in other words, the danger
 15 obviously has to cause the government action, and that
 16 is built into the clause. That, for my Lords'
 17 reference, is to be found at {1/12/100} to page 102.
 18 But we can't go any further into this, my Lords,
 19 because in terms of causation and in terms of whether
 20 this clause responds to anything, further than I have
 21 already indicated, it is a question about dates,
 22 locations and facts as to whether there was a danger in
 23 the vicinity, as to what the vicinity is. The vicinity
 24 of, say, Islington or a road in Islington will probably
 25 occupy really quite a small area compared to the

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1 vicinity of a rural hotel in the middle of
 2 Northumberland. It all depends upon the context in
 3 which the premises are to be located and found.
 4 So I can't say any more than that at the moment.
 5 Certainly if it is suggested that the vicinity means
 6 a place where, if something happens it can reasonably be
 7 expected to have an impact on the premises, that is such
 8 a broad and indefinite and unhelpful definition that one
 9 doesn't really know what to say about it. I suppose the
 10 next time there is an outbreak of some unknown virus in
 11 China, that might be said to be in the vicinity of
 12 Westminster, simply because there might be a reasonable
 13 expectation that if things aren't done properly it could
 14 extend to Westminster. But I don't think that anyone in
 15 his or her right mind or their right mind would say that
 16 what is going on in China really is in the vicinity of
 17 Westminster.
 18 My Lords, I move on swiftly to the question, which
 19 I'm not going to answer because I have answered it
 20 already, as to the meaning of "following", because it
 21 won't have escaped your eagle eyes that the causal
 22 connecting linkage in clause 1 is "following". So you
 23 have to have interruption or interference with business
 24 following action by the police or other competent local,
 25 civil or military authority following a danger.

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1 Now, you have heard our submissions on "following"
 2 in a completely different context. We would say, and
 3 indeed the FCA acknowledges I think, that "following"
 4 denotes some causal connection. But the obvious causal
 5 connection in this context is caused by, in our
 6 respectful submission, where you have interference or
 7 interruption of business following action by the police,
 8 that is not sequential, that means as a result of. So
 9 I can't really take it any further than that.
 10 LORD JUSTICE FLAUX: Well, you say it is a further
 11 indication that "resulting from" and "following" are
 12 used interchangeably in this policy.
 13 MR KEALEY: Yes, my Lord, that's right.
 14 I think I have dealt with Amlin1 now and could
 15 I move on to Amlin2.
 16 I have already dealt with Amlin2 the disease clause,
 17 which is clause 6, because that is the same as Amlin1,
 18 save to one extent. The disease clause, my Lord, is at
 19 {B/11/47}.
 20 I am reminded that the FCA makes one additional
 21 point at paragraph 906 of its trial skeleton, so that is
 22 in {1/1/290}. At paragraph 906, the third line, it is
 23 said:
 24 "There is no requirement in MSAmIn2 for
 25 'interruption or interference' at all."

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1 Unless serious surgery is done to transplant
 2 a modified form of the property damage-related
 3 consequential loss definition, all that is required is
 4 loss following the notifiable disease. That is where it
 5 begins and ends. But if one could just go back, if we
 6 may, to {B/11/47}, "Consequential Loss" is a defined
 7 term. The definition of "Consequential Loss", my Lords,
 8 is at page {B/11/42}. We have looked at this before,
 9 I think, in the earlier policy. "Consequential Loss" is
 10 defined as:
 11 "Loss resulting from interruption of or interference
 12 with the business ..."
 13 To put that definition into the context of clause 6
 14 at page 47, obviously a certain degree of verbal
 15 manipulation is required, because the definition of
 16 "Consequential Loss" is following damage to property,
 17 and of course we are in one of the non-damage
 18 extensions. But there is no doubt about it, my Lords,
 19 that the emboldened "consequential loss" in clause 6 at
 20 page 47 takes its meaning from the definition, as one
 21 would expect, and the definition includes "loss
 22 resulting from interruption of or interference with the
 23 business".
 24 So when the FCA says that there is no requirement in
 25 MSAmIn2 for interruption or interference at all, they

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1 have got it wrong. And when they talk about serious
2 surgery done to transplant a modified form, it is not
3 that serious surgery, all it requires is a little bit of
4 skill and deftness and elegance and we know exactly what
5 it means; it means "loss resulting from interruption of
6 or interference with the business carried on by you at
7 the premises following any occurrence ..." et cetera,
8 et cetera, or following any notifiable disease. It is
9 hardly brain surgery.

10 My Lords, we move on now to "Prevention of access --
11 non-damage" clause, that is number 8. That is at
12 {B/11/48}. You have seen a remarkably similar version
13 to this in the Hiscox NDDA clause. This is the incident
14 within a 1 mile radius resulting in a denial of access
15 or hindrance in access, et cetera.

16 Now, we adopt everything and anything that
17 Mr Gaisman said in relation to this clause,
18 mutatis mutandis. There is only one extra point that
19 I would like to make, which gives us a little more
20 weight, as it were. As you will see, going back to
21 page 46 {B/11/46}, at the top it says:

22 "We will pay you for ..."

23 Then if you go to page {B/11/47} -- well, if you
24 stay on page 46, forgive me, you will see that the words
25 "consequential loss", in bold, are used very frequently

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1 in, for example, clauses 2, 3, and then if one turns the
2 page to {B/11/47}, 4, 6, 7, and in fact later on at
3 page {B/11/48}, 11, 12 and 13. What you find is that
4 clause 8 does not say "consequential loss", so one asks
5 oneself why has the defined term not been used, why have
6 the parties used different language?

7 Well, there are two reasons, as Mr Gaisman said
8 yesterday in relation to a similar point. Instead of
9 covering loss just resulting from, on this occasion it
10 covers only loss resulting solely and directly from.

11 The second reason, which is a more powerful point
12 than Mr Gaisman was able to make, simply because I have
13 better fortune in my wording than he does, is that
14 clause 8 does not cover interruption of or interference
15 with the business, it only covers interruption to the
16 business. So there is no contamination here by any
17 thought of interference with the business. We only have
18 interruption to the business.

19 That reinforces the fact, my Lords, that in this
20 clause the parties said what they meant and meant what
21 they said in referring only to interruption. No room
22 exists for conflating "interruption" with
23 "interference", given the way in which clause 8 has been
24 prepared and drafted.

25 On that note, I will leave this clause and simply

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1 adopt everything that Mr Gaisman said.

2 That leads me naturally, as it were, to Amlin3,
3 which I am going to take very swiftly, perhaps even as
4 swiftly as Mr Edelman took Amlin3. It is at {B/12/1}.

5 LORD JUSTICE FLAUX: Is it used by anyone other than forges?
6 MR KEALEY: Not that I'm aware of, my Lord, no.

7 LORD JUSTICE FLAUX: Does anybody know what happened to
8 forges during lockdown?

9 MR KEALEY: Well, they were businesses that were never
10 required to close.

11 LORD JUSTICE FLAUX: Yes.

12 MR KEALEY: They --

13 LORD JUSTICE FLAUX: Insofar as forges, in one sense, is
14 a rural concept, the requirements for those things which
15 are made in forges continued throughout the lockdown.
16 MR KEALEY: Indeed. It is quite difficult to take your
17 furnace and everything home and start making iron works
18 and weathervanes and goodness knows what from one's
19 drawing room.

20 LORD JUSTICE FLAUX: Horseshoes, agricultural machinery,
21 implements, I suppose. Anyway ...

22 MR KEALEY: Horseshoes are much more farriers. You don't
23 normally go to a forge.

24 LORD JUSTICE FLAUX: No, I suppose that's true.

25 MR KEALEY: Your farrier normally comes to your horse.

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1 LORD JUSTICE FLAUX: Well, you would know.

2 MR KEALEY: Anyway --

3 MR JUSTICE BUTCHER: Doesn't the forge have to make the
4 horseshoe which the farrier then shoes the horse with?

5 MR KEALEY: Not necessarily, no, my Lord. If you ever come
6 across a farrier, you will find that the horseshoes
7 there may be made but normally the farrier will have
8 made them himself. Whether he has a personal forge or
9 not, I don't know, but of course he then heats them up
10 very considerably and moulds them to your horse's hoof
11 and hammers away, and normally gets bitten by the horse,
12 or at least does in my case.

13 Anyway, I should say there are no claims of which
14 Amlin is aware, but that is neither here nor there, you
15 have the wording and --

16 LORD JUSTICE FLAUX: It shows in the wording.

17 MR KEALEY: What I am going to do on this is, I just don't
18 see the profit, with the amount of time that we have, to
19 go into any detail. My written submissions stand. Your
20 Lordships will see them.

21 LORD JUSTICE FLAUX: Unless you want to add anything to your
22 written submissions, we will take them as read,
23 Mr Kealey.

24 MR KEALEY: I'm grateful.

25 I am just going to take your Lordship then -- I am

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1 coming towards the end, but not quite, because I still
2 have some causation issues to take, very shortly, and
3 maybe just a word or two about trends clauses. But I am
4 aware of my learned friends, who are, to use the same
5 analogy, champing at the bit to get into court, as it
6 were, before your Lordship.

7 I don't know whether my Lord, Lord Justice -- you
8 are still there.

9 I can't hear your Lordship. I am trying to lipread
10 and I think I probably have worked it out.

11 LORD JUSTICE FLAUX: I was just saying that I seem to have
12 gone back to the other camera. I have got two cameras
13 and one of them that was working this morning has now
14 stopped working, but not to worry.

15 MR KEALEY: Good. I am going to take causation quite
16 swiftly. I want to take a very simple insuring clause
17 for BI loss. Business interruption loss caused by
18 prevention of access to the premises, caused by public
19 authority action due to an incident within a 1 mile
20 radius.

21 For your reference, it is the joint skeleton,
22 paragraphs 63 to 80, pages 68 to 75. All I want to
23 address is the issue of independent and interdependent
24 causes in that last example -- or that last clause.

25 The authority action and the incident are

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1 interdependent in the sense only that the incident
2 caused the authority action. Without the incident the
3 public authority would not have taken action. The
4 relevant question, however, is whether the loss, that is
5 interruption to or interference with the business
6 resulting from prevention of access, was caused by those
7 interdependent causes; in other words, by their
8 combination.

9 The insuring clause only provides cover where those
10 causes are operating in combination. That is the
11 combination or causal chain which the insurance clause
12 requires. There has to be both an incident and
13 authority action due to the incident for the insuring
14 clause to be triggered. But the mere existence in
15 combination of the incident and the authority action
16 does not necessarily prove that the loss was caused by
17 that combination. If the accident or the incident was
18 the start of another causal chain in which it combined
19 with something else to cause the loss, that something
20 else would be an independent cause of the loss, capable
21 of causing the loss, independently of the combination,
22 which the insuring clause defines as the peril.

23 So if the incident gave rise to public reaction
24 separate and apart from government action, and if the
25 public reaction was such as to cause the same business

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1 interruption loss irrespective of the government action,
2 the loss was not caused by the incident in combination
3 with the government action. That is because that
4 combination doesn't pass the "but for" test.

5 As between insured and insurer, the loss is regarded
6 as caused by a separate combination, the causal chain
7 containing the incident and the public reaction to the
8 incident.

9 So a loss is only caused by interdependent causes
10 when both causes operate in combination and caused the
11 loss. In that situation, both causes satisfy the "but
12 for" test. That was the case in *The B Atlantic*; drugs
13 on the hull of the ship, and the seizure by the customs
14 authorities. There was a combination of causes. There
15 was an interdependence of causes. There was no other
16 potential cause of the loss.

17 Here there is something additional and independent
18 going on from the clause that I have just identified.

19 If you assume that COVID-19 caused customers to stay
20 away, regardless of government action, that is a cause
21 independent of the combination of interdependent causes
22 located in the insured peril. Though the interdependent
23 causes exist and are essential for the insured peril,
24 they simply didn't cause the insured loss, because there
25 was a further independent cause, the operation of which

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1 means that the insured combination, at least pro tanto,
2 failed the "but for" test.

3 Now, it is said against us that that makes no
4 commercial sense.

5 LORD JUSTICE FLAUX: That would, of course, depend on the
6 facts in any given case, would it not?

7 MR KEALEY: That is absolutely right, my Lord. Absolutely
8 right.

9 LORD JUSTICE FLAUX: So all we can do in terms of issues of
10 principle is to determine whether or not, in your
11 example, the fact that customers are staying away as
12 a consequence of COVID-19, irrespective of government
13 advice, would amount to an independent cause.

14 MR KEALEY: Yes. That is correct. That is absolutely
15 right.

16 Don't get me wrong, this can work in favour of the
17 insured. Let's say you have got an access road, and
18 a jogger is stabbed along the side of the road. Let's
19 hope he doesn't die, but anyway, he's stabbed. He
20 doesn't block any road, he happens to be injured by the
21 side of the road, but the police close the road and
22 it is a crime scene for several days. The prevention of
23 access isn't caused by the incident, it is caused by the
24 public authority action. The public authority action
25 was itself caused by the incident, and the insured gets

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1 cover.
 2 That is the sort of case which the clause covers.
 3 The prevention of access is caused by the authority
 4 action due to the incident. There is no other
 5 independent cause operating, so there is nothing to stop
 6 the insured combination, which are interdependent
 7 causes, from passing the "but for" test and being
 8 regarded as the proximate cause of the loss.

9 My Lords, that is Amlin and that is causation.
 10 The last item is trends. I have only got a little
 11 while to go, and I am going to take this quite shortly
 12 because it hasn't detained many of the participants in
 13 these proceedings, but it would be remiss of me not to
 14 say something. I could, if I were lazy, simply refer
 15 your Lordships to our skeleton at paragraphs 255-278,
 16 {1/12/129} to 148. All I will do is emphasise one or
 17 two matters.

18 The trends clauses generally reflect the causal
 19 requirements in the relevant insuring clauses, all of
 20 which require the application of the "but for" test.
 21 The general rule or the general practice that you will
 22 see reflected in all these insurance contracts with
 23 which you are concerned, not just mine, is that the
 24 trends clauses make explicit that which was already
 25 implicit as a matter of law.

1 Secondly, it cannot have been intended that the
 2 policies do not provide any method for quantifying an
 3 insured's loss under the non-damage business
 4 interruption extensions.

5 So even though the trends clauses almost all appear
 6 in the context of business interruption loss caused by
 7 physical damage, it is obvious when one reads the
 8 policies that the trends clauses, likewise the gross
 9 profit or standard turnover or increased expense of
 10 working, all those clauses were intended to apply to
 11 business interruption losses which were provided by
 12 extension beyond the physical damage business
 13 interruption sections of the policy. And the right and
 14 sensible conclusion for the purposes of the application
 15 of the trends clauses, in I think all these policies, is
 16 simply to substitute for the word "damage", where it
 17 appears, "the insured peril", in the context of the
 18 non-damage BI extensions.

19 Thirdly, Mr Edelman made submissions on Day 2 as to
 20 the breadth and meaning of trends clauses, and submitted
 21 that they could only be used to adjust for extraneous
 22 matters unconnected with the cause of the insured peril.
 23 Now, we have addressed that in writing, paragraphs 276
 24 to 278 of our skeleton at {1/12/144}. What I will do is
 25 simply make my submissions by reference to trends

1 clauses in Ecclesiastical type 1.2., which is accepted
 2 by the FCA to apply.

3 Your Lordships will go there, it is in {B/5/39}. If
 4 your Lordships go to the "Standard Revenue", the bottom
 5 left, it means:

6 "The revenue during the period corresponding with
 7 the indemnity period of the 12 months immediately prior
 8 to the date of the damage appropriately adjusted where
 9 the indemnity period exceeds 12 months to which such
 10 adjustments will be made as may be necessary to provide
 11 for the trend of the business and for variations in or
 12 other circumstances affecting the business either before
 13 or after the damage or which would have affected the
 14 business had the damage not occurred so that the figures
 15 thus adjusted shall represent as nearly as may be
 16 reasonably practicable the results which but for the
 17 damage would have been obtained during the relative
 18 period after the damage."

19 My Lords, as I read that, although it sounds
 20 complicated, nothing could be clearer than the objective
 21 or the purpose of the clause. In fact, it is explicit.
 22 Everything is to go into the mix so that upon
 23 adjustment, taking into account everything, the figures
 24 shall represent as nearly as may be reasonably
 25 practicable the results which but for the damage, or in

1 our case but for the insured peril, would have been
 2 obtained during the relative period after the damage.

3 It is as simple as that. These words are plainly
 4 broad enough to encompass the uninsured effects on the
 5 insured's business of the cause or causes of the insured
 6 peril. In other words, not the insured peril, but that
 7 which underlies or underlines the insured peril.

8 As in the Orient-Express in the business
 9 interruption section, where the insured peril was
 10 physical damage, as we know, it takes into account the
 11 cause of the insured peril, the insured event; in other
 12 words, the hurricane.

13 No restrictions whatsoever are placed on the type or
 14 nature of trends, variations or other circumstances.
 15 They can, and not only can but they must be taken into
 16 account so long as they either affected the business or
 17 would have affected the business had the insured peril
 18 not occurred.

19 It does not say on the tin, which Mr Edelman has,
 20 see transcript {Day2/109:17} to line 19, it does not say
 21 on the tin that it is all about the ordinary
 22 vicissitudes of life. That neither appears under the
 23 ingredients nor under any of the health warnings that
 24 might be apparent on the tin.

25 All that the trends clause is concerned about is to

1 make sure that but for the insured peril, everything is
2 taken into account. So that the insured business is put
3 into exactly the same position as it would have been in
4 had the insured peril not occurred.

5 There is absolutely nothing on the tin which says
6 you must not adjust for extraneous matters or you can
7 only adjust for extraneous matters unconnected with the
8 cause of the damage. That is an assertion by the FCA,
9 {Day2/94/1} to 95 and 107, and it has no actual or
10 proper regard to the words used in the trends clauses.

11 Now, Mr Edelman sought to highlight the heading of
12 the "trends clause" in Orient-Express, {Day2/95:1}.
13 None of the Ecclesiastical or for that matter Amlin
14 policies has such a heading, but in any event, the
15 heading cannot be used for reading the actual words
16 used. There is nothing illogical or unintended about
17 adjusting, under the trends clauses, for the underlying
18 cause giving rise to the insured peril. If the
19 underlying cause were intended to be part of the insured
20 peril, as an insured peril on its own, the clause would
21 have said so.

22 All that the trends clauses do is merely give effect
23 to the "but for the insured peril" requirement. That is
24 consistent with the causation requirement in the BI
25 insuring clauses and would be applicable even in the

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1 absence of the trends clauses.

2 In our respectful submission, the approach of the
3 tribunal in the Orient-Express and the approach of
4 Mr Justice Hamblen as then he was, to construing the
5 trends clauses, was undoubtedly correct and should be
6 applied here. It would be wrong to depart from that
7 case on the basis of some general a priori assessment of
8 the sort of factors that properly come into play in
9 a trends clause.

10 My Lords, that is mainly what I want to say. There
11 is just one additional point.

12 Mr Edelman said in the course of his oral
13 submissions, that is {Day3/153:6} to line 7, that the
14 Ecclesiastical type 1.1 policies have no specific trends
15 clause. Perhaps it is easier in this context if
16 I simply take you to our skeleton argument, because we
17 fear that Mr Edelman has fallen into error.

18 If one goes in our skeleton argument to
19 paragraph 261, {1/12/131} this is the easiest way of
20 doing it. Paragraph 261 identifies the lead wording for
21 EIO1.1 is the ME857 Parish Plus wording. It did not
22 contain a trends clause in its traditional form, but it
23 contains wording in the loss of income clause in its
24 "Basis of settlement" section.

25 There you have it, "Loss of income":

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1 "We will pay the difference between the income you
2 would have received during the indemnity period if there
3 had been no damage and the income you actually received
4 during that period ..."

5 In other words, but for the damage.

6 Of the nine other policies included, only one other
7 is in similar form to that wording; the remaining eight
8 are similar to one another and contain a trends clause
9 in its traditional form. Those are addressed in the
10 following section. It is important to note, therefore,
11 that so far as the basis of settlement provisions and
12 trends clauses are concerned, the policies included in
13 EIO type 1.1 are not all similar to the lead policy
14 wording.

15 So we say, returning to the loss of income clause,
16 the underlying wording, in similar terms to that found
17 in a trends clause and requires the court to assess the
18 insured's loss by reference to the income it would have
19 earned but for the damage.

20 That applies, we say in 264, and we go on and do
21 that. It becomes quite detailed, and I am not going to
22 go on any further. Suffice it to say that the absence
23 of a heading called "Trends clause" is neither here nor
24 there.

25 I should mention, in fact, that Riley doesn't even

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1 refer to them all the time as trends clauses, it refers
2 to them by means of a whole variety of other
3 descriptions, and "trends clauses" may be one of them,
4 but they are referred to in Riley as clauses, "other
5 circumstances clauses" is one, and a variety of other
6 titles or descriptions.

7 There is no magic in the words "trends clause",
8 although if they are there, then that is fine, and if
9 they are not there, look at the words actually used, and
10 if the words actually used have the same effect as
11 a traditional trends clause or an effective trends
12 clause, it's all right, you don't have to worry about
13 the absence of the magic words "the trends clause" or
14 "the trends terms" or whatever it is, because they are
15 not really magic words.

16 My Lords, I think I have despatched what I need to
17 despatch.

18 LORD JUSTICE FLAUX: If you think of it in terms of -- I am
19 just looking at this clause on paragraph 261 and going
20 back to the example of reduction in income as a result
21 of concerns about COVID before any government
22 restrictions were imposed. You would say: well, in
23 my Lord's example you have already had a reduction from
24 100 to 80, that in calculating any loss that had been
25 suffered by the church in question, you couldn't start

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1 at 100%, because you would say there is 20% of this that
 2 you would have suffered anyway even if the insured peril
 3 hadn't operated.
 4 MR KEALEY: Correct, my Lord.
 5 LORD JUSTICE FLAUX: I mean in a sense, unless Mr Edelman is
 6 right about his point about "in anticipation of the
 7 hurricane", the one follows from the other, doesn't it?
 8 MR KEALEY: Yes.
 9 LORD JUSTICE FLAUX: Because as in Orient-Express the
 10 hurricane itself is not insured, so here the effects of
 11 COVID, in general terms, are not insured until there is
 12 a restriction or whatever it happens to be.
 13 MR KEALEY: And even then they are not an insured peril in
 14 their own name or in their own right; they are only
 15 a predicate for, say, government action and thereafter
 16 a prevention. In other words, they are a cause of, they
 17 are one of the ingredients in a combination which
 18 amounts to the insured peril.
 19 If COVID-19 or infectious disease were an insured
 20 peril, then that is all you need. It is the government
 21 action which must actually cause the loss, and the
 22 government action must be coming from an insured peril.
 23 You have heard me on this before.
 24 LORD JUSTICE FLAUX: Yes. Okay.
 25 MR KEALEY: My Lords, if I can assist you further please

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1 don't hesitate to cross-examine me, but otherwise I am
 2 departing.
 3 LORD JUSTICE FLAUX: I don't think we need to cross-examine
 4 you any more than we already have done, Mr Kealey.
 5 MR KEALEY: My Lords, my clients are grateful, as am I.
 6 LORD JUSTICE FLAUX: Thank you very much.
 7 Right. Who is next?
 8 MR LOCKEY: Good afternoon, my Lord, I appear for Arch.
 9 LORD JUSTICE FLAUX: Not yet you don't.
 10 There you are. Yes, hello.
 11 (2.57 pm)
 12 Submissions by MR LOCKEY
 13 MR LOCKEY: My Lords, the policy wordings written by Arch
 14 that the court is asked to consider are to be found in
 15 three Arch policies; there is a commercial combined
 16 policy, a retailers policy and an offices and surgeries
 17 policy. They are at bundle B tab 2, tab 23 and tab 24,
 18 but we will only be looking at {B/2/1}, the commercial
 19 combined policy, which has been designated as the lead
 20 Arch1 policy.
 21 The key provisions which fall for consideration at
 22 this hearing, in particular the government and local
 23 authority action extension, are materially the same in
 24 each of the three policies. So I am in the fortunate
 25 position of only having to address your Lordships on

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1 a single relevant extension, and we will do that by
 2 reference to the Arch combined commercial policy. I am
 3 also in the fortunate position that it is common ground
 4 between Arch and the FCA that the trends clause in the
 5 Arch combined commercial policy applies to the relevant
 6 extension, and that similar or equivalent language
 7 requiring "but for" causation, which appears in the
 8 retailers' policy and in the offices and surgeries'
 9 policy, also apply to claims under the extension.
 10 Now, what we have done, and I hope your Lordships
 11 recall reading our skeleton, we have set out three
 12 annexes.
 13 Annex A, which is bundle {I/8/1}, explains our
 14 position on the seven categories of business which have
 15 been referred to by the FCA, and with which your
 16 Lordships are now very familiar. Annex A summarises
 17 evidence which is set out in Ms Valder's witness
 18 statement, she is the head of claims at Arch, which is
 19 at {D/1/1} and which is not challenged by the FCA. That
 20 statement sets out what Arch's interests are in the
 21 various categories of business so far as concerns the
 22 Arch1 policy.
 23 It is fair to say that Arch, in common with other
 24 insurers, has a much greater interest in category 5
 25 than, say, category 1, pubs and clubs and cafes. We are

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1 also interested in particular in category 3, because of
 2 the Arch retail policy in particular, and we are, as
 3 I said, not especially interested in category 1, where
 4 only 0.4% of our policyholders would fall. Therefore,
 5 although the FCA spent a quite a lot of time in their
 6 submissions against Arch developing interesting debates
 7 about take-aways, we are not really interested in
 8 take-aways, at least in any legal sense.
 9 We have no category 6 policies and we have only two
 10 policyholders who fall within category 7, so I am not
 11 going to say much at all about that.
 12 That is annex A to our skeleton; that sets out in
 13 detail our position on the seven categories of business
 14 and I do commend re-reading that document.
 15 Annex B to our skeleton sets out our response to the
 16 FCA's assumed facts scenario under the Arch wording.
 17 Now, your Lordships may recall, when reading the FCA
 18 skeleton, that interspersed in the sections which deal
 19 with each insurer there are assumed fact scenarios.
 20 They appear to have received, so far as I can recall,
 21 virtually no or indeed possibly none, no attention at
 22 all in the FCA's oral submissions. But we set out in
 23 annex B our response to the FCA's assumed facts scenario
 24 under the Arch wording, which appears in the FCA's
 25 skeleton at {I/1/173}. Time will probably not permit me

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1 to go through that example in detail, but I do recommend
2 undertaking the exercise of comparing the assumed fact
3 scenario with Arch's response, because it reveals, we
4 would suggest, a number of errors in the FCA's
5 construction of the relevant clause and also in the
6 application of the relevant principles of causation.

7 If I could start, my Lords, by inviting your
8 Lordships' attention again to the Arch1 policy, the lead
9 policy, {B/2/1}. If we could look at page {B/2/9}
10 first, just to pick up the definitions of "The Business"
11 and "The Premises".

12 Your Lordships will see from the left-hand column
13 towards the foot of the page that "The Business" is
14 defined as:

15 "Activities directly connected with the business
16 described in the statement of fact and specified in the
17 schedule."

18 Then "The Premises" are:

19 "The premises as stated in the statement of fact and
20 specified in the schedule."

21 What is obvious is that we are here concerned, in
22 the government and local authority action extension and
23 indeed with the business interruption provisions
24 generally, we are concerned with business premises. And
25 so far as the government and local authority action

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1 clause is concerned, we are concerned with whether there
2 has been a qualifying prevention of access to business
3 premises.

4 So we have not sought to suggest that where insured
5 premises were required to close under the regulations,
6 or where closure was advised in the days before the
7 regulations, that there was no prevention of access,
8 because the policyholder could have had access to the
9 premises to conduct repairs or to start a different new
10 business from them. We hope we have taken, and
11 I suggest and submit that we have taken, a sensible
12 commercial approach to the construction of the clauses.

13 Could I then move to the business interruption
14 section, which starts at page {B/2/32} of the policy,
15 and if we could turn to the key business interruption
16 insuring provision under Arch1, which is at page
17 {B/2/34}.

18 We are not concerned with the book debts cover,
19 cover 2, which is over the page, we are concerned with
20 the loss of gross profits cover, item 1.

21 It is accepted by the FCA and by Arch that the loss
22 of gross profit cover which you see here is the relevant
23 cover for a claim under the extensions, including the
24 government and local authority action clause, as well as
25 for the main business interruption cover. I will show

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1 you in a moment why that is common ground.

2 You will see from the left-hand column under the
3 heading "Gross Profit" that the indemnity is expressed
4 as follows:

5 "In respect of each item in the schedule, we will
6 indemnify you in respect of any interruption or
7 interference with the business as a result of damage
8 occurring during the period of insurance by

9 "(1) any cause not excluded by the terms of the
10 property damage and/or theft sections of your policy."

11 We will come to look at the definition of "Damage"
12 in a moment.

13 If you look in the right-hand column under the
14 heading above (i) in the right-hand column:

15 "The amount payable will be

16 "(i) in respect of reduction in turnover the sum
17 produced by applying the rate of gross profit to the
18 amount by which due to the damage, the standard turnover
19 exceeds the turnover during the indemnity period."

20 Familiar concepts. And then a provision in relation
21 to:

22 "... increase in cost of working ... [incurred]

23 solely to prevent or limit a reduction in turnover

24 during the indemnity period which but for such

25 additional expenses would have taken place due to the

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1 damage."

2 So, so far as the loss of gross profit cover is
3 concerned, the typical formulation, I would suggest,
4 applying the rate of gross profit to the reduction in
5 turnover which has been caused by the damage.

6 If we turn back to page {B/2/33} you will see the
7 definition of "Damage" in the left-hand column:

8 "Accidental loss or destruction of or damage to
9 property used by you at the premises for the purposes of
10 the business."

11 So we would submit that it is plain that for the
12 purposes of the main BI cover, the insured peril is
13 accidental damage to property used by the policyholder
14 at the premises for the purposes of the business. And
15 in order to be indemnifiable, the loss of gross profit
16 must be caused by such damage.

17 If we could then look at the right-hand column on
18 this page {B/2/33}, you will see the definitions of
19 "Indemnity Period", "Gross Profit", "Rate of Gross
20 Profit" and "Standard Turnover". My Lords, we don't
21 need to focus on the detail of these provisions, which
22 are fairly standard and your Lordships will be very
23 familiar with them.

24 At the foot of the page we find the trends language.
25 We have referred to it as "trends language" because it

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1 doesn't appear set out as a separate clause. As I said
 2 at the beginning of my remarks, it is common ground
 3 between the FCA and Arch that the trends language
 4 applies to the government and local authority action
 5 extension.
 6 You will see:
 7 "Rate of gross profit and standard turnover may be
 8 adjusted to reflect any [and I emphasise 'any'] trends
 9 or circumstances which
 10 "(i) affect the business before or after the damage.
 11 "(ii) [or] would have affected the business had the
 12 damage not occurred."
 13 If we could go to the next page {B/2/34}, in the top
 14 left corner:
 15 "The adjusted figures will represent, as near as
 16 possible, the results which would have been achieved
 17 during the same period had the damage not occurred."
 18 So we would submit that it is clear that the trends
 19 language confirms that "but for" causation is required
 20 by the Arch policy. The adjustment exercise is aimed at
 21 arriving at an answer to the question: what would have
 22 been the financial results for the business during the
 23 indemnity period if the damage had not occurred?
 24 In the case of the main business interruption cover
 25 under this policy, therefore, the enquiry is into what

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1 would have been the results for the business if the
 2 damage to insured property had not been incurred. And
 3 we would respectfully suggest that the analysis is
 4 indistinguishable from that applied in the
 5 Orient-Express case.
 6 And the counterfactual is logically the same, where
 7 any of the business interruption extensions apply,
 8 reading "damage" in the context of the trends language
 9 to mean the operation of the relevant insured peril
 10 under the applicable extension.
 11 If we could go back to page 33 {B/2/33}, just to
 12 pick up on the trends language at the foot of the page,
 13 I emphasise that it is any trends or circumstances, in
 14 our trends language. Plainly, "trends" suggests
 15 patterns, patterns affecting the business, and it is
 16 sensible to look at patterns affecting the business
 17 because the standard turnover will only be a snapshot
 18 for a particular 12-month period, it won't tell you
 19 whether the business was growing or shrinking over
 20 a period of years.
 21 So far as concerns "circumstances", that, we
 22 suggest, plainly means anything else which has an effect
 23 on the business. And "any", I would respectfully
 24 suggest, means "any". It is very difficult, we would
 25 suggest to see why "any circumstances" should be limited

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1 to what Mr Edelman described as ordinary business
 2 vicissitudes, whatever they might be.
 3 Mr Kealey has just made submissions to you on this
 4 point and I am not going to repeat them. Can I just
 5 note that it doesn't even appear to have been argued in
 6 the Orient-Express case that the trends clause in that
 7 case, that the special circumstances were limited to
 8 ordinary business vicissitudes. It doesn't appear to
 9 have been argued that the hurricane was not an ordinary
 10 business vicissitude and could not, for that reason, be
 11 a relevant circumstance.
 12 With that introduction to the indemnity provisions
 13 and the business interruption section in mind, can we
 14 move then to the extensions in the policy, the
 15 extensions to the business interruption provisions.
 16 They are called "clauses" in this policy for some
 17 reason, but they are extensions.
 18 If we could start on bundle {B/2/35} with the stem,
 19 to use Mr Gaisman's helpful words, the stem under the
 20 heading "Clauses" in the right-hand column:
 21 "We will also indemnify you in respect of reduction
 22 in turnover and increase in cost of working as insured
 23 under this section resulting from ..."
 24 It is the words "as insured under this section"
 25 which confirm -- and as I said, this is common ground --

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1 that the loss of gross profits provisions, including the
 2 trends language which we have been looking at, apply as
 3 much to these extensions in the Arch policy as they do
 4 to the main business interruption cover.
 5 I don't really need to say anything more about
 6 "resulting from"; it indicates that the loss of gross
 7 profit must result from the insured peril. In other
 8 words, the insured peril must be a proximate cause of
 9 the loss of gross profit.
 10 I am going to look carefully in a moment at the
 11 government and local authority action extension, which
 12 is the only extension upon which the FCA places
 13 reliance. But before we get to it, it is helpful just
 14 to look at some of the extensions which are not relied
 15 upon, simply to identify the provisions by reference to
 16 which coverage would attach.
 17 The first clause I invite your attention to is
 18 clause 1, "Prevention of Access", and this only applies
 19 in an event of damage to property in the vicinity of the
 20 premises. But the words that I invite your particular
 21 attention to are "hinders or prevents access to the
 22 premises". You will note that this clause includes the
 23 word "hinders".
 24 We then have clause 3, the "Disease, Infestation and
 25 Defective Sanitation" clause. This is not relied on by

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1 the FCA and if I can just say the reason why; it is
 2 because item (c), notifiable human infectious or
 3 contagious disease, the definition of that term contains
 4 a closed list which does not include COVID-19. But that
 5 is not the reason for showing you the clause. The
 6 reason I am showing you the clause is because you will
 7 see that the peril insured against involves the use of
 8 the premises being restricted on the order or advice of
 9 the competent authority. So this is a restriction of
 10 use clause.

11 If we then turn over the page we get to the relevant
 12 provision for the purposes of the FCA's claim {B/2/36},
 13 which is clause 7, "Government or Local Authority
 14 Action".

15 Can I just draw your Lordships' attention very
 16 briefly to the next clause, clause 8, the "Loss of
 17 attraction" clause, the extension at clause 8, which
 18 insures against a loss of gross profit by reason of
 19 reduced customer footfall as a result of damage to the
 20 property in the vicinity of the premises. As we pointed
 21 out in our written skeleton, this provision is relevant
 22 because it shows that the policy, in specific
 23 provisions, does deal with the limited circumstances in
 24 which a loss of customer footfall may give rise to
 25 a business interruption claim under one of the

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1 extensions. We will come to look in due course at
 2 regulation 6, and the suggestion or contention by the
 3 FCA that the movement restrictions which led to
 4 a reduction in customer footfall in some way involves
 5 a prevention of access, and we submit plainly it
 6 doesn't.

7 If we then look, finally, with that rather long
 8 build-up, at the relevant provision, the "Government or
 9 Local Authority Action" provision which your Lordships
 10 will see at the top on the right-hand column. Our case
 11 in a nutshell is that this extension provides that if
 12 the policyholder's premises cannot be accessed for the
 13 purposes of the carrying on of the Business, capital B,
 14 by reason of the order or advice of government or local
 15 authority in response to a qualifying emergency, the
 16 policy will pay for the loss of gross profit caused by
 17 that prevention of access. And we submit that that is
 18 the natural, indeed only reasonable and sensible
 19 construction of the first three lines of the clause.

20 So if we identify what it is that goes to make up
 21 the insured peril, the insured peril requires each of
 22 the following. Firstly, it requires a qualifying
 23 emergency, an emergency likely to endanger life or
 24 property. Second, it requires government or local
 25 authority action or advice, taken in response to the

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1 qualifying emergency. Thirdly, the effect of that
 2 action or advice must be to require or recommend the
 3 prevention of access to the premises.

4 To repeat a point which I think all insurers have
 5 made at various stages, this is obviously not pandemic
 6 cover. The emergency is the first step, but the
 7 emergency obviously doesn't trigger any right to an
 8 indemnity.

9 This extension does not purport to provide, and no
 10 reasonable reader of the clause could conclude that it
 11 provides, cover for loss of gross profit due to an
 12 emergency. The extension provides cover for loss of
 13 gross profit caused by a particular category of
 14 prevention of access to the premises, namely one which
 15 is the result of an order or advice of government or
 16 local authority, which is in turn a response to an
 17 emergency of a particular type.

18 So the insured peril is no more and no less than the
 19 prevention of access to the premises as a result of
 20 governmental action or advice taken in response to
 21 a qualifying emergency.

22 LORD JUSTICE FLAUX: Is that a convenient moment, Mr Lockey?

23 MR LOCKEY: Yes.

24 LORD JUSTICE FLAUX: We will break until 3.30, ten minutes.

25 MR LOCKEY: Very good.

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1 (3.20 pm)

(Short break)

2 (3.30 pm)

3 LORD JUSTICE FLAUX: Right.

4 MR LOCKEY: My Lords, if I can resume.

5 LORD JUSTICE FLAUX: Yes.

6 MR LOCKEY: If we could have the "Government or Local
 7 Authority Action" clause on the screen again {B/2/36}.
 8 There is no dispute about the emergency, and there is no
 9 dispute about the meaning of "actions or advice of a
 10 government or local authority".

11 The dispute at the coverage stage, and it is
 12 the principal dispute, is about the meaning of
 13 "prevention of access to the premises". There is
 14 a limit to how many times one can make the same point.
 15 The premises are defined; they are the location or
 16 location stated in the policy schedule, the place where
 17 the policyholder carries on his business.

18 "Access to the premises" refers to the means by
 19 which entry is made to the premises. That is the
 20 natural meaning of the phrase and it is also essentially
 21 what the FCA says at paragraph 153 of their skeleton.
 22 I will give you the reference but we don't need to look
 23 it up, {1/1/60}.

24 Therefore, reading the clause as a whole, we say
 25

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1 that government action or advice which prevents access
2 to the premises is government action or advice which
3 requires, recommends, that the means of accessing the
4 premises are no longer to be used.

5 In practical terms, therefore, we do submit that
6 nothing short of action or advice, the effect of which
7 is to require or recommend closure of the premises, will
8 suffice to lead to a prevention of access to the
9 premises.

10 If I could make some very simple points to show
11 where we differ from the FCA on the construction of this
12 clause. The points are very straightforward and rather
13 obvious, and to a certain extent they have been made by
14 other insurers in connection with other clauses, but
15 nevertheless they fall to be made by reference to this
16 clause for Arch.

17 The first obvious point is that the clause is
18 concerned with access to the premises. It is not
19 concerned with restrictions on the use which may be made
20 of the premises. That is the first obvious point.

21 The second is that the clause is concerned with
22 prevention of access to the premises, not hindrance of
23 access to the premises. You will have seen the earlier
24 prevention of access clause, clause 1 in the extensions.
25 You have also seen reference in the skeleton arguments

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1 to the difference between "prevention" and "hindrance",
2 when similar words are used in force majeure clauses.

3 LORD JUSTICE FLAUX: You say there is no reason why we
4 shouldn't give effect to those cases like *Tennants v*
5 *Wilson*, and *Westfalische Central-Genossenschaft*, merely
6 because they are dealing with force majeure clauses
7 rather than insurance disputes.

8 MR LOCKEY: Absolutely. They reflect the ordinary use, we
9 would suggest, of "prevention" and "hindrance".

10 LORD JUSTICE FLAUX: Yes.

11 MR LOCKEY: Thirdly, or the next obvious point is that the
12 clause is concerned with "prevention of access to the
13 premises", not prevention of access to the premises or
14 to any part thereof. It is an obvious point, but the
15 FCA argues that the clause does not say complete
16 prevention of access to the premises, but that is
17 obviously what the words used do mean. By the same
18 token, it is impossible to see how "prevention of access
19 to the premises" can be read to mean partial prevention
20 of access, which is another FCA variant. We struggle
21 with the concept of the partial prevention, but in any
22 event that as it were is by-the-by, it is "prevention of
23 access to the premises" which is required.

24 Jumping ahead to the facts slightly, this is
25 a particularly important --

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1 LORD JUSTICE FLAUX: Mr Lockey, just as a matter of
2 presentation, you have sort of disappeared off the right
3 of our screen. I think you need to move very slightly
4 to your right.

5 MR LOCKEY: I do want your Lordship to see me.

6 LORD JUSTICE FLAUX: I know I'm a fine one to talk, but ...

7 MR LOCKEY: My chair has wheels.

8 LORD JUSTICE FLAUX: I hate seeing only a part of your face.

9 MR LOCKEY: That would be too awful. What I was going to
10 say, jumping ahead to the facts, and this is
11 particularly important for category 3 and category 5
12 businesses, this clause is not triggered by restrictions
13 placed on the free movement of those who may use the
14 premises, whether it is the business owner, his or her
15 employees, or his or her customers or clients. Those
16 restrictions, the restrictions which we see in
17 regulation 6, are not directed at the means of accessing
18 the premises and do not prevent access to the premises.

19 Therefore, our position so far as categories 3 and 5
20 are concerned is clear and, we would submit, clearly
21 correct. Those businesses were neither required nor
22 even advised to close, and so there is no question of
23 a prevention of access to the premises.

24 MR JUSTICE BUTCHER: I see the point about categories 3 and
25 5. Is there any tension between the concept of

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1 prevention of access and the idea that this can be due
2 to advice?

3 MR LOCKEY: The fact that it can be due to advice means that
4 the prevention of access doesn't need to be legally or
5 practically impossible. That is what I would suggest is
6 the way of resolving any tension from, or explaining how
7 actions and advice relate to prevention. That is why we
8 don't argue that it must be a physical legal
9 impossibility. It is enough that the advice recommends
10 closure of the premises.

11 MR JUSTICE BUTCHER: But the advice has to recommend total
12 closure, as it were, and it doesn't matter that people
13 could ignore the advice.

14 MR LOCKEY: Exactly. Absolutely. Yes. We don't say that
15 the fact that the advice could be ignored makes
16 a difference. Nor do we say, and having explained
17 already that we accept that it is prevention of access
18 to business premises, we don't go so far as to say that
19 access for the limited purpose, which wouldn't involve
20 a breach of the regulations, for example to switch off
21 the electricity or to do urgent maintenance work during
22 the period when the premises were required to be closed,
23 meant there was no prevention of access. We don't take
24 such an absolutist point. We take the point that it is
25 access to the premises for the purposes of carrying on

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1 the business which must be prevented.
 2 So far as regulation 6 is concerned, this does not
 3 on any view, we would submit, represent or constitute
 4 a prevention of access to the premises of any insured
 5 business. It doesn't actually amount -- and this is
 6 a point I think made by Mr Gaisman -- it doesn't even
 7 amount to a prevention of egress from the uninsured
 8 premises where the owners or employees or customers
 9 live.

10 But the focus of the clause is not on the access of
 11 customers or the access of employees or the access of
 12 the business owners. The FCA's point that the clause
 13 does not say whose access must be prevented is, in our
 14 respectful submission, a non-point. It is addressing
 15 the wrong question. The clause tells us what must be
 16 prevented; it must be access to the premises which must
 17 be prevented. It is not a relevant enquiry to
 18 investigate whose access must be prevented, it is the
 19 access to the premises.

20 Therefore, the answer to the FCA's argument that
 21 advice and social distancing advice, followed by action
 22 placing restrictions on movement constitutes prevention
 23 of access, is that such advice or actions have no effect
 24 on the means of access to the premises, and therefore
 25 does not fall within the scope of our clause.

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1 The FCA also argues --
 2 LORD JUSTICE FLAUX: It might amount to a hindrance of
 3 access. Just to test the point.
 4 MR LOCKEY: Possibly, although --
 5 LORD JUSTICE FLAUX: Going back to Mr Gaisman's point about
 6 queuing outside Waitrose for 45 minutes because you can
 7 only go in one at a time, for these purposes, just
 8 looking at what is hindrance or prevention, you might
 9 say access to the premises there are hindered, but they
 10 are clearly not prevented.
 11 MR LOCKEY: No. And we will come on --
 12 LORD JUSTICE FLAUX: If the shops close because they have
 13 been told to close, then access is prevented by
 14 everybody.
 15 MR LOCKEY: Yes. The FCA also argues that the clause must
 16 be read commercially, and that access and its prevention
 17 has to be assessed by reference to the effects on
 18 revenue, to quote the transcript from {Day3/27:18}.
 19 I don't think we need to turn that up.

20 We respectfully submit that, again, that is looking
 21 at the wrong target. The proper construction of the
 22 clause does not involve any assumption that any
 23 reduction in revenue must be the result of a prevention
 24 of access to the premises. The clause has nothing --
 25 the insured peril is not dependent or driven by revenue

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1 effects on the advice or action; it requires
 2 a particular result or effect of the advice or action.

3 If I could just then run through the various
 4 categories of business and how the clause applies to the
 5 facts. We say that the only advice which meets the
 6 requirement of preventing access to certain types of
 7 premises is the advice given by the Prime Minister on
 8 20 March 2020 and on 23 March 2020, advising or
 9 instructing certain categories of business premises to
 10 be closed. If I can just give you the cross-references,
 11 it is rows 46, 53 and 54 of the table in Agreed Facts 1,
 12 at {C/1/21} and pages 26 to 27. But we don't need to
 13 look those up, you will remember the transcript of the
 14 Prime Minister's speeches.

15 There is one point on the facts where there is
 16 a disagreement as to whether it constitutes relevant
 17 advice and that concerns the Prime Minister's advice on
 18 16 March, 2020, entry 33 at {C/1/12} to page 14. You
 19 will recall this advice, my Lords. This was the advice,
 20 advising people to work from home where possible and not
 21 to go to pubs or clubs. This advice did not, we would
 22 respectfully submit, recommend the closure of any
 23 premises. It is one thing to tell people not to go to
 24 pubs or clubs; it is something else to advise the pubs
 25 and clubs to close. I am not going to give evidence,

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1 but your Lordships may well remember, at least from the
 2 newspapers that week, reporting on the fact that many
 3 pubs and clubs did remain open after the speech on
 4 16 March 2020 and people continued to flock to them all
 5 that week. But on the FCA's case --
 6 LORD JUSTICE FLAUX: I think, from recollection, there was
 7 a sort of booze-fest on the basis that any day now he's
 8 going to close them down, which is what happened.
 9 MR LOCKEY: On the FCA's case there was already a prevention
 10 of access for those pubs and clubs that were benefiting
 11 from the booze-fest.

12 So we don't accept the FCA's case that the social
 13 distancing advice or advice to work from home where
 14 possible given by the Prime Minister on 16 March 2020
 15 constituted advice preventing access to insured
 16 premises. That advice did not recommend closure of
 17 insured premises.

18 But we do accept, as with the advice given on
 19 20 March and on 23 March, that the regulations which
 20 followed hot on the heels of that advice also qualify
 21 as actions preventing access to certain types of
 22 premises. But it is only those regulations which
 23 required closure of premises, or closure of a business
 24 carried on at the premises, which qualify. That is why
 25 we get to the seven categories of business. Perhaps

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1 I could just take this briefly from annex A to our
2 skeleton, which is at {1/8/1}.

3 If we could go over the page {1/8/2}. I apologise
4 that the formatting may cause some difficulty if you are
5 looking at this on a small screen.

6 Category 1, I will take this very quickly because,
7 as I said, although the FCA are obsessed with
8 take-aways, Arch has very few policyholders in
9 category 1, and in our submission the point is extremely
10 straightforward.

11 Access to the premises of a pub, bar, club or
12 restaurant was only prevented by the 20 March advice and
13 then by the 21 March regulations and followed by the
14 26 March regulations, if the pub, bar, club or
15 restaurant did not offer take-away services as part of
16 its Business, with a capital B.

17 For those businesses, we would accept that the
18 effect of the advice and subsequent regulations was that
19 the premises could not be open to customers without the
20 policyholder making a fundamental change to its
21 business; in other words, a different business to that
22 referred to in the schedule and the statement of facts
23 or the proposals. We have not taken the position that
24 where a policyholder in category 1 could start a new
25 business which is permitted, that there is no prevention

1 of access to the premises.

2 So we don't suggest, for example, that
3 Gordon Ramsey's restaurant could re-open as a take-away
4 and therefore there was no relevant prevention of
5 access. But by the same token, we would not accept that
6 there was a prevention of access to McDonalds, which
7 prior to the regulations did have a significant and
8 substantial take-away business.

9 Could I just note that --

10 MR JUSTICE BUTCHER: Does it matter that it was significant
11 and substantial?

12 MR LOCKEY: I think it needs to be more than de minimis.

13 Can I just note in this context that the FCA relies
14 on the duty to mitigate losses and the reasonable
15 precautions provision, but in our submission those
16 provisions have no bearing on what triggers the
17 extension.

18 If I can move quickly on to category 2. We accept
19 that there was a prevention of access to the premises
20 where the premises were used for businesses which would
21 fall within category 2 and which were required to cease
22 those businesses under regulation 2.4 of the 21 March
23 regulations and regulation 4.4 of the 26 March
24 regulations.

25 The FCA suggested there was some sort of

1 inconsistency in our position, even though we have
2 accepted, to all intents and purposes, that category 2
3 involves closure, because they say that under the
4 regulations a theatre could still put on a performance
5 for remote audiences or, perhaps even more bizarrely,
6 could host blood donation sessions. But there is no
7 inconsistency in our position. There is a prevention of
8 access for theatres because neither of those permitted
9 activities would have formed part of the Business,
10 capital B, of a policyholder as set out in the statement
11 of fact.

12 Category 3. Now this is important to Arch, but the
13 FCA skates over it. They skate over category 5, but
14 they also skate over category 3 and it is very important
15 for Arch because 70% of the Arch retail policyholders
16 operate businesses which fall within category 3. And
17 category 3, as you know, is the category of business
18 where there was no requirement to close. On the
19 contrary, they were expressly permitted by the
20 regulations to remain open. That is regulation 5.1 at
21 J16; we don't need to turn it up, you are familiar with
22 it.

23 How, we ask, can there be a relevant prevention of
24 access to the premises of businesses by government
25 action or advice, where the government action or advice

1 is to the effect that such businesses are expressly
2 permitted to remain open? And we submit that the FCA's
3 case is really, really hopeless on this point. It is
4 just difficult to see how it even passes the red face
5 test. Those premises were expressly permitted to remain
6 open.

7 Even if it is relevant, which it is not, to look at
8 the position of employees or customers, the position is
9 equally clear. Regulation 6.2(f) provided that it would
10 be a reasonable excuse for a person to leave the place
11 where they are living to travel for the purposes of work
12 where it was not reasonably possible for that person to
13 work from the place where they were living. That
14 clearly meant that business owners and employees were
15 not prevented from accessing category 3 premises.
16 Equally, customers of category 3 businesses were not
17 prevented from leaving home to shop at category 3
18 premises.

19 The FCA's case appears to boil down to this: that
20 access was prevented merely because it was more
21 expensive for the businesses to operate because of
22 social distancing advice or because footfall was less
23 than usual.

24 And please bear in mind when you look back at the
25 FCA's case on this topic, that the FCA's case on

1 category 3 is not limited to shops in category 3 which
 2 chose to close, it includes all those shops in
 3 category 3 which remained open through the lockdown.
 4 You can see that from their skeleton at section 151.3,
 5 and you will also note it from Ms Mulcahy's oral
 6 submissions on {Day3/34:1}. There is no need to turn
 7 that up.
 8 Category 4, we can deal with that fairly quickly.
 9 We say this is fact-sensitive, and certainly the FCA is
 10 not entitled to any sort of blanket declaration. This
 11 is probably the category into which the somewhat quaint
 12 or homespun example of the tailor might fall, but one
 13 would also include, perhaps more realistically in
 14 category 4, the example of a high street estate agent or
 15 letting agent whose business includes operations carried
 16 on online. The regulations didn't require the estate
 17 agent's premises to be closed if used for those
 18 purposes. Likewise, movement restrictions in regulation
 19 6 would not prohibit attendance at premises by the
 20 estate agent if this was reasonably necessary, for
 21 example to update the website, if that was something
 22 that couldn't be done from home, or to access paper
 23 files.
 24 Category 5, you heard something on this from
 25 Mr Gaisman and also from Mr Kealey. I don't want to

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1 repeat their submissions. Category 5 businesses are of
 2 great importance to Arch as well; it represents 38% of
 3 the total. These businesses were not required or
 4 advised to close, and we submit that there was no
 5 prevention of access to those premises; the premises in
 6 question remained fully accessible throughout.
 7 Category 6 is not relevant to Arch.
 8 Category 7, we have the sum total of two businesses
 9 in category 7, two policies, so I am not going to
 10 develop any submissions on that orally.
 11 Where does that take us? You will see that we have
 12 accepted, and this has been our position prior to this
 13 litigation, we have accepted that where businesses were
 14 advised to close or required to close pursuant to the
 15 regulations, and did close, that the extension has been
 16 triggered for those policyholders. That has not been
 17 disputed or doubted by Arch. On the contrary, that is
 18 the position we have taken.
 19 The point which then arises, which is also a point
 20 which the FCA seeks to deal with by way of these broad
 21 declarations, concerns the calculation of the indemnity
 22 where the clause has been triggered.
 23 Our main point on causation is essentially a point
 24 that goes to the determination of the appropriate
 25 indemnity, rather than to the operation of the insured

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1 peril. Our point is a fairly obvious one and you can
 2 see it coming: a policyholder whose premises have been
 3 closed is not entitled to claim from Arch a loss of
 4 gross profits which the policyholder would not have made
 5 if the premises had remained open.
 6 What the FCA is seeking to do by the broad
 7 declarations sought in these proceedings is to prevent
 8 Arch from adjusting claims on the basis that some or all
 9 of its policyholders under Arch1 would not have realised
 10 their expected profit even if their premises had not
 11 been closed, because of the economic effects of the
 12 pandemic, including the reduction in footfall caused by
 13 the lockdown restrictions, but also by the general fear
 14 of COVID and the general lack of consumer confidence.
 15 None of which comprise the insured peril.
 16 Despite having set out to prove this, we say that
 17 the FCA has singularly failed to prove a rule of law
 18 which makes that argument unavailable to Arch simply as
 19 a matter of principle.
 20 So we say it is a necessary part of the
 21 policyholder's burden of proving that a reduction in
 22 gross profit has been proximately caused by the
 23 operation of the insured peril, to show that the loss
 24 would not have been suffered or, in other words, the
 25 gross profit would have been earned if the insured peril

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1 had not operated. And the fact that the emergency is
 2 the first link in the chain of causation in the insured
 3 peril does not mean that the other effects of the
 4 emergency fall to be excluded from consideration when
 5 examining what would be the position if the insured
 6 peril had not operated. There is no principle of law
 7 which requires the cause of the insured peril to be
 8 ignored.
 9 To pick up a point that was addressed by Mr Kealey
 10 in his submissions, I think on Ecclesiastical1, it is
 11 not entirely clear from the FCA's submissions on the
 12 Arch policy whether the FCA's position on the
 13 counterfactual turns on the fact that the emergency is
 14 one of the stipulated requirements for cover under our
 15 clause, extension 7.
 16 So one could test this point, as indeed Mr Kealey
 17 did, by asking what would be the FCA's position if the
 18 clause had simply stopped at government or local
 19 authority action or advice. So that the clause would
 20 apply, the extension would be operative, irrespective of
 21 what it was that caused the government or local
 22 authority to respond.
 23 If one assumes the facts are the same, that you have
 24 got the emergency, which leads to the government or
 25 local authority action or advice in this case, would the

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1 FCA accept that in those circumstances, where the
2 emergency is not referred to in the insured peril, one
3 could have regard to the economic effects of the
4 emergency when assessing what the results would have
5 been if the premises had not been closed?

6 It seems, certainly from some parts of the FCA's
7 submissions, and Ms Mulcahy's submissions in particular
8 on Arch, that the point is said to arise because
9 extension 7 is a composite peril. But in truth, the
10 point can't depend on whether there is a particular
11 cause identified in the peril or not.

12 It seems to us that the FCA's case has to go
13 further, and it is the heretical proposition that any
14 and all causes of the operation of an insured peril are
15 to be excluded from consideration, whether those causes
16 are identified in the insuring clause or otherwise. And
17 it can't be a point which turns on whether there is
18 a composite insured peril clause or not.

19 We respectfully submit that there is nothing in
20 insurance law or in the law of causation more generally
21 in contract to support that proposition.

22 The second point we make is that "but for" causation
23 is expressly required by the trends language in the lead
24 Arch commercial combined policy, which we looked at
25 a few minutes ago, and similar "but for" language which

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1 is common ground appears in the other two forms of Arch
2 policy. This language requires the making of an
3 assumption that the insured peril has not occurred, but
4 everything else remains the same.

5 So in short, the indemnity, where the extension has
6 been triggered, is to be calculated assuming that the
7 premises had not been a required or advised to close,
8 but everything else remains equal.

9 Can I just deal now with the assertion that it is or
10 may be impossible to distinguish between the loss caused
11 by the closure and loss which was caused by the pandemic
12 or the restrictions on movement, the recession,
13 et cetera.

14 Mr Kealey has addressed this point this morning, and
15 I don't want to go over all of that ground again.

16 What I would draw your attention to are the
17 following practical points. We know that for many
18 businesses they did suffer a reduction in turnover
19 before the closure advice and closure orders were made.
20 It is one of the agreed facts; the reference is
21 paragraph 1 in Agreed Facts 8 at {C/14/2}. Not wishing
22 to go over well trodden turf, on any view the gross
23 profit on that loss of turnover, turnover before the
24 advice and closure orders were made, is not recoverable.
25 The cause of that loss of turnover was the emergency, it

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1 wasn't the subsequent closure advice nor indeed the
2 anticipation of the closure advice or orders.
3 Therefore, the reduced turnover for policyholders in the
4 days and indeed weeks before 20 March will form part of
5 the available evidence that even if the premises had
6 been permitted to remain open after 20 March, the
7 budgeted gross profit would not have been achieved.

8 The second practical point is that we know that many
9 businesses which were permitted to remain open after
10 20 March also suffered a loss of turnover compared to
11 the same period last year, because of the economic
12 recession, the lack of consumer confidence and the
13 restrictions on movement. There is plenty of publicly
14 available data about the drastic reductions in daily
15 travel by bus, train and road during the lockdown period
16 and subsequently. There are reams of economic data
17 published by the ONS and other sources, and this doesn't
18 require the evidence of social scientists or mind
19 readers.

20 Finally, the third practical point is that we know
21 that many businesses which were required to close and
22 which have since reopened, since the relaxation of the
23 regulations, have suffered a loss of turnover for the
24 period following re-opening compared to the same period
25 last year, because of the economic recession and the

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1 lack of consumer confidence.

2 That is not an agreed fact, but anyone who has read
3 the newspapers will know it to be true, at least in
4 general terms. Therefore, the policyholders' results
5 for the period following the end of the closure period
6 will also be available and will assist in showing the
7 extent to which the emergency, and its effects on the
8 economy, rather than the closure, has been responsible
9 for the loss of turnover and the loss of gross profit
10 during the closure period.

11 These are all issues which we say we are entitled to
12 raise in an assessment or adjustment of what, if any,
13 loss of gross profit has been caused by the closure
14 order for any particular insured, and the FCA is simply
15 not entitled to declaratory relief which seeks to rule
16 out this exercise. And the fact that there is an
17 extension sub-limit of €25,000 does not change the legal
18 position.

19 If I can close by making one final point, which is
20 that adjustment exercises are often far from
21 straightforward, because one is seeking to establish
22 hypothetical trading results. The point was made by the
23 tribunal in the award in the Orient-Express, if you just
24 note paragraph 20 of the award, which is set out at
25 {J/106/5}:

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1 "All claims for business interruption raise
 2 hypothetical issues, and whilst the tribunal would
 3 acknowledge that the evaluation required on the facts of
 4 the present dispute is more difficult than most, this
 5 cannot affect what is the correct approach in
 6 principle."
 7 I would respectfully suggest that that is correct.
 8 My Lords, unless I can assist your Lordships any
 9 further, that is all I propose to say on behalf of Arch.
 10 Obviously the written argument is taken as read.
 11 LORD JUSTICE FLAUX: I don't have any questions, Mr Lockey.
 12 Thank you very much.
 13 Who do we have now?
 14 MR ORR: My Lords, can you hear me?
 15 LORD JUSTICE FLAUX: Yes. You might need to turn up your
 16 sound a bit.
 17 (4.03 pm)
 18 Submissions by MR ORR
 19 MR ORR: Is that better?
 20 LORD JUSTICE FLAUX: Yes, that is fine.
 21 MR ORR: I am obliged, my Lords.
 22 My Lords, as you know, I appear for Zurich. There
 23 are two Zurich wordings relied upon by the FCA; they are
 24 both public authority prevention of access clauses.
 25 They each provide cover for loss resulting from

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1 interruption or interference with the insured's business
 2 in consequence of action by the police or other
 3 competent local, civil or military authority following
 4 a danger or disturbance in the vicinity of the premises
 5 whereby access to the premises is prevented.
 6 There are notifiable disease clauses in the Zurich
 7 policies, but these are not alleged by the FCA to be
 8 triggered by the COVID pandemic or the government's
 9 response to that pandemic.
 10 In terms of a route map for my submissions,
 11 I propose first to take your Lordships to the Zurich
 12 policies, and to make certain preliminary points on the
 13 wordings and the policies in which they appear.
 14 Second, I will address the coverage issues between
 15 Zurich and the FCA, focusing in particular on two
 16 issues: first of all, whether the government measures
 17 responding to the COVID-19 pandemic were taken following
 18 a danger in the vicinity of the premises, within the
 19 meaning of the clause; and second, whether the
 20 government measures prevented access to the premises
 21 within the meaning of the clause.
 22 Third, I will address certain discrete issues
 23 concerning causation of loss and trends.
 24 As regards the coverage issues, I should explain
 25 that Zurich does not pursue an argument about the

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1 meaning of "civil authority". It accepts that the term
 2 as used in the Zurich policies encompasses central
 3 government.

4 I will endeavour in my submissions to avoid
 5 duplicating points that have already been made by other
 6 insurers.

7 My Lords, could we start, then, by going to the
 8 Zurich wordings. There are two lead policies; they are
 9 in {B/21/1} and {B/21/1}. The relevant wordings in each
 10 policy are in materially the same terms, but the
 11 policies are different in structure and there are
 12 relevant differences between them to which I should draw
 13 your Lordship's attention.

14 Ms Mulcahy took your Lordships to the combined all
 15 risk policy at {B/21/1}. That comprises a policy
 16 document and a schedule.

17 Can I take your Lordships to the second lead policy,
 18 known as Zurich2, which is in {B/22/1}.

19 If we can start at page 1, this is known as the
 20 Acturis policy and, as its front page indicates, it is
 21 designed for manufacturing businesses.

22 The Contents page identifies the types of cover
 23 provided. Section B, business interruption, begins at
 24 page 28 of the document {B/22/28}.

25 The primary business interruption cover, the

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1 insuring clause for that is at page {B/22/30}, and your
 2 Lordships will see in the middle of the page "Cover":

3 "In the event of any incident occurring during the
 4 period of insurance and in consequence the business
 5 carried on by you at the premises being interrupted or
 6 interfered with then we will pay you ..."

7 "Incident" is defined at page {B/22/28} as being:

8 "Damage to property used by you at the premises for
 9 the purposes of the business."

10 And "Damage" in turn is defined on page {B/22/13}
 11 as:

12 "Physical loss, destruction or damage."

13 If I can take you back to page {B/22/30} your
 14 Lordships will see there that for the basic business
 15 interruption cover are set out at page 30, "Basis of
 16 claim settlement" clauses. There are various types of
 17 bases of claim clauses, but by way of example item 1 is
 18 dealing with gross profit:

19 "The amount payable as indemnity under this item
 20 will be:

21 "(a) in respect of reduction in turnover: the sum
 22 produced by applying the rate of gross profit to the
 23 amount by which the turnover during the indemnity period
 24 falls short of the standard turnover in consequence of
 25 the incident."

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1 The trends clause, as we have been describing it,
2 appears at the top of page {B/22/30} under the heading
3 "Notes to the special definitions". Your Lordships will
4 see:

5 "In respect of the definitions of [among other
6 things] standard turnover, adjustments will be made as
7 may be necessary to provide for the trend of the
8 business and for variations in or other circumstances
9 affecting the business either before or after the
10 incident which would have affected the business had the
11 incident not occurred so that the figures thus adjusted
12 will represent as nearly as may be reasonably
13 practicable the results which but for the incident would
14 have been obtained ..."

15 Your Lordships have seen similar wording in trends
16 clauses in other insurers' policies.

17 Now, my Lords, could we then go to the extensions to
18 the primary business insurance cover, and they begin at
19 page 34. {B/22/34}. All of these are governed by the
20 introductory words, the stem appears towards the top of
21 page 34.

22 "Additional cover extensions applicable to
23 subsection B1 ...

24 "Any loss as insured under this section resulting
25 from interruption of or interference with the business

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1 in consequence of:

2 "(a) damage at any situation or to any property
3 shown below; or

4 "(b) any of the under-noted contingencies
5 " will be deemed to be an incident."

6 So the obvious purpose of that is to deem the
7 contingencies under each extension to be an incident,
8 which then brings it within the scope of the basic
9 business interruption insuring clause and engages the
10 quantification machinery.

11 The first extension is what we call the AOCA
12 extension, the action of competent authorities
13 extension. That is the wording that I have already
14 identified to your Lordships.

15 I should, while I'm on this, just make this point in
16 relation to the indemnity period. The maximum indemnity
17 period is 12 months. "Indemnity Period" is defined on
18 page {B/22/28} towards the bottom of page 28, as being:

19 "The period beginning with the occurrence of the
20 incident and ending not later than the maximum indemnity
21 period thereafter during which the results of the
22 business are affected in consequence of the incident."

23 I draw that to your Lordship's attention because the
24 FCA in their skeleton have taken a bad point against us.
25 They suggest that the reference to 12 months indemnity

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1 period suggests that this clause is contemplating
2 a danger or disturbance which could last for 12 months.
3 That is clearly not the case. The indemnity period is
4 looking to the period during which the business' results
5 are affected, not the period during which the danger or
6 disturbance continues.

7 Other relevant extensions are the loss of attraction
8 extension on page {B/22/35}, which engages damage to
9 property within the vicinity of the premises. Then the
10 notifiable diseases and vermin extension, number 8, on
11 page 35:

12 "Loss resulting from interruption of or interference
13 with the business at the premises resulting from

14 "(a)(i) any occurrence of a notifiable disease at
15 the premises."

16 And so on:

17 "which causes restrictions on the use of the
18 premises on the order or advice of the competent local
19 authority."

20 Importantly, in this policy, if your Lordships go
21 over to page {B/22/36}, towards the top, as part of the
22 notifiable disease extension, your Lordships will see an
23 exclusion:

24 "Excluding:

25 "(i) any infectious diseases which have been

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1 declared as a pandemic by the
2 World Health Organisation."

3 So it is for that reason common ground between us
4 and the FCA that this extension is not engaged.

5 I should also ask your Lordships to note that
6 "Notifiable Disease" is defined; we don't need to go to
7 it, it's at page {B/22/29} and it is a closed list.

8 Then finally on these extensions that are relevant
9 the prevention of access extension on page {B/22/36}
10 number 10, that is engaged where:

11 "Property in the vicinity of the premises is
12 damaged, damage to which will prevent or hinder the use
13 of the premises or access thereto, whether your premises
14 or property therein sustain damage or not ..."

15 Now I don't propose to take your Lordships to
16 Zurich1, because Ms Mulcahy has already done that.
17 That, as I have said, comprises a policy document and
18 a schedule. It is in materially similar terms, except
19 for this: the notifiable disease extension does not
20 include the exclusion that appears in this policy.

21 LORD JUSTICE FLAUX: But it is limited in any event, isn't
22 it, to occurrence at the premises?

23 MR ORR: Yes, it is, my Lord. In both policies, precisely
24 so. Occurrence of a notifiable disease is constrained
25 by that limitation.

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1 LORD JUSTICE FLAUX: Yes.
 2 MR ORR: My Lords, a number of preliminary points fall to be
 3 made at the outset about the provisions I have
 4 identified .
 5 First , the Zurich policies draw a clear distinction
 6 between three matters. First of all , access to the
 7 premises and use of the premises. They also distinguish
 8 between access to the premises being prevented , and
 9 access to the premises being hindered. Thirdly , they
 10 also distinguish between access to the premises being
 11 prevented and use of the premises being hindered or
 12 becoming subject to restrictions .
 13 So these are the same distinctions that have been
 14 made by insurers preceding me.
 15 The second preliminary point is that the phrase
 16 " vicinity " , "in the vicinity of the premises" or "within
 17 the vicinity of the premises" is used not only in the
 18 AOCA extension but also in the loss of attraction and
 19 the prevention of access extensions . We say that this
 20 phrase has the same meaning in each of the extensions ,
 21 namely that it means in the immediate locality of the
 22 premises ; it requires the relevant event to have
 23 occurred within close spatial proximity of the premises ,
 24 ie close to or nearby the premises. That is especially
 25 clear from the prevention of access extension . Unless

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1 the damaged property is near or close to the insured 's
 2 premises , the damage to that property would not or would
 3 be unlikely to prevent or hinder access to the insured 's
 4 premises .
 5 The third preliminary point is that the extensions
 6 to the business interruption cover provide pockets of
 7 cover , each one of which is limited by its own specific
 8 requirements ; there is no blanket coverage , for example ,
 9 in respect of danger or notifiable diseases . That is
 10 particularly apparent from the notifiable diseases
 11 extensions .
 12 The same circumscription of cover is apparent , we
 13 submit , from the AOCA extension. The circumscription
 14 includes the geographical location of the danger or
 15 disturbance ; it must be in the vicinity . Secondly , the
 16 requirement that the danger or disturbance in the
 17 vicinity must cause the action by the relevant
 18 authority , ie the one must follow from the other. And
 19 thirdly , the type of public authority action which
 20 triggers cover , namely that it must prevent access to
 21 the premises .
 22 Those limitations are fundamental , but they are
 23 ignored by the FCA in their arguments.
 24 We also emphasise at this stage that the vicinity
 25 limitation , and accordingly the causal link between the

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1 vicinity and the authority action , is an important
 2 distinction between the Zurich wording and the
 3 government authority clause in Arch's wording.
 4 My final preliminary point is to note the
 5 composition of Zurich's policyholders . As Ms Mulcahy
 6 informed your Lordships , the Zurich1 and 2 wordings were
 7 purchased by insureds falling within all seven
 8 categories of business identified by the FCA , but with
 9 a heavy leaning towards category 5.
 10 Now , in fact 84% of the policies in issue were
 11 purchased by policyholders in category 5. , that is
 12 service businesses and manufacturers. The relevant
 13 figures are in a table at bundle H , tab 44 , page 15 ,
 14 {H/44/15}. That is a schedule that has been compiled by
 15 the FCA on the basis of information from insurers , and
 16 your Lordship will see there on the right-hand side , the
 17 final column , a box containing the various percentages
 18 of policyholders across all Zurich wordings.
 19 Of course none of the business , as your Lordships
 20 know , in category 5 were required to cease or close
 21 their premises .
 22 My Lords , we also echo Mr Kealey's observation that
 23 these policies were not all sold to SMEs. Zurich1
 24 policies , for example , are sold mainly to mid-market
 25 companies with substantial turnovers , and not SMEs.

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1 That is a point that is made in our skeleton at
 2 paragraph 41.
 3 My Lords , can I then turn to the construction
 4 issues .
 5 Before focusing on the main two issues I make this
 6 general point about the AOCA extension. Reading the
 7 clause as a whole , it is clearly directed to occurrence
 8 of a danger or disturbance in the immediate locality of
 9 the insured 's premises which leads to the police or
 10 other relevant authority taking action to prevent access
 11 to the insured 's premises . And it is common ground , as
 12 others have told your Lordships , that "access" in this
 13 clause means the means to approach or enter the
 14 premises . Access is therefore agreed to be a physical
 15 concept ; the clause is concerned with obstruction to the
 16 physical means of the approaching or entering the
 17 premises .
 18 The paradigm case contemplated by the clause is
 19 a bomb scare , a brawl , a serious traffic accident . In
 20 response , the police or other relevant authority takes
 21 action which prevents access to the premises , ie shuts
 22 off access altogether for all purposes , because access
 23 to the premises is unsafe or needs to be kept clear for
 24 the emergency services or for police investigations .
 25 That is the vanilla risk that is insured by this clause .

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1 Now, as explained by Riley on Business Interruption
2 Insurance, in a passage that we have cited in our
3 skeleton in a footnote to paragraph 66, which is at
4 {1/19/33}, this type of extension arose out of terrorist
5 activity in the UK in the 1980s and 1990s. If we could
6 have bundle {1/19/33} up, that may help. Thank you.

7 Now, that terrorist activity, as mentioned in the
8 footnote there, involved not only devices which did
9 explode, but also bomb hoaxes to which the authorities
10 were bound to react by cordoning off areas, thereby
11 preventing access to premises. In the absence of
12 material damage, other business interruption cover would
13 not respond, because ordinary denial of access or loss
14 of attraction cover depends upon such damage, as indeed
15 is the case in the Zurich policies.

16 So the objective intent of the AOCA extension could
17 not be clearer, it contemplates a local kind of incident
18 which causes the police or other relevant authorities to
19 obstruct the physical means of approaching or entering
20 the premises. That, of course, is a very long way from
21 the COVID-19 pandemic and the national measures
22 implemented by the UK Government on a nationwide basis
23 to deal with that pandemic.

24 If one were drafting an extension to apply to the
25 government measures taken in response to the pandemic,

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1 it would certainly not look like the AOCA extension. In
2 our submission, no reasonable reader reading that
3 extension would think that it covered the COVID-19
4 pandemic or the wholly unprecedented measures introduced
5 by the UK Government to deal with the pandemic.

6 By arguing the contrary, the FCA is trying to force
7 a square peg into a round hole. Many of the
8 difficulties encountered in this case, including how
9 does a policyholder prove danger, what expert evidence
10 is required, and the artificiality of the jigsaw
11 argument that is relied upon by the FCA, all stem from
12 the fact that the FCA is attempting to use this clause
13 to achieve an objective it was never intended to
14 achieve.

15 But the FCA nevertheless goes so far as to say that
16 it was contemplated, at least in Zurich2, that the AOCA
17 extension might be triggered by pandemics, as the
18 reasonable reader would understand. In our submission,
19 that is plainly wrong.

20 The FCA seeks to make a virtue of the express
21 exclusion for pandemics in the notifiable diseases
22 extension in Zurich2. Thus, it pleads in its amended
23 particulars of claim, at paragraph 33, and its reply at
24 paragraph 43, that the presence of the pandemic's
25 exclusion in the notifiable diseases extension would be

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1 taken by a reasonable reader to demonstrate a deliberate
2 decision by the draftsman not to exclude pandemics from
3 the scope of the AOCA extension, which should therefore
4 be taken to encompass pandemics. In our submission,
5 that is fallacious reasoning.

6 The true position, the correct position is the
7 opposite. The reasonable reader reading either of the
8 Zurich policies would infer that if cover was afforded
9 by any of the extensions for infectious disease
10 pandemics, it would be found in the notifiable disease
11 extension. But since that extension doesn't apply there
12 is no cover.

13 Zurich doesn't contend that the extensions are
14 mutually exclusive and that there is therefore only one
15 door for any event. The extensions are not mutually
16 exclusive in a strict sense except where they specify
17 otherwise.

18 However, where a particular extension is directed to
19 a particular kind of event, as for example the
20 notifiable diseases extension, it is unlikely that it
21 was intended that the restrictions set out in that
22 extension could be side-stepped by a policyholder's
23 reliance on general wording in another extension.

24 My Lords, there is one further point to make at this
25 stage.

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1 LORD JUSTICE FLAUX: Is that right in this sense, that
2 certainly other insurers, and in relation to other
3 wordings, accepted, I think Mr Kealey accepted that
4 danger in the vicinity of the premises could encompass
5 an occurrence of a disease, say measles or whatever, in
6 the locality, and that the real thrust of the point
7 about this clause is it is dealing with local incidents,
8 local dangers, local disturbances?

9 MR ORR: My Lords, we entirely agree that the real thrust is
10 on the local nature of the incident, of the danger or
11 the disturbance.

12 LORD JUSTICE FLAUX: Yes.

13 MR ORR: We do have a point of construction on danger which
14 I will come to tomorrow. It is a short point. Your
15 Lordships will either be with us or not. It is the one
16 point on which we disagree with Mr Kealey. But
17 otherwise we entirely endorse everything that he has
18 said.

19 LORD JUSTICE FLAUX: The point to my recollection was that
20 you did disagree with Mr Kealey, and I was just trying
21 to test the point. It is probably better to test it in
22 the morning rather than now.

23 MR ORR: Yes, my Lord. I won't take me long. Can I just
24 finish off this point?

25 LORD JUSTICE FLAUX: Yes, sure.

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1 MR ORR: It is this: that having positively relied in its
 2 pleadings upon the notifiable diseases extension in
 3 Zurich2, the FCA now appears in its skeleton to be
 4 trying to distance itself from the other extensions in
 5 the Zurich policies .
 6 We deal with this in paragraphs 61 to 63 of our
 7 skeleton . I don't need to take your Lordships there
 8 now. But our short point is that we submit that the
 9 court can and should have regard to the other extensions
 10 in the Zurich policies as well as the other provisions
 11 of those policies when construing the Zurich wordings.
 12 The two policies before the court are those in tabs
 13 21 and 22 of bundle B. {B/21/1} and {B/22/1}. Those
 14 are the policies that have been selected to be tested in
 15 these proceedings.
 16 The FCA, as I have said, has relied on other
 17 extensions and provisions in those policies to support
 18 its case and we must be entitled to do the same.
 19 So it is not open, in our submission, to the FCA to
 20 say, well, a particular policyholder might not have
 21 purchased a notifiable disease extension, therefore the
 22 court shouldn't take that into account.
 23 My Lord, as I say, we have to construe the policies
 24 that are before the court.
 25 My Lords, is that a convenient moment?

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1 LORD JUSTICE FLAUX: Yes, that is a convenient moment.
 2 Now, is there any need to start earlier tomorrow
 3 morning?
 4 MR ORR: My Lords, I have been asked if we could prevail
 5 upon your Lordships to do so in order to make sure that
 6 insurers do finish tomorrow.
 7 LORD JUSTICE FLAUX: I am conscious also that, you know, you
 8 obviously won't be that long, but we haven't heard from
 9 Mr Howard or Mr Salzedo yet.
 10 MR ORR: No, my Lord. In terms of allotment I have another
 11 hour left .
 12 LORD JUSTICE FLAUX: Yes, okay. In that case subject to
 13 Mr Justice Butcher disagreeing I will say 10.00 am. Are
 14 you happy with that?
 15 MR JUSTICE BUTCHER: Yes, certainly.
 16 MR EDELMAN: My Lord, can I just say something.
 17 We have been faced with 850 pages of written
 18 submissions and a full four days of argument. They have
 19 had their extra half an hour on two days, which is what
 20 we had. Why they should now require four days to reply
 21 to only three days of our submissions in circumstances
 22 where we also had to spend some time, for example, going
 23 through the legislation to explain that to the court,
 24 leaves us in a state of some bemusement.
 25 There has been a good deal of repetition from

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1 insurers on the causation issues . Even though Mr Kealey
 2 was supposed to be dealing exclusively with that we have
 3 been hearing the same argument repeated and developed
 4 and they in a sense have wasted their own time and not
 5 done what they were supposed to do in accordance with
 6 the framework agreement.
 7 It is a matter for the court, but I put down
 8 a marker as to why this extra time is necessary .
 9 MR ORR: My Lords --
 10 LORD JUSTICE FLAUX: Does anybody want to say anything about
 11 that on behalf of insurers before I say anything?
 12 MR ORR: My Lords, could I just say this . Obviously it is
 13 a complex case. Each insurer needs to look at its
 14 individual wording. I certainly will endeavour
 15 overnight to cut out whatever duplication I can. But we
 16 each have to present our own arguments to some extent.
 17 As I say, that is a complex process. We are just asking
 18 for half an hour to ensure that we are able to finish
 19 tomorrow.
 20 LORD JUSTICE FLAUX: Well, two things. First of all,
 21 I detected -- I don't know about Mr Justice Butcher --
 22 I certainly detected less repetition orally than there
 23 was in writing . So I don't think any criticism of
 24 insurers on that basis is warranted.
 25 Secondly, I think from the court's perspective it is

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1 extremely important firstly that everybody who is
 2 separately represented has the opportunity to make the
 3 submissions on behalf of their clients , so that
 4 everybody feels that they have had a fair trial , and
 5 secondly that we complete this case in its totality by
 6 4.30 on Thursday.
 7 Given that there is a risk -- and there has always
 8 been a risk in relation to the timing of the whole
 9 exercise -- it seems to me giving you an extra half an
 10 hour tomorrow morning is probably wise, because once we
 11 get to 4.30 on Thursday requests, for example, to sit
 12 late on Thursday will not be met kindly, and requests to
 13 sit on Friday will be met with the short answer "no",
 14 because I have another hearing on Friday .
 15 So I am very anxious that we do finish this case by
 16 4.30 on Thursday. To ensure that we will sit at
 17 10.00 am tomorrow. We will see you in the morning.
 18 MR EDELMAN: Will my Lord also then be sitting at 10.00 am
 19 on Thursday?
 20 LORD JUSTICE FLAUX: Quite possibly. We will see where we
 21 get to tomorrow, Mr Edelman.
 22 MR EDELMAN: I assume that insurers will take the full day.
 23 Obviously if they don't take a full day and they finish
 24 half an hour early then we won't need to.
 25 LORD JUSTICE FLAUX: We might not need to sit at 10.00 am on

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1 Thursday.
 2 MR EDELMAN: Yes, my Lord, but if they do take a full day,
 3 as I anticipate they will, then we would want our extra
 4 time on Thursday as well. I think there would be some
 5 disquiet if we weren't -- having felt that we were
 6 pressed with our three days to fit everything in, and we
 7 will be pressed on Thursday, that there ought to be at
 8 least equality between the parties, which there will not
 9 be if we don't get the extra half an hour on Thursday.

10 LORD JUSTICE FLAUX: Subject to anything anybody wants to
 11 say at close of business tomorrow, I will be prepared --
 12 and again subject to Mr Justice Butcher -- to sit at
 13 10.00 am on Thursday, to avoid any more forensic
 14 ping-pong about who has had whatever length of time.

15 I understand the point you make, Mr Edelman, but
 16 I must say I am not overimpressed. But we will sit at
 17 10 o'clock both days running as necessary, and we will
 18 see you at 10.00 am tomorrow.

19 (4.36 pm)
 20 (The hearing adjourned until 10.00 am on Wednesday,
 21 29 July 2020)

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