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

Day 6

July 28, 2020

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1 Tuesday, 28 July 2020 1 that the cover has no content if Hiscox is right. 2 (10.00 am) 2 Now I addressed this in my opening remarks. In the 3 Submissions by MR GAISMAN (continued) 3 paradigm situation at which the clause is aimed, the 4 LORD JUSTICE FLAUX: Yes, Mr Gaisman. 4 restaurant closed as a result of food poisoning, the 5 MR GAISMAN: My Lords, a few concluding remarks on 5 suicide in the adjacent building, there will be no 6 6 causation. I have limited time, as Mr Kealey has just difficulty in saying that the restrictions themselves 7 reminded me. 7 were the cause of the loss, and the objection is simply 8 8 chimerical . I don't need to spend any more time on the 9 counterfactual. The position is set out in 9 Then it is said, thirdly, that there is a problem of 10 paragraphs 330 and 332 of our skeleton and your 10 artificiality . Your Lordships again know the submission 11 Lordships have read it; your Lordships know where the 11 that I am going to make here. 12 12 battle lines are drawn. But the question I want to ask The insured peril is removed and, depending on the 13 is this: what is actually the justification for the 13 facts, that may lead to an artificial hypothetical. In FCA's case? 14 14 a professional negligence case where the court, having 15 My learned friend Mr Kealey on Day 4 dealt with some 15 anathematised the serial negligence and incompetence of 16 16 of the purported justifications $% \left(1\right) =\left(1\right) \left(1\right) +\left(1\right) \left(1\right)$ put forward, and I have the hapless solicitor or accountant, then reinvents the 17 a few supplementary points. 17 world in which, impossibly, one considers the 18 The first one I am going to call the trade off. One 18 counterfactual of him having competently done the very 19 question which the FCA has completely failed to grapple 19 job which he has failed to do competently. 20 20 with is this: since these are composite perils, with That is simply an exercise of causation that is so 21 several defined steps all of which have to be satisfied, 21 natural that one hardly considers it. In a sense it's 22 22 including their causal relations, in other words, quite artificial . But as my learned friend Mr Kealey said, 23 limited perils, why, objectively, would the parties have 23 what could be more artificial than imagining a country without COVID or a world without COVID? Counterfactuals 24 24 agreed carefully to circumscribe the insured peril as 25 25 they have, only to throw away the rule book by allowing in one sense are always artificial , they require an 1 the causation exercise dramatically to widen it? 1 artifice . They require one to imagine something that 2 This question, as I say, is not even identified by 2 never happened and, given what did happen, never could 3 FCA, let alone answered. At least, and to its credit, 3 have happened. But in any event, if it is relevant, for 4 4 the Hiscox interveners see the need to proffer some reasons again which your Lordships are familiar with, we 5 justification . The trouble is it's no justification at 5 say that the counterfactual proposed by Hiscox is far 6 all . In their skeleton at paragraph 90, $\{1/3/32\}$ which 6 from artificial; it happened in Sweden, it happened 7 I understand my Lord, Lord Justice Flaux may not be able 7 previously in the case of prior pandemics in the UK, and 8 to access, but -- I'm sorry, your Lordship's mute is on. 8 it might have happened here in relation to COVID-19 had 9 9 LORD JUSTICE FLAUX: I've got it in hard copy. Lord Sumption won the day in the public arena. We have 10 10 dealt with these points in our joint skeleton on MR GAISMAN: I'm not sure your Lordship really needs it. 11 11 What they say is, it won't take long: causation in paragraph 25. 12 "That is the trade off the insurer must make in 12 Now another alleged justification that I have 13 return for forcing the insured to prove a long chain of 13 already covered in my opening remarks is the alleged 14 matters and the causal relationship between each of 14 difficulty of proof point and, again, I don't need to go 15 them. The insurer can ask the insured to prove many 15 back through it. Even if it were made out, it is no 16 16 things but then, when considering whether 'but for' sufficient basis to rewrite contracts or ignore legal 17 causation is established those matters must all be 17 principle. 18 stripped away in the counterfactual." 18 But may I just dwell on one point, my Lords. Anyone 19 With deference to my learned friend Mr Lynch and 19 who has had anything to do with business insurance knows

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how complicated it can be when it comes to

quantification of indemnity. We gave a reference in

Interruption Insurance: unhelpfully we didn't include

the citation, and I am not asking your Lordships to look

at it now because I haven't got time. It is $\{J/154/43\}$.

footnote 364 to chapter 14 of Riley on Business

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however often I re-read that short paragraph, I can

discern the operation of no known legal principle to

So much for the trade off. The next justification

is alleged absurdity and I have dealt with this, because

the charge that is made, it is an incorrect charge, is

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underpin or justify that suggestion.

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

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

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

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

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

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

22 That brings me on --

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

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

MR GAISMAN: My Lord, I didn't quite say that. What I said was that if the elements of the peril are established and the assured establishes a prima facie case that the loss was caused by those insured perils, then the burden to say, oh, something else, would have shifted,

I certainly don't say that the burden is shifted to the insurer merely by the insured establishing the operation

of an insured peril, because causation is always for the

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

according to orthodox principles .

Mr Edelman, on behalf of the FCA, is inviting your Lordships to undertake some unorthodox and heretical procedure and he has no justification for doing so, and it is the justifications that I am dealing with at the moment.

That takes me on almost to my last substantive topic, which is the question of divisible loss which I said I wanted to come back to. It is inherent, although implicit, in the FCA's case that everything is indivisible, that the different elements of loss cannot be separated. We say there is simply no warrant for treating the loss as indivisible as a matter of fact. Quite apart from anything else, there is no evidence that it is.

It can't simply be asserted, it would have to be proved. If my learned friend wants to argue that a particular legal result follows from a particular fact, the first thing he needs to do is to prove the fact.

Now, I mentioned in my opening remarks the case of Rahman v Arearose, $\{K/99/1\}$ and it is instructive to spend a minute on that. That was a case, as your Lordships may remember, where a man was assaulted in a fast food restaurant and he suffered serious injuries .

One of those injuries was to his eye, and due to negligence in a subsequent hospital procedure he lost the sight in that eye. He also developed complicated psychological disabilities. He sued both his employer and the hospital, and the question was which defendant was responsible for what.

It is instructive to go to paragraph 6 of the judgment on page $\{K/99/6\}$, where Lord Justice Laws sets out the trial judge, Mr Justice Rougier's findings . Your Lordship sees that between letters D and G. The detail doesn't matter, but what the learned judge, Mr Justice Rougier, says at G is this:

"The effects of the two separate incidents, [namely the incident in the fast food restaurant and the incident at the hospital] which have led to the condition I have outlined with entwined around each other like ivy strands round a tree. The court is faced with the daunting task of trying to disentangle various causes and effects and to determine at which door they are to be laid."

That being obviously a case of two wrongdoers. Mr Justice Rougier didn't give up, he reached an apportionment. The Court of Appeal disagreed with the apportionment, but reached its own apportionment. It is in that context that the line of Lord Justice Laws that

we quote in our skeleton, at paragraph 19 of the judgment, the line that loss qualifies as indivisible only where there is "simply no rational basis for an objective apportionment of causative responsibility for objective responsible for the injury between the tortfeasors".

Therefore, indivisible loss is matter of last resort, and we are not in any such territory in this case.

Now, for example, it is perfectly possible to conceive, over an episode that has lasted already for several months, that different loss will be capable of being analysed as being caused by different things at different times. What could be more normal than that?

Now, my learned friend half recognises the possibility of some form of temporal division , because in the discussion with your Lordships on Day 3 about the approaching hurricane , he recognised that the reduction in turnover before the hurricane has finally hit is not insured , although he argued that it could somehow be recovered in different ways. All I think I need to do, whether that is in advance on the skeleton or not doesn't matter, but can I show your Lordship , the last thing I want to show your Lordship of my learned friend's skeleton is paragraph 276.1 is $\{I/1/108\}$ in my

learned friend's skeleton argument. 276.1. clauses. We have explained how these work in our 2 Now, this is a most peculiar paragraph. I may well 2 skeleton argument, we have explained how they fit in 3 not have understood it . The language has that tortured 3 with the general law, and we have explained in both that 4 quality which is more eloquent than anything I could 4 and the joint skeleton how the Orient-Express is right 5 5 say, so this is by way of illustration . My learned both on the general law and the trends clauses, it 6 friend says: 6 having considered both. 7 7 "If, in a public authority clause, the trigger I have only got to mention I think, and only 8 8 public authority action is preceded by a downturn or briefly, the FCA's big point on some of our trends q q closure (eg due to voluntary behaviour or government clauses, it is in a minority of the wordings in fact, 1410 10 advice [et cetera]) the government action ..." out of 40, which don't mention restrictions, but do 11 Then we have a (i) and a (ii), I'm not quite sure if 11 mention damage. 12 they are the same thing or different things: 12 It is hard to think of a clearer case of what, in 13 13 "... (i) is the sole cause of any additional the high and far off times, we were allowed to call 14 14 interference, interruption or loss not suffered prior to a falsa demonstratio, but I am going to pose a question 15 the action, but in any case [and one takes a deep breath 15 that we pose in our skeleton at paragraph 397, for which 16 16 here (ii) takes over or encompasses/absorbs (as an I am still waiting for an answer from the FCA, and it is 17 interlinked and so not truly concurrent cause) the prior 17 this: what possible reason could there be why the 18 disease-related causes as the sole proximate and 'but 18 parties would have wanted the trends clause to apply 19 for 'cause of interference, interruption or loss." 19 differently to claims involving material damage and 20 Now, I think I haven't really got time to do more 20 claims involving non-damage business interruption? 91 than leave that paragraph with your Lordships, but 21 Because unless there is an answer to that question, this 22 22 either what is being said is that one ignores temporal is a non-point. 23 23 To borrow a phrase of my learned friends, I would divisibility and so the interruption has retrospective 24 24 ask the FCA to consider its position, because these effect to cover the previous, as it were, approaching 25 hurricane, or alternatively, as we interpret it, in 25 clauses can work both ways, and whilst the FCA submits 13 1 a case where the necessary causal link between the 1 in a fit of literalism that the clause doesn't apply to 2 2 public authority action and the interruption cannot be a non-damage case unless it mentions restriction, what 3 shown because the interruption preceded the public 3 will it say to an insured restaurant, in a paradigm case 4 authority action. But what the FCA is doing is 4 in six months' time, that wishes to rely in its claim 5 5 retrospectively interposing a causal link which never against one or other of the insurers on a clause which 6 existed. Either way, my Lords, the FCA is, with 6 only mentions damage, which wishes to rely upon the fact 7 respect, in a world of its own. 7 that it hired a star chef and business was rising by the 8 8 Two more topics, one of which --9 LORD JUSTICE FLAUX: Speaking for myself, Mr Gaisman, if the 9 This is a terrible point, and the fact that the same 10 business has closed before the public authority action, 10 mistake occurs not only in some of our clauses but in 11 I just don't understand how coverage gets off the ground 11 those of several other insurers shows what a bad point 12 at all, either as a matter of causation or in any other 12 That is all I want to say about trends clauses; the 13 13 way, because the interruption simply is not caused by, whole position is set out in the skeleton. 14 14 doesn't follow or result from, or whatever the linking 15 15 word is, any action of the public authority. My Lord, that leaves me two minutes, which I am not 16 MR JUSTICE BUTCHER: Mr Gaisman, you are on mute, so I have 16 going to occupy, on "solely and directly". As 17 17 missed the last sentence at least. your Lordship knows, those words are in the stem. 18 MR GAISMAN: Yes. But if one looks at (ii), what appears to 18 I made one submission about the relationship between the 19 being said is that once the interruption happens it sort 19 interruption and the loss, and there having to be 20 20 of takes over. But even though -- I am not going to a relationship of sole cause. There are other points

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and they are contained in our skeleton in paragraphs 421

to 439. If one could imagine a situation in which your

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Lordships have nothing better to do, I would ask

your Lordships to read those for yourselves.

Thank you, my Lords.

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spend my precious last few minutes. There are some

your Lordship, even if they are in one's opponent's

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Can I then say something very quickly about trends

paragraphs which it is only necessary to read to

skeleton argument.

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(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	MSAmlin. 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 $12~\{I/12/1\}$. We begin in
22	relation to Ecclesiastical EIO at page $\{I/12/38\}$.
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.

LORD JUSTICE FLAUX: Yes, they are now, thank you. MR KEALEY: At page 38 you will see the beginning of the wording, and it may be more convenient to turn to one of these wordings which is in $\{B/4/1\}$.

The loss of income section, my Lords, is at page 42. $\{B/4/42\}$. You will want to turn to page $\{B/4/45\}$ for the relevant coverage provision. What you see there, my Lords, at the top of the page is that this is an

extension:

"The insurance by this section is extended to cover loss resulting from interruption of or interference with your usual activities as a result of the following."

Then if you look at the left-hand column you will see "What is covered" and in the right-hand column "What is not covered".

I should mention, my Lords, that in some of the policies what you find is that these columns don't appear, but what you find is what is covered is then followed by an exclusion, excluding that which appears on the right-hand side of this page. It is item 3, my Lords, "Prevention of access -- Non-damage". This covers:

"Access to or use of the premises being prevented or hindered by

"(a) any action of government, police or a local 18

authority due to an emergency which could endanger human life or neighbouring property."

If you look on the right-hand side of the page to see what is not covered, you will see that item (iii), what is not covered, is:

"Closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease (or the discovery of an organism resulting in or likely to result in the occurrence of an infectious disease) food poisoning, defective drains or other sanitary arrangements."

So you have on the left that which is covered, and on the right that which is carved out of that which is covered.

Now, for better or for worse, we have in our skeleton argument described clause 3 in the right-hand column as the infectious disease carve out. That is a misnomer because it doesn't just carve out infectious diseases, it carves out food poisoning, defective drains or other sanitary arrangements, and also closure or restriction in the use of the premises due to vermin and a few other items as well. But I hope you will forgive us if we continue to use the term "infectious disease carve out".

My Lords, the first point that we make is that you can't construe the left and the right-hand columns on their own, you also have to construe them in the context in which they appear in the contract. In this context could I take you to $\{B/4/46\}$, where you have the specified disease, murder, food poisoning, defective sanitation and vermin coverage clause. If you have a look at the left-hand column of page 46, you will see that the specified diseases are identified.

Now, most of those specified diseases, I should mention to your Lordship, are in the list of notifiable diseases scheduled to the Health Protection

Notifications Regulations of 2010; most of them, but not all of them. If I could tell your Lordships which are not, they are dysentery, legionellosis, leptospirosis, meningitis, although a form of meningitis is in the notifiable disease list attached to the regulations of 2010, ophthalmia relapsing fever and viral hepatitis.

All the rest, my Lords, are notifiable diseases in the list; and you will find that list, incidentally, at bundle { J/11/8}.

The list also, my Lord, includes some diseases which are not included in the list attached to the notifiable diseases regulations; those include dysentery, meningitis, relapsing fever and scarlet fever.

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But if your Lordships turn to page $\{B/4/47\}$, in relation to specified diseases, and other matters, you will see what is covered. At the top of page 47 on the left-hand column you will see that what is covered is:

"Any occurrence of a specified disease [as we have just seen] being contracted by a person at the premises or within a radius of 25 miles of the premises."

Then if you could go just after (d):

"Which causes restrictions in the use of the premises on the order or advice of the competent local authority."

So we have in the specified disease clause, clause 6, a clause which provides coverage in respect of certain specified diseases in relation to occurrences contracted by persons not only at the premises but also within a radius of 25 miles of the premises.

We also know that it is not just any occurrence which is covered, it has to be an occurrence, as the clause goes on to say, "which causes restrictions in the use of the premises on the order or advice of the competent local authority".

Just so that you have it well in mind, those last words are not an exact but an almost exact echo of similar words in the infectious disease carve out at page $\{B/4/45\}$. Those last words were:

"Which causes restrictions in the use of the premises on the order or advice of the competent local authority ."

And the words at page 45 in clause 3 are:

"Closure or restriction in the use of the premises due to the order or advice of the competent local authority as a result of an occurrence of an infectious disease ..." et cetera.

There is a clear echo, as it were, between the infectious disease carve out and clause 6, the specified

Now turning back to the prevention of access - non-damage clause, my Lords, I should just tell you that the ordinary principles of construction apply. You don't treat the clause which is under the heading "What is not covered" or even if it were to be described as an exclusion clause, you don't treat that clause as an exemption clause, exempting an insurer from liability for negligence or something like that. The clause on the right, under the column on the right, is there, as much as is the clause on the left, to define and circumscribe the scope of the coverage under the policy.

LORD JUSTICE FLAUX: Delineation of cover.

MR KEALEY: Delineation of cover. I am not going to take

your Lordship to the cases because time doesn't permit,

and you will see an excellent analysis by Mr Peter MacDonald Eggers, sitting as a Deputy High Court Judge in Crowden v QBE, which is at $\{J/135/13\}$, paragraphs 63 to 65. Delineation of cover.

but Impact Funding, Lords Hodge and Toulson, {J/132/7},

Now, the Ecclesiastical says, relying upon the column of what is not covered in conjunction with the specified disease clause, that that which has been carved out is closure or restriction in the use of the premises due to the order or advice of the competent local authority where the words "competent local authority" in that context, and also in the context of clause 6, means the authority with competence in the relevant locality.

We say that for a variety of what we consider, in our respectful submission, to be very good reasons. But before going there I should mention that the FCA suggests that our preferred meaning is, in their words, very challenging ". That is in the FCA skeleton at paragraph 531, which is $\{I/1/185\}$.

But in our respectful submission, the challenge that Ecclesiastical faces is more apparent than real. That doesn't make it not challenging, but it is a challenge which is and readily should be overcome. We say this for the following very simple reasons.

First, it is perfectly obvious that there was an infectious disease carve out from the prevention of access coverage, and the types of infectious diseases to be carved out were unrestricted; they were any and all infectious diseases. It is also apparent that there is a clear connection between the infectious disease carve out in clause 3 and the specified disease coverage in clause 6.

Clause 6, as I have mentioned before, contains an almost but not quite verbatim rendition of the same words in the infectious disease carve out: closure or restriction in the use of the premises due to the order or advice of the competent local authority. So it is apparent that it was recognised that the coverage provision in is clause 3 was wide enough, unless qualified, to include access to or use of premises being prevented or hindered by action due to any infectious disease emergency.

But it is, we say, clearly to be implied that: firstly, there was no wish on Ecclesiastical 's part to provide such wide infectious disease coverage, hence the carve out; and secondly, that there was a wish and intention on the part of Ecclesiastical to provide some infectious disease cover, but limited to those diseases identified in clause 6 and within the circumscriptions

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

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

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

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

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

reasonably available to the parties .

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

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

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

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

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

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

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

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

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

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

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

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

Then 55:

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

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

So what is the position of the legislative 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 two matters that $\ensuremath{\text{I}}$ need to take your Lordships 5 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 $\{J/8/1\}$. q q As you look at that Act, my Lords, can I just remind 10 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: 11 12 12 "Access to or use of the premises being prevented or 13 13 hindered by ... 14 14 "Any action of government, police or a local 15 authority due to an emergency which could endanger human 15 16 16 life or neighbouring property." 17 If you go to the Civil Contingencies Act 2004, to 17 18 page 1, you will see straightaway that in relation to 18 19 19 local arrangements for civil protection -- not directly 20 20 relevant, but it doesn't matter -- the meaning of 91 "emergency" means an event or situation which threatens 21 22 22 serious damage to human welfare in a place in the United 23 23 Kingdom. 24 24 Then subparagraph 2: 25 "For the purposes of subsection 1(a), an event or 25 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 10 11 emergency regulations ". Firstly, subsection (1): 11 12 "Her Majesty may by order in council make emergency 12 13 13 regulations if satisfied that the condition of 14 section 21 are satisfied ." 14 15 15 A senior minister of the Crown may similarly do so. 16 my Lords, and that includes the Prime Minister and any 16 17 of Her Majesty's principal secretaries of State; that is 17 18 18 in subsection (3). 19 Regulations under subsection (5) must be prefaced by 19 20 a statement by the person making the regulations : 20 21 "(a) specifying the nature of the emergency in 21 22 respect of which the regulations are made, and. 22

provision which is appropriate for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency in respect of which the regulations are made."

Then turning the page $\{J/8/14\}$ the conditions are set out in section 21 and the scope of the emergency regulations are set out in section 22.

If one looks at sub-section (2):

- "... emergency regulations may make any provision which the person making the regulations is satisfied is appropriate for the purpose of:
 - "(a) protecting human life, health or safety.
- "(b) treating human illness or injury."

Further, my Lords, under the Public Health (Control of Disease) Act 1984, section 45C, the relevant minister may by regulations make provisions to protect against, control or provide a public health response to the incidence or spread of infection . If your Lordships could be taken to $\{J/5.1/15\}$ you will see at section 45C.

(1) The appropriate minister may by regulations make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales ...

- (2) The power ... may be exercised:
- "(a) in relation to infection or contamination generally or in relation to particular forms of infection or contamination, and
- (b) so as to make provision of a general nature, to make contingent provision or to make specific provision in response to a particular set of circumstances."

Now it is apparent, my Lords, from that legislation -- that is the 1984 Act and I'm not going to take you through it, you can see it at paragraph 67.4 of our skeleton -- that the architecture of the legislation contemplates action by central government, local government and other authorised persons, for example Justices of the Peace.

As our skeleton indicates at paragraph 95.3, the legal background shows, firstly, it has never been the case that the only authority competent to act in relation to public health protection, including in relation to infectious diseases, is a local government authority. Secondly, the power to make the most intrusive and invasive orders in fact lies with the courts, particularly magistrates, and thirdly, central government has always been an authority with competence to act in relation to local and indeed wider public health matters and national public health matters.

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"(ii) is satisfied that the regulations contain only

"(b) declaring that the person making the

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regulations ...

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

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

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

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

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

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

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

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

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

LORD JUSTICE FLAUX: Just following the point through,
Mr Kealey. If COVID-19 was a specified disease in
clause 6, you would accept that the restrictions which
are being imposed by the government, for example closing
churches, would fall within the definition "restrictions
in the use of the premises on the order or advice of the
competent local authority". Because, in context, the
authority which was competent to impose such
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 IUSTICE FLAUX: The irony is of course the FCA will

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

a competent local authority .

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

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

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

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

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

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

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

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

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

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

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

"44.5 not of themselves orders or advice of a competent local authority for the purposes of (but only for the purposes of) the exclusion in Ecclesiastical 1.1 and 1.2, where the words 'competent local authority' are used in the exclusion in the context of a clause addressing action of 'government, police or a local authority'. That contextual construction does not dictate the meaning of a similar or the same phrase when used in denial of access cover clauses in Arch1 ('local authority') and MSAmlin1, RSA4, and Zurich1-2 ('competent local authority')."

If you were to go for example to Amlin1 --MR JUSTICE BUTCHER: That is actually a fair point, isn't it? It is one of the difficulties of looking at lots of different policies. But here the point against you is based simply on the fact that the terms of 3(a) use the word "local authority" and so does the carve out. That is the point.

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

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

So whilst of course I understand the tension that your Lordship has just drawn my attention to, for the very first time, I would actually say that that tension is , as I have said $% \left(1\right) =\left(1\right) =\left(1\right)$ originally , more apparent than real . LORD JUSTICE FLAUX: In a sense I understand your answer to my Lord's question, but another way of putting it would be to say that last sentence of 44.5, if it were the case, going back to the point I was putting to you, that COVID was a specified disease in clause 6 of the Ecclesiastical policy, the FCA would be saying that list of policies using the words "competent local authority" would include Ecclesiastical on 1.1 and 1.2. MR KEALEY: Yes, it would LORD JUSTICE FLAUX: And you would say, or you do say, if

"competent local authority" in clause 6 must include,

2	whoever imposes the relevant restrictions , then those	2	really mean "local". He goes on to say:
3	words "competent local authority" must or should at	3	"So I am making it clear that this is purely
4	least mean the same in the carve out in clause 3.	4	contextual for this exclusion in this particular policy.
5	A fortiori if what we are dealing with is delineation of	5	Other policies, where it is in the insuring clause,
6	cover rather than exclusion.	6	a different context may have a different meaning,
7	MR KEALEY: That is exactly right, my Lord. It is very	7	because Mr Kealey is right about the authorities that
8	difficult to improve on the point.	8	can deal with disease."
9	LORD JUSTICE FLAUX: Yes. It is actually a short point,	9	Then he says:
10	really .	10	"There is really no clue to it being different .
11	MR KEALEY: It is a very short point. It is very difficult	11	I know he relies heavily on extension 6, but one has to
12	for the FCA to improve on its point as well, in the	12	look to see whether a reasonable reader of 3 would think
13	sense that you just look at both columns and you say: oh	13	that it meant something fundamentally different from
14	my goodness me, impressionistically that is not the	14	what it appears to say. And 6, it has got diseases, but
15	government or the police.	15	if you are now assuming a reader with intimate knowledge
16	LORD JUSTICE FLAUX: It is very badly drafted, with respect.	16	of all the public health legislation , you would think:
17	MR KEALEY: It is.	17	yes, well these correspond to the notifiable diseases
18	Can I just make one or two points before moving on,	18	list , but hang on a minute, what is the most recent
19	because you are either, as it were, I hope persuaded or,	19	epidemic disease of a type that could, if it resurrected
20	if I am unlucky, unpersuaded. But Mr Edelman or the FCA	20	itself , spread across the country, it's SARS. And it's
21	mentioned in his submissions that Ecclesiastical	21	not there.
22	clause 6 is confined to local diseases and local	22	"I'm not saying that it would be conclusive, but
23	outbreaks of disease. Now, I am not going to get into	23	there is nothing here that drags you into saying that
24	that very much, because when I look at the plague, for	24	it's not local. If the list was unspecified in 6 and it
25	example, and measles and rather nasty things which	25	was an insuring clause, one might say and that was
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1	appear in the specified disease list , it may be that	1	a unitary clause, only dealing with disease, then you
2	they might be confined and it may be, for some reason or	2	might say: if it is only purporting to cover notifiable
3	another, there are an awful lots of rats, we seem to	3	disease and it's not limiting it, well maybe it could
4	have a lots of rats in this case, but there are an awful	4	extend to something else. But that is not what we have
5	lot of itinerant rats and their fleas, which may go way	5	here. We don't even have in the exclusion to the
6	beyond 25 miles, I have absolutely no idea. But what	6	extension 3, we don't even have a reference to
7	Mr Edelman also said at $\{\mbox{Day3}/146{:}1\}$ to page 148 and	7	" notifiable disease ""
8	it is probably worth having a quick look at that.	8	Then if you go to page 148 at line 8, $\{Day3/148:8\}$:
9	If you go to page 146 first , he firstly , at line $7,$	9	"What I was saying was if you have a notifiable
10	agreed with an observation by my Lord	10	disease, an unspecified notifiable disease list, and
11	Lord Justice Flaux, that the carve out covers a whole	11	25 miles and this, it might be open to it."
12	lot of more local things like food poisoning, defective	12	In other words, if you had in clause 6 an
13	drains and other sanitary arrangements. Pausing there,	13	unspecified notifiable disease clause, then you might
14	your Lordships probably now have quite a lot of	14	say that the competent local authority being referred to

Then he goes on at line 17:

"If you had a clause which had 'competent local authority' and a 25-mile radius in the insuring clause, then you might say: oh well, does that really mean 'local'?

experience of these clauses, and what you find is that

infectious disease clauses are commonly included with

suicide, murder, sanitary arrangements and a whole lot

of unsavoury things like that, so you shouldn't in any

way be influenced or badly influenced by that.

for example, magistrates or a government minister or

Well, that is what you have got in clause 6, $$42$\,$

But what we are saying in relation to clause 6, my Lord, is that clause 6 is not confined, other than by

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that is its choice and it might be said, well, it has

there was not confined to local government. But

actually, in the specified disease list we have

regulations list , we have also a variety of other

right, we don't have SARS, no doubt because

made its bed, it must now lie on it.

diseases which are not. And Mr Edelman is absolutely

a multitude of notifiable diseases which are on the 2010

Ecclesiastical didn't want to insure against SARS. But

my Lord. So I would in fact ask myself: does that

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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 first thing. 4 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,

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

central government can make any variety of fairly

draconian orders in a locality within 25 miles or

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

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

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

7 LORD JUSTICE FLAUX: That's your point.

MR KEALEY: So I can't positively say that central government will be involved, but it might be a dereliction of duty on the part of the Secretary of State for Health, Mr Hancock, if the plague broke out in Newcastle and if he rang up the head of the council in Newcastle and said, "Oh well, you're probably a member of the Labour Party, I $% \left(1\right) =\left(1\right) \left(1\right)$ will let you get on with it and see how well you do". I suspect Mr Hancock would say, "This is really quite serious, I am going to send people up there and \boldsymbol{I} am going to take a personal 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)

24 (Short break)

25 (11.30 am)

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MR KEALEY: My Lord, many thanks.

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

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

14 I have looked at the transcript --

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

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

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

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were making any such suggestion.

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

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

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

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

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with every other.

some rather important paragraphs.

At 71, we have broken down the clause into its constituent elements. You will see that there are three critical elements. And we say in 72 that the scope of the cover and what triggers the cover is to be discerned by a process of construing the clause, and you have to identify the specific role performed by each phrase

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

within the clause, having regard to its relationship

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

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

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

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

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

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

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

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

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

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

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

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

LORD JUSTICE FLAUX: Paragraph 30 or 80?
 MR KEALEY: I meant 80, not 30. Forgive me, my Lords. 80.
 (Pause)

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

20 MR KEALEY: Right, thank you. $\{I/12/57\}$.

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

Firstly, at paragraph 82, the insured peril is not

the emergency. That is the first point.

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

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

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

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

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Then we say, thirdly , at page 61, paragraph 83.3 $\{1/12/61\}$:

"... the insured peril cannot be converted into the emergency by the back door of the facts."

For example, 83.3(c), it is a point that Mr Gaisman kindly addressed, I think possibly even this morning:

"According to the FCA, none of the disease, the public authority action [et cetera] can be separated out from any other."

It is all part of some indivisible and interlinked strategy and package of national measures.

My Lords, that is a highly controversial statement, and not least because I think some people would suggest that the government reactions have hardly been part of any one strategy. Quite apart from the fact that even if they are part of a strategy, they can somehow or other be determined as being indivisible.

But if you look at (e) at the bottom, the public authority actions are clearly not indivisible among themselves, any more than the actions are not indivisible from disease, and distinctions can and must be made.

The third obvious point, at paragraph 84:

"The insured peril must ultimately be determined by construing the policy wording carefully ."

We refer to Lord Justice Clarke in AstraZeneca, in an appeal from my Lord, Lord Justice Flaux, where his judgment was upheld, speaks about the occurrence being the shell within which the pearl of liability is to be found

But if the peril were to include the emergency in its own right, as the FCA suggests, then insurers would be taken to have provided insurance for all the consequences of the emergency. But that is not what we agreed to insure, the Ecclesiastical agreed to insure. It is rather like saying the more elements you include, in the chain of causes, the more you agree to insure. Whereas in fact it is the contrary that is normally the case. The more elements in the chain of causation which qualify and narrow the peril, the narrower the insured peril.

Now, in our opening, my Lords, at paragraph 86 at page 63 $\{1/12/63\}$ we pose the example of a wealthy donor whose giving to the church stopped because his restaurant had been closed due to COVID-19. If your Lordships look at paragraph 86 and paragraph 86.1, we postulated the donor making the donation by standing order. The donor was the owner of the local restaurant. In fact, when the church had been closed in the preceding year, the donation had continued. In other

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

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

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

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

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

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

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

So the loss of income was caused by the COVID-19 emergency and wouldn't have been suffered if you assume no COVID-19 in the UK and no government action.

Therefore, on the FCA's pleaded case it ought to be recoverable.

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

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

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

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

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

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

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

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

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

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

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

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

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

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have been in the collection plate irrespective of the service, then no loss of income has been suffered.
UORD JUSTICE FLAUX: If in any given case the church is

closed, just assume the church is closed and as a result there is no collection and nobody gives anything, the church makes a claim for loss of income of č1000 a week for whatever period of time it is, on the basis that nobody has given any money, and they have not given any money because the church is closed, and the church is closed because of the restriction imposed by the government as a result of the emergency.

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

MR KEALEY: Well --

 $\begin{array}{lll} 17 & \hbox{LORD JUSTICE FLAUX: And why doesn't the burden then pass to} \\ 18 & \hbox{the insurer? If the insurer wants to say, "Well,} \\ 19 & \hbox{actually , nobody would ever have given any money anyway,} \\ 20 & \hbox{even if the church had remained open throughout, because} \\ \end{array}$

they were all down on their uppers as a result of COVID", why isn't the burden on the insurer to say that, rather than on the insured to, as it were, make good

rather than on the insured to, as it were, make good what is otherwise a prima facie case of loss?

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

losure , as caused $25\,$ MR KEALEY: My Lord, o

the same question by my Lord Mr Justice Butcher. extent of the economic effects of COVID in the country. 2 LORD JUSTICE FLAUX: Yes. 2 MR KEALEY: I will take it in stages. 3 MR KEALEY: And the answer I gave Mr Justice Butcher 3 If the income had fallen from 100 to 80 by the time 4 I myself remember vaguely and therefore I will try and 4 of the closure of the church, firstly, the best that the 5 5 church could seek to recover is 80% of the 100. repeat it without --6 LORD JUSTICE FLAUX: Yes. No, in all seriousness, this is 6 LORD JUSTICE FLAUX: Subject to Mr Edelman's ingenious 7 7 a point in relation to your clients, specifically your point, I think we both follow that. 8 8 MR KEALEY: Right. clients, Ecclesiastical, which troubles both of us. It q q is a matter we have discussed. So I would welcome your LORD JUSTICE FLAUX: It is the difference between the 80 and 10 10 assistance on this point, Mr Kealey. the zero in my Lord's example. 11 MR KEALEY: Well, my Lord, as I indicated on Thursday, if 11 MR KEALEY: Let's just say that the church comes along and 12 for example there is a prima facie case so that let us 12 says: well, it was down to 80%, I was then closed, 13 13 just say that the church regularly received č1000 per I couldn't recover anything, I couldn't get anything 14 14 week and did so through its collection plate. The from my parishioners, they all stopped coming because 15 church was closed, so no one attended church. So each 15 I couldn't receive them, therefore there was nothing in 16 week the church was closed the church did not receive 16 the collection plate. That might give rise to an 17 17 evential burden, as I have said before, on the insurer 18 The church, in those circumstances, would be able to 18 to say: yes, that certainly ostensibly appears to be the 19 establish a prima facie case that there was an emergency 19 case, but in fact what we can show or what we have 20 that caused police or authority action, that prevented 20 evidence to show is that even if the church had remained 21 or hindered access. And assume that the emergency 21 open and the parishioners had all come into church, 22 22 didn't affect the situation of the parishioners in any nevertheless , for example, 25% of your income was 23 23 other way than that they couldn't attend church and did attributable to the restaurateur, well he hasn't got any 24 24 not, therefore, give their donations. In that case, business left . in fact . so far as we can see he has 25 I would accept that the loss of income is highly likely 25 actually put up his restaurant for sale and he might 1 to have been caused by the prevention of access caused 1 even go into administration, and therefore, if you 2 2 by the action, because there is unlikely to be any actually ascribe 25% of your income to the wealthy 3 alternative cause, on those very simple facts where the 3 parishioner, we, the insurer, will suggest to you that 4 emergency has not affected the situation of the 4 the reason why you are not getting his 25% is not 5 5 parishioners in any other way. because of the closure of the church, but actually is 6 In other words, the insured would be able to make 6 because of the fact that --7 MR JUSTICE BUTCHER: I understand that, Mr Kealey. What 7 out a prima facie case of coverage and that the insured 8 8 peril had not only operated but also had caused the I was trying to get at was: are you saying that there 9 church loss, the č1000 a week. 9 won't even be a shifting of the evidential burden 10 However, if you have a situation which is slightly 10 because of the general effects of COVID on the economy, 11 different , where you have a widespread situation 11 and that Ecclesiastical can as it were say: no, there 12 affecting the whole of society and not just the insured 12 isn't even a prima facie case, because of these general 13 13 effects? That is what I was rather falteringly trying church, which has separate and independent effects on the lives and the financial situation of many 14 14 to get at. 15 15 parishioners, it may be that the church will not be able MR KEALEY: I am sorry, it was probably my fault. No, I am 16 to make out a prima facie case. And even if it does 16 not saying that necessarily . And I want to make it 17 make out what on the face of it looks like a good case 17 absolutely plain it is not necessarily. Every single

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case will depend upon its facts, obviously, and it may

be that some cases are much clearer than others. Some

cases will have, cases where you have got a parishioner,

et cetera, who accounts for 25%, and let's say he's

necessarily that in every case the evidential burden

single case, just because there is a situation of an

will shift, totally, and I am not saying that in every

noticeably without funds. So I am not saying

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for (a) coverage and (b) caused loss, causation may

MR JUSTICE BUTCHER: Let me understand that. You are saying

that if the takings had gone down, let's say, from last

zero on 23 March, you are saying there won't be

year, down to 80% by 23 March, and then fall from 80% to

a prima facie case, or Ecclesiastical 's position is that

there won't be a prima facie case of loss because of the

become a real issue.

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

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

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

This is one of the main reasons why you have such

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

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

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

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

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

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

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

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

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

He savs:

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

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

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

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

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

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

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

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

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

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

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

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

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

But taking the very basic church closure case, if a church is able to say, "On average I made č10 a week and now I am making nothing because nobody is turning up because they can't turn up", then I would probably have to accept that that looks like a prima facie case. It is then, as I indicated on Thursday, I am not saying that it is necessarily correct totally but it would then probably be for the insurer to say, "Well, actually your congregation had all died of COVID-19 and therefore your closure is an irrelevance".

I can't go into --

LORD JUSTICE FLAUX: Or postulating another example, if you had an inner city church in a deprived area, the insurer might be able to say "Well, in actual fact even if your church had remained open and people could have come to it, all the people in the town who would have come to your church are now unemployed as a result of COVID".

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

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

MR KEALEY: That's what you shouldn't be concerned with, and 24 I don't see how you can be concerned with. As

Mr Gaisman said, we have worked long and hard on assumed

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

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

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

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

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

MR KEALEY: I would suggest that, and that is vitally important. And it chouldn't be thought that that is in

important. And it shouldn't be thought that that is in any way not doing as much as you can. In fact, it is doing exactly what a court should do in these circumstances, where the essence of the FCA's case is that on the counterfactual you reverse everything, and the essence of insurers' case is that that simply is unprincipled and unthought out, and you have to be slightly more intellectually logical and astute and actually work out what these contracts are about.

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

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

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

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

LORD JUSTICE FLAUX: No, understood.

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

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

But let's test it just briefly in another way.

Assume that the clause gave much broader coverage to the insured, and let's say that the clause covered prevention, losses, et cetera, resulting from prevention or hindrance due to any government action. Full stop.

That would be a clause providing really quite wide

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

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

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

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

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

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

MR JUSTICE BUTCHER: Very clear, Mr Kealey.

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

Ecclesiastical to Amlin, if I may.

Now, my Lords, there are as it were two clauses in Amlin1 that are relevant, they are clauses 1 and 6. My Lords will find those in {B/10/65} and 66. I think I have got things mixed up here, my Lords. No, 65 and 66, I think that is right. It is right. 65 and 66. LORD JUSTICE FLAUX: Yes, business interruption cover in Amlin1.

MR KEALEY: That is right.

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

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

My Lords, clause 6 says:

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

(a)(iii):

"Any notifiable disease within a radius of 25 miles of the premises." $\,$

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

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

" Illness sustained by any person resulting from \dots

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

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

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

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

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

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

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

Then it tells you what Zurich would suggest it means.

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

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

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

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

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

At the top of page 87 in $\{I/1/87\}$:

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

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

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

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

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

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

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

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?

 $5 \qquad {\rm MR\ KEALEY:\ That\ is\ exactly\ what\ I\ am\ saying.\ It\ makes\ no}$ $6 \qquad {\rm causal\ contribution\ at\ all\ .}$

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.

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

17 LORD JUSTICE FLAUX: No.

which talk about material contribution, like Bonnington, which is in the bundle, which is a tort case, if you look at anything which is described as making a material causal contribution, it is either something which satisfies the "but for" test or, in the tortious context, is something which falls within the Fairchild

MR KEALEY: In our submission, even if you look at the cases

Enclave or an acknowledged and recognised exception to

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

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

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

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

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

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

MR KEALEY: Then that --

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

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

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

But here we are in a completely different area of

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

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

18 Your Lordships --

 $\begin{array}{ll} 19 & \hbox{LORD JUSTICE FLAUX: This wording doesn't in fact mention} \\ 20 & \hbox{government action at all , does it , clause 6?} \end{array}$

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.

 $1 \qquad \text{MR KEALEY: Yes, that is right, my Lord. That is exactly} \\ 2 \qquad \qquad \text{what --}$

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

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

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

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

1	interruption .	1	the context.
2	Just because the government in London says, on	2	If you go to page $\{B/10/60\}$ and you go to "Rent
3	a jigsaw basis, as the FCA suggests, "Well, we have got	3	Receivable" under paragraph 1:
4	to stop the disease from spreading" or "We've got to	4	"For loss of rent receivable the amount by which
5	stop the NHS from being overrun or overwhelmed", that	5	the rent receivable during the indemnity period will,
6	doesn't mean, in our respectful submission, that	6	following the damage, fall short of the standard rent
7	a sickness within that radius had the impact which it is	7	receivable ."
8	required to have for the purposes of satisfaction of	8	It is the same causal connection link . It is also
9	that clause.	9	the case, as Mr Edelman pointed out, that we rely on
10	Now, as I have mentioned, we say that "following",	10	what is said at the Welcome page, which is $\{B/10/3\}$.
11	in the context in which it appears, is intended to	11	This is a Welcome page. This is your instant,
12	equate to direct or proximate cause.	12	et cetera, policy, and it sets out the details of your
13	Mr Edelman suggested that the word "following" and	13	insurance contract:
14	" resulting from" had only been used interchangeably on	14	"It must be read [this document] any
15	one occasion, on the Welcome page and in the BI insuring	15	endorsements, et cetera, must be read together as one
16	clause. He said that at {Day3/130:1}.	16	contract as they form your policy . In return for
17	Can I take your Lordship to the contract more	17	payment of the premium shown in the schedule we agree to
18	specifically . If you go to $\{B/10/59\}$ you will see that	18	insure you against"
19	"Insuring clause" says:	19	The second bullet point:
20	"For each item in the schedule, we will pay you for	20	"Loss resulting from interruption or interference
21	any interruption or interference with the business	21	with the business following damage."
22	resulting from damage to property used by you at the	22	Just to remind your Lordships about the top of
23	premises for the purposes of the business"	23	page 59 $\{B/10/59\}$, when it comes to the actual insuring
24	So there the words " resulting from damage" are used.	24	clause, at the top of 59:
25	If you go down on the same page to the basis of	25	"We will pay you for any interruption or
	, G		
	89		91
1	settlement provision, and you go to gross profit you	1	interference with the business resulting from damage."
1	settlement provision, and you go to gross profit, you will see that under paragraphs 1 and 2. "for reduction	1	interference with the business resulting from damage."
2	will see that under paragraphs 1 and 2, "for reduction	2	There is no intention, my Lords, to have a different
2 3	will see that under paragraphs 1 and 2 , "for reduction in turnover" and "for increase in cost of working", the	2 3	There is no intention, my Lords, to have a different causal requirement. As you see there, the Welcome page
2 3 4	will see that under paragraphs 1 and 2, "for reduction in turnover" and "for increase in cost of working", the use of the word "following the damage".	2 3 4	There is no intention, my Lords, to have a different causal requirement. As you see there, the Welcome page says "following damage"; the top of 59 says "resulting
2 3 4 5	will see that under paragraphs 1 and 2, "for reduction in turnover" and "for increase in cost of working", the use of the word "following the damage". So, for example, if you look at 1:	2 3 4 5	There is no intention, my Lords, to have a different causal requirement. As you see there, the Welcome page says "following damage"; the top of 59 says "resulting from damage"; the bases of settlement clauses refer to
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2 3 4 5 6 7	will see that under paragraphs 1 and 2, "for reduction in turnover" and "for increase in cost of working", the use of the word "following the damage". So, for example, if you look at 1: "For reduction in turnover, the sum produced by applying the rate of gross profit to the amount by which	2 3 4 5 6 7	There is no intention, my Lords, to have a different causal requirement. As you see there, the Welcome page says "following damage"; the top of 59 says "resulting from damage"; the bases of settlement clauses refer to "following damage". These are words that we say are used
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the different word of course, but it means the same in $$90\ \end{tabular}$

1	should start at the top of page $\{65\}$:	1	We again refer your Lordships to the Welcome page,
2	"Additional cover provided as standard.	2	which is at page 4, the second bullet point:
3	"We will pay you for ", and then go to clause 6:	3	"Loss resulting from interruption or interference
4	"Consequential loss as a result of interruption of	4	with the business following damage."
5	or interference with the business carried on by you at	5	I will refer you again to the "consequential loss"
6	the premises following any notifiable disease."	6	definition at page 42 $\{B/11/42\}$:
7	Now if you transpose the words from the definition	7	"Loss resulting from interruption [et cetera]
8	"consequential loss", there is a certain element of	8	carried on by you following damage."
9	duplication and superfluity because "consequential loss"	9	So we say again that these clauses reflect the cover
10	means:	10	provided under the main BI provision and use the word or
11	"Loss resulting from interruption of or interference	11	the term "following" interchangeably or meaning the same
12	with the business carried on by you at the premises in	12	as "resulting from".
13	consequence of damage to property", and then one would	13	So our primary argument on the wording is that
14	continue:	14	"following " is the same as proximate causation. It is
15	"As a result of interruption of or interference with	15	not a looser causal connection. But if it is a looser
16	the business carried on by you following any notifiable	16	causal connection than proximate cause then we make the
17	disease ."	17	submission that it still doesn't assist the FCA in
18	Of course as one reads that out one recognises that	18	displacing the "but for" test.
19	if the definition of "consequential loss" was applied	19	MR JUSTICE BUTCHER: Even if it does displace the "but for"
20	strictly in accordance with its terms clause 6 would	20	test, does it make any difference?
21	never be triggered, because notifiable disease would	21	Wouldn't you say that whatever causal significance
22	never have caused damage to property. So that can't	22	you give to the word "following ", it is not met by the
23	have been intended.	23	disease within the 25-mile radius, because to take
24	So what must have been intended is that some deft	24	and I have put the point about but for to you before,
25	and sensible verbal manipulation should take place such	25	Mr Kealey and I am not going to do it again but this
	and sensible verbal manipulation should take place such		The reality and a animot going to do it again.
	93		95
1	that "damage" is read as referring to the insured peril .	1	is not a case where you can even say that, that because
2	And indeed that appears to be common ground: FCA's trial	2	of the 25-mile radius that had any specific effect in
3	skeleton $\{1/1/259\}$.	3	relation to the interference with the business.
4	So on that basis it is clear, we would respectfully	4	MR KEALEY: That is exactly what we say. We respectfully
5	suggest, that the phrase "in consequence of" in the	5	adopt, and your Lordships will see it in QBE's skeleton,
6	definition of "consequential loss", is being used	6	I think it is, I think it is QBE's skeleton, which
7	interchangeably with the word "following" in the disease	7	really dispatches the point, if I might very
8	clause, MSA 1, clause 6.	8	respectfully say so, with huge skill and elegance all at
9	So you have there clear indications wherever the	9	the same time, QBE's skeleton despatches any idea that
10	word "following" is used, that it is used in the same	10	any disease within any particular radius I should
11	sense as "as a result of" or "resulting from", or "in	11	mention it is in $\{1/17/36\}$ it despatches any idea
12	consequence of". All three phrases or words have the	12	that anything going on, any of these illnesses, whatever
13	same meaning.	13	they were, within whatever radius it is, and the
14	The same analysis, my Lords, I should say applies to	14	greatest one is a 25-mile radius, had any causative
15	Amlin2. I can deal with this I suppose more quickly	15	impact whatsoever on any interruption or interference,
16	because I have just dealt with it in Amlin1. But if you	16	any interruption of or interference with the business of
17	go to $\{B/11/44\}$ what is covered is at the top:	17	any insured .
18	"For each item in the schedule we will pay you for	18	I was going to let Mr Howard make his submissions in
19	any interruption or interference with the business	19	due course, of course. But if one looks at $\{1/17/37\}$
20	resulting from damage to property used by you for the	20	for a moment. If we could go to page 37, one should
21	purposes of the business occurring during the period of	21	read really one should actually read paragraph 85 of
22	the insurance caused by an insured event"	22	my learned friends ', who acts for QBE, their skeleton .
23	Then you go down to the "Gross Profit ", and you see	23	You should read 85 through to 90.
24	under paragraphs 1 and 2 the same use of the words	24	LORD JUSTICE FLAUX: Why don't we read those to ourselves

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 $\mbox{\tt "following the damage"}.$

over the lunch break. We can break now until 2 o'clock.

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1	How much longer have you got, will realey:
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
	97

How much langur have you got Mr Kealey?

use of the premises or access to them will be deemed to be damaged."

So clause 7 envisages both access being prevented or

So clause 7 envisages both access being prevented or hindered, and also use being prevented or hindered. The parties obviously know the difference between access and use, and the difference between prevention and hindrance. Out of the four possibilities envisaged in clause 7, only one appears in clause 1, namely access will be prevented.

Therefore, when the parties used only one of the four possibilities in clause 1, we would respectfully suggest that that has to be given effect to as a matter of construction. We make these points, for your reference, my Lords, at paragraphs 144 to 145 of our skeleton. You needn't look it up, it is in $\{1/12/94\}$.

So we are not talking about hindrance and we are not talking about use. We say that in that context "prevention", prevention of access that is, means an impossibility of gaining physical access to the premises. That impossibility may be the physical effect of the authority action or a legal effect, but nothing short of impossibility will do.

Now, if that provides only limited cover, then so be it. That is not a reason for expanding the cover. If a situation arises in which it is made more difficult

authorities ":

"Loss resulting from interruption or interference with the business following action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the premises where access will be prevented ... "

It obviously speaks of authority action where access will be prevented.

We say the words "will be prevented", the tense used is simply looking to the result or the effect on the premises of the authority action. That, we say, is the only significance of the tense used.

Now, in terms of the necessary result or effect of the action, it doesn't talk about access being hindered, it only talks about access being prevented. It doesn't talk about use being prevented and it doesn't talk about use being hindered; in fact, it doesn't talk about use at all. So the only concept in terms of the effect of the action with which we are concerned is access being prevented.

If you compare that with clause 7, at page 67 of the same file $\{B/10/67\}$, you will see under the heading "Prevention of access":

"Consequential loss as a result of damage to property near the premises which prevents or hinders the

but not impossible to gain physical access to the premises, that is not prevention of access, that is hindrance of access. That is not covered.

If a situation arises in which you can get to the premises and access them, but you can only use some part of the premises when you get there, because use of some part of the premises is impossible when you get there, that is not prevention of access; that is prevention or hindrance of use. That is not covered, because nothing short of prevention of access is.

The fact that loss has to result from interruption of or interference with the business, with the emphasis in this context on interference, does not dilute the meaning of prevention of access. A business may well be interfered with, and not interrupted, as a result of prevention of access to its premises. For example, a business may have several premises. One of those premises might suffer from enforced prevention of access. That might interfere with a carrying on by the insured of its business as a whole. For example, if access is prevented to warehouse A, containing raw materials which are required by the factory at location B, the factory at location B may be interfered with but not interrupted, because it can still receive some materials from warehouse C.

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"Business", I should mention is defined at $\{B/10/10\}.$ The business is:

"The business specified in the schedule conducted solely within the territorial limits \dots "

So "Business" there contemplates a business with just one premises or with several premises. So as I say, if one of those premises cannot be accessed, in other words, access is prevented, if it has raw materials required by the factory at premises B, the inability to gain access to A and extract raw materials for the purposes of the business carried on at premises B will interfere or may interfere with the business, but will not necessarily interrupt it.

Moreover, perhaps a simpler example, a business to whose premises access is prevented may nonetheless be capable of being carried on away from the premises. A professional services business, for example, may be able to work from home, but because access to its premises might be prevented that might affect its turnover. That is interference with the business as a result of prevention of access.

Now in our case, my Lords, in our submission, for much the same reasons as given by Mr Gaisman earlier yesterday, there was no prevention of access to the premises even insofar as the lockdown regulations meant

that customers were not allowed to go there.

Mr Gaisman gave the example of the tailor who was able to conduct her tailoring business from home. Because the materials and equipment are essential , she can't conduct her business -- sorry , she can't conduct her business from home because the materials and equipment are essential and they are only at the premises. That business , my Lord -- that is $\{J/16/4\}$ --was never required by the regulations to close . It was always permitted by rule 6(2)(f), always permitted for the tailor to travel to work because she couldn't undertake her business at home.

We take into account in making these submissions, my Lords, that none of the government advice was mandatory or compulsory. We make that point at paragraphs 31 and following in our opening skeleton $\{1/12/23\}$. It is worth just reminding ourselves what Lord Sumption said. What he said was in The Times newspaper, it is in $\{1/12/28\}$, that is paragraph 33.6. At the foot of the page, at 33.6 he says:

"... in his press conference Boris Johnson purported to place most citizens under virtual house arrest through the terms of a press conference and a statement on the government website said to have 'immediate effect'. These pronouncements are no doubt valuable as

'advice', even 'strong advice'. But under our constitution neither has the slightest legal effect without statutory authority."

Then if you could read the rest of the passage from his piece at page 29, I would be grateful, my Lord. $\{1/12/29\}$.

My Lords, we say, therefore, for access to be prevented by any action of any authority within the meaning of this clause, that means any action, generally speaking, having the force of law. So nothing done by any authority by way of advice, instructions or announcement legally prevented access to any premises.

Now, as you know, the FCA says, see its reply at paragraph 13.1, that is $\{A/14/8\}$, that prohibition does not require legal force, it requires that something is forbidden by someone with authority. The FCA continues and says that the government did prohibit through guidance and announcements, and would have been so understood by Mr Gaisman's Jacobean reasonable citizen . They go so far as to say that:

"All the advice [et cetera] given on 16 March and on many occasions subsequently amounted for all businesses to prevention of access to the premises."

That is paragraph 46 of the amended points of claim, that is $\{A/2/30\}$.

Now, we have dealt with that in considerable detail, mainly by reference to constitutional law and very high authority, at paragraphs 33 and following of our opening submissions; that is $\{I/12/23\}$ and following. It is worth just remarking that Boris Johnson is not Maximilien Robespierre or Georges Danton, he is not the president of the Committee of Public Safety, we don't live in a dictatorship or a totalitarian regime. The idea that Boris Johnson, also known as Robespierre, can issue an instruction without any legal validity or force, and that is translated as a legal prohibition or a prohibition by someone with authority, has only to be stated, we say, to be rejected.

Now, the fact that some members of the citizenry of this country, if one wants to borrow from the French revolution, might have been taken in and might have chosen to live by the Prime Ministerial announcements or guidance rather than by the regulations is neither here nor there. There was government guidance that went beyond the government regulations, and the latter are binding and the former are not. It is as simple as that.

If one takes the documents in the bundle, that is just for your reference $\{C/2/287\}$, according to what Mr Edelman would say, all citizens were prohibited from

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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 8 the premises. What it does is it prevents the use of q

to close one's business that does not prevent access to the premises for that business. The proprietor could still gain access to the premises, even if there was a complete prohibition or prevention of use from or at those premises for the purposes of conducting the insured business. What you cannot do is transform a prevention of access cover into a prevention of use cover. If, however, we are wrong on that --

LORD JUSTICE FLAUX: So you would say this clause doesn't

MR KEALEY: No, we say that exactly.

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

105

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

5 MR KEALEY: Correct.

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

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

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,

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

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

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

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

MR KEALEY: Correct, my Lord.

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

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

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

107

that is a prevention or hindrance of use of the fifth

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

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

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

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MR KEALEY: I think we would accept that, my Lord, yes. LORD JUSTICE FLAUX: Yes. MR KEALEY: We would. The fact that it is a disease or an illness doesn't make any difference. LORD JUSTICE FLAUX: It doesn't stop it from being a danger. It is not a disturbance but it is a danger. MR KEALEY: That is absolutely right, my Lord. Equally, an outbreak of weasels as opposed to measles could be q a danger, depending on the ferocity of the weasels concerned LORD JUSTICE FLAUX: Not so likely, Mr Kealey. MR KEALEY: What we can say is set out in our written submissions at paragraphs 177 to 185, including as to the causation requirement; in other words, the danger obviously has to cause the government action, and that is built into the clause. That, for my Lords' reference , is to be found at $\{I/12/100\}$ to page 102. But we can't go any further into this, my Lords, because in terms of causation and in terms of whether this clause responds to anything, further than I have already indicated, it is a question about dates, locations and facts as to whether there was a danger in the vicinity , as to what the vicinity is . The vicinity of, say, Islington or a road in Islington will probably

occupy really quite a small area compared to the

vicinity of a rural hotel in the middle of Northumberland. It is all depends upon the context in which the premises are to be located and found.

So I can't say any more than that at the moment. Certainly if it is suggested that the vicinity means a place where, if something happens it can reasonably be expected to have an impact on the premises, that is such a broad and indefinite and unhelpful definition that one doesn't really know what to say about it. I suppose the next time there is an outbreak of some unknown virus in China, that might be said to be in the vicinity of Westminster, simply because there might be a reasonable expectation that if things aren't done properly it could extend to Westminster. But I don't think that anyone in his or her right mind or their right mind would say that what is going on in China really is in the vicinity of Westminster.

My Lords, I move on swiftly to the question, which I'm not going to answer because I have answered it already, as to the meaning of "following ", because it won't have escaped your eagle eyes that the causal connecting linkage in clause 1 is "following ". So you have to have interruption or interference with business following action by the police or other competent local, civil or military authority following a danger.

Now, you have heard our submissions on "following" in a completely different context. We would say, and indeed the FCA acknowledges I think, that "following" denotes some causal connection. But the obvious causal connection in this context is caused by, in our respectful submission, where you have interference or interruption of business following action by the police, that is not sequential, that means as a result of. So 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.

MR KEALEY: Yes, my Lord, that's right.

I think I have dealt with Amlin1 now and could I move on to Amlin2.

I have already dealt with Amlin2 the disease clause, which is clause 6, because that is the same as Amlin1, save to one extent. The disease clause, my Lord, is at $\{B/11/47\}$.

I am reminded that the FCA makes one additional point at paragraph 906 of its trial skeleton, so that is in $\{I/1/290\}.$ At paragraph 906, the third line, it is said:

"There is no requirement in MSAmlin2 for interruption or interference at all."

Unless serious surgery is done to transplant a modified form of the property damage-related consequential loss definition , all that is required is loss following the notifiable disease. That is where it begins and ends. But if one could just go back, if we may, to $\{B/11/47\}$, "Consequential Loss" is a defined term. The definition of "Consequential Loss", my Lords, is at page $\{B/11/42\}$. We have looked at this before, I think, in the earlier policy . "Consequential Loss" is defined as:

"Loss resulting from interruption of or interference with the business \ldots "

To put that definition into the context of clause 6 at page 47, obviously a certain degree of verbal manipulation is required, because the definition of "Consequential Loss" is following damage to property, and of course we are in one of the non-damage extensions. But there is no doubt about it, my Lords, that the emboldened "consequential loss" in clause 6 at page 47 takes its meaning from the definition, as one would expect, and the definition includes "loss resulting from interruption of or interference with the business".

So when the FCA says that there is no requirement in MSAmlin2 for interruption or interference at all , they

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

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

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

"We will pay you for ..."

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

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

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

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

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

On that note, I will leave this clause and simply

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1 adopt everything that Mr Gaisman said.

That leads me naturally, as it were, to Amlin3, which I am going to take very swiftly, perhaps even as 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 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.

MR KEALEY: Indeed. It is quite difficult to take your
 furnace and everything home and start making iron works
 and weathervanes and goodness knows what from one's
 drawing room.

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

MR KEALEY: Horseshoes are much more farriers. You don'tnormally go to a forge.

 $24~{\rm LORD}$ JUSTICE FLAUX: No, I suppose that's true.

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

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LORD JUSTICE FLAUX: Well, you would know.

2 MR KEALEY: Anyway --

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 $\begin{array}{lll} 3 & \mbox{MR JUSTICE BUTCHER: Doesn't the forge have to make the} \\ 4 & \mbox{horseshoe which the farrier then shoes the horse with?} \end{array}$

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

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

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.

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

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

I don't know whether my Lord, Lord Justice -- you are $% \left(1\right) =\left(1\right) +\left(1\right) =\left(1\right) +\left(1\right) +\left(1\right) =\left(1\right) +\left(1$

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

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

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

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

The authority action and the incident are

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

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

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

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

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

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

Here there is something additional and independent going on from the clause that I have just $% \left(1\right) =\left(1\right)$ identified .

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

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

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

 $\begin{tabular}{lll} 5 & LORD JUSTICE FLAUX: That would, of course, depend on the \\ 6 & facts in any given case, would it not? \end{tabular}$

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

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

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

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

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cover.

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

My Lords, that is Amlin and that is causation.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

All that the trends clause is concerned about is to

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

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

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

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

absence of the trends clauses.

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

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

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

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

There you have it, "Loss of income":

had been no damage and the income you actually received during that period ..."

In other words, but for the damage.

Of the nine other policies included, only one other

"We will pay the difference between the income you

would have received during the indemnity period if there

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

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

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

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

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

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

 $\label{eq:my_loss} \mbox{My Lords, I think I have despatched what I need to} \\ \mbox{despatch.}$

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

": 25 suffered by the church

1	at 100%, because you would say there is 20% of this that	1	a single relevant extension, and we will do that by
2	you would have suffered anyway even if the insured peril	2	reference to the Arch combined commercial policy. I am
3	hadn't operated.	3	also in the fortunate position that it is common ground
4	MR KEALEY: Correct, my Lord.	4	between Arch and the FCA that the trends clause in the
5	LORD JUSTICE FLAUX: I mean in a sense, unless Mr Edelman is	5	Arch combined commercial policy applies to the relevant
6	right about his point about "in anticipation of the	6	extension, and that similar or equivalent language
7	hurricane", the one follows from the other, doesn't it?	7	requiring "but for" causation, which appears in the
8	MR KEALEY: Yes.	8	retailers ' policy and in the offices and surgeries '
9	LORD JUSTICE FLAUX: Because as in Orient-Express the	9	policy, also apply to claims under the extension.
10	hurricane itself is not insured, so here the effects of	10	Now, what we have done, and I hope your Lordships
11	COVID, in general terms, are not insured until there is	11	recall reading our skeleton, we have set out three
12	a restriction or whatever it happens to be.	12	annexes.
13	MR KEALEY: And even then they are not an insured peril in	13	Annex A, which is bundle $\{I/8/1\}$, explains our
14	their own name or in their own right; they are only	14	position on the seven categories of business which have
15	a predicate for, say, government action and thereafter	15	been referred to by the FCA, and with which your
16	a prevention. In other words, they are a cause of, they	16	Lordships are now very familiar . Annex A summarises
17	are one of the ingredients in a combination which	17	evidence which is set out in Ms Valder's witness
18	amounts to the insured peril .	18	statement, she is the head of claims at Arch, which is
19	If COVID-19 or infectious disease were an insured	19	at $\{D/1/1\}$ and which is not challenged by the FCA. That
20	peril, then that is all you need. It is the government	20	statement sets out what Arch's interests are in the
21	action which must actually cause the loss, and the	21	various categories of business so far as concerns the
22	government action must be coming from an insured peril .	22	Arch1 policy.
23	You have heard me on this before.	23	It is fair to say that Arch, in common with other
24	LORD JUSTICE FLAUX: Yes. Okay.	24	insurers , has a much greater interest in category 5
25	MR KEALEY: My Lords, if I can assist you further please	25	than, say, category 1, pubs and clubs and cafes. We are
	129		131
1	don't hesitate to cross-examine me, but otherwise I am	1	also interested in particular in category 3, because of
2	departing.	2	the Arch retail policy in particular, and we are, as
3	LORD JUSTICE FLAUX: I don't think we need to cross-examine	3	I said, not especially interested in category 1, where
4	you any more than we already have done, Mr Kealey.	4	only 0.4% of our policyholders would fall . Therefore,
5	MR KEALEY: My Lords, my clients are grateful, as am I.	5	although the FCA spent a quite a lot of time in their
6	LORD JUSTICE FLAUX: Thank you very much.	6	submissions against Arch developing interesting debates
7	Right. Who is next?	7	about take-aways, we are not really interested in
8	MR LOCKEY: Good afternoon, my Lord, I appear for Arch.	8	take-aways, at least in any legal sense.
9	LORD JUSTICE FLAUX: Not yet you don't.	9	We have no category 6 policies and we have only two
10	There you are. Yes, hello.	10	policyholders who fall within category 7, so I am not
11	(2.57 pm)	11	going to say much at all about that.
12	Submissions by MR LOCKEY	12	That is annex A to our skeleton; that sets out in
13	MR LOCKEY: My Lords, the policy wordings written by Arch	13	detail our position on the seven categories of business

14 that the court is asked to consider are to be found in

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and I do commend re-reading that document.

Annex B to our skeleton sets out our response to the FCA's assumed facts scenario under the Arch wording. Now, your Lordships may recall, when reading the FCA skeleton, that interspersed in the sections which deal with each insurer there are assumed fact scenarios. They appear to have received, so far as I can recall, virtually no or indeed possibly none, no attention at all in the FCA's oral submissions. But we set out in annex B our response to the FCA's assumed facts scenario under the Arch wording, which appears in the FCA's skeleton at $\{I/1/173\}$. Time will probably not permit me

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Arch1 policy.

three Arch policies: there is a commercial combined

policy, a retailers policy and an offices and surgeries

policy. They are at bundle B tab 2, tab 23 and tab 24,

but we will only be looking at $\{B/2/1\},$ the commercial

combined policy, which has been designated as the lead

this hearing, in particular the government and local

each of the three $\;$ policies . So I am in the fortunate

position of only having to address your Lordships on

authority action extension, are materially the same in

The key provisions which fall for consideration at

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

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

Your Lordships will see from the left-hand column towards the foot of the page that "The Business" is

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

Then "The Premises" are:

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

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

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

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

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

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

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

you in a moment why that is common ground.

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

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

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

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

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

"The amount payable will be

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

Familiar concepts. And then a provision in relation to:

"... increase in cost of working ... [incurred] solely to prevent or limit a reduction in turnover during the indemnity period which but for such additional expenses would have taken place due to the

damage."

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

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

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

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

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

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

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doesn't appear set out as a separate clause. As I said at the beginning of my remarks, it is common ground between the FCA and Arch that the trends language applies to the government and local authority action extension .

You will see:

"Rate of gross profit and standard turnover may be adjusted to reflect any [and I emphasise 'any'] trends or circumstances which

"(i) affect the business before or after the damage.
"(ii) [or] would have affected the business had the

damage not occurred."

If we could go to the next page $\{B/2/34\},$ in the top left $\mbox{ corner:}$

"The adjusted figures will represent, as near as possible, the results which would have been achieved during the same period had the damage not occurred."

So we would submit that it is clear that the trends language confirms that "but for" causation is required by the Arch policy. The adjustment exercise is aimed at arriving at an answer to the question: what would have been the financial results for the business during the indemnity period if the damage had not occurred?

In the case of the main business interruption cover under this policy, therefore, the enquiry is into what

would have been the results for the business if the damage to insured property had not been incurred . And we would respectfully suggest that the analysis is indistinguishable from that applied in the Orient-Express case.

And the counterfactual is logically the same, where any of the business interruption extensions apply, reading "damage" in the context of the trends language to mean the operation of the relevant insured peril under the applicable extension.

If we could go back to page 33 $\{B/2/33\}$, just to pick up on the trends language at the foot of the page, I emphasise that it is any trends or circumstances, in our trends language. Plainly, "trends" suggests patterns, patterns affecting the business, and it is sensible to look at patterns affecting the business because the standard turnover will only be a snapshot for a particular 12-month period, it won't tell you whether the business was growing or shrinking over a period of years.

So far as concerns "circumstances", that, we suggest, plainly means anything else which has an effect on the business. And "any", I would respectfully suggest, means "any". It is very difficult, we would suggest to see why "any circumstances" should be limited

to what Mr Edelman described as ordinary business vicissitudes , whatever they might be.

Mr Kealey has just made submissions to you on this point and I am not going to repeat them. Can I just note that it doesn't even appear to have been argued in the Orient-Express case that the trends clause in that case, that the special circumstances were limited to ordinary business vicissitudes. It doesn't appear to have been argued that the hurricane was not an ordinary business vicissitude and could not, for that reason, be a relevant circumstance.

With that introduction to the indemnity provisions and the business interruption section in mind, can we move then to the extensions in the policy, the extensions to the business interruption provisions. They are called "clauses" in this policy for some reason, but they are extensions.

If we could start on bundle $\{B/2/35\}$ with the stem, to use Mr Gaisman's helpful words, the stem under the heading "Clauses" in the right-hand column:

"We will also indemnify you in respect of reduction in turnover and increase in cost of working as insured under this section resulting from ..."

It is the words "as insured under this section" which confirm -- and as I said, this is common ground --

that the loss of gross profits provisions, including the trends language which we have been looking at, apply as much to these extensions in the Arch policy as they do to the main business interruption cover.

I don't really need to say anything more about "resulting from"; it indicates that the loss of gross profit must result from the insured peril. In other words, the insured peril must be a proximate cause of the loss of gross profit.

I am going to look carefully in a moment at the government and local authority action extension, which is the only extension upon which the FCA places reliance. But before we get to it, it is helpful just to look at some of the extensions which are not relied upon, simply to identify the provisions by reference to which coverage would attach.

The first clause I invite your attention to is clause 1, "Prevention of Access", and this only applies in an event of damage to property in the vicinity of the premises. But the words that I invite your particular attention to are "hinders or prevents access to the premises". You will note that this clause includes the word "hinders"

We then have clause 3, the "Disease, Infestation and Defective Sanitation" clause. This is not relied on by

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

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

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

141

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

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

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

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

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

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

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

LORD JUSTICE FLAUX: Is that a convenient moment, Mr Lockey? 22 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) 2

(Short break)

3 (3.30 pm)

LORD JUSTICE FLAUX: Right. 4

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

6 LORD JUSTICE FLAUX: Yes.

> MR LOCKEY: If we could have the "Government or Local Authority Action" clause on the screen again {B/2/36}.

There is no dispute about the emergency, and there is no dispute about the meaning of "actions or advice of a government or local authority "

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

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

Therefore, reading the clause as a whole, we say

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

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

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

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

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

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

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

MR LOCKEY: Absolutely. They reflect the ordinary use, we

would suggest, of "prevention" and "hindrance".

LORD JUSTICE FLAUX: Yes.

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

 $\label{eq:Jumping ahead to the facts} \mbox{ slightly , this is } \\ \mbox{a particularly important --}$

presentation, you have sort of disappeared off the right of our screen. I think you need to move very slightly to your right. MR LOCKEY: I do want your Lordship to see me. LORD JUSTICE FLAUX: I know I'm a fine one to talk, but ... MR LOCKEY: My chair has wheels. LORD JUSTICE FLAUX: I hate seeing only a part of your face. q MR LOCKEY: That would be too awful. What I was going to

LORD JUSTICE FLAUX: Mr Lockey, just as a matter of

say, jumping ahead to the facts, and this is particularly important for category 3 and category 5 businesses, this clause is not triggered by restrictions placed on the free movement of those who may use the premises, whether it is the business owner, his or her employees, or his or her customers or clients. Those restrictions, the restrictions which we see in regulation 6, are not directed at the means of accessing the premises and do not prevent access to the premises.

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

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

 $\begin{array}{lll} 1 & & \text{prevention of access and the idea that this can be due} \\ 2 & & \text{to advice?} \end{array}$

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

 $\begin{array}{ll} 11 & \mbox{MR JUSTICE BUTCHER: But the advice has to recommend total} \\ 12 & \mbox{closure, as it were, and it doesn't matter that people} \\ 13 & \mbox{could ignore the advice.} \end{array}$

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

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the business which must be prevented.

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

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

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

The FCA also argues -LORD JUSTICE FLAUX: It might amount to a hindrance of access. Just to test the point.

MR LOCKEY: Possibly, although --

LORD JUSTICE FLAUX: Going back to Mr Gaisman's point about queuing outside Waitrose for 45 minutes because you can only go in one at a time, for these purposes, just looking at what is hindrance or prevention, you might say access to the premises there are hindered, but they are clearly not prevented.

MR LOCKEY: No. And we will come on --

LORD JUSTICE FLAUX: If the shops close because they have been told to close, then access is prevented by everybody.

MR LOCKEY: Yes. The FCA also argues that the clause must be read commercially, and that access and its prevention has to be assessed by reference to the effects on revenue, to quote the transcript from {Day3/27:18}.

I don't think we need to turn that up.

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

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

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

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

but your Lordships may well remember, at least from the newspapers that week, reporting on the fact that many pubs and clubs did remain open after the speech on 16 March 2020 and people continued to flock to them all that week. But on the FCA's case --

LORD JUSTICE FLAUX: I think, from recollection, there was a sort of booze-fest on the basis that any day now he's going to close them down, which is what happened.

MR LOCKEY: On the FCA's case there was already a prevention of access for those pubs and clubs that were benefiting from the booze fest.

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

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

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

If we could go over the page $\{1/8/2\}$. I apologise

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

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

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

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

of access to the premises.

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

Could I just note that --

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

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

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

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

The FCA suggested there was some sort of

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

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

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

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

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

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

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

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category 3 is not limited to shops in category 3 which chose to close, it includes all those shops in category 3 which remained open through the lockdown. You can see that from their skeleton at section 151.3, and you will also note it from Ms Mulcahy's oral submissions on $\{Day3/34:1\}$. There is no need to turn that up

Category 4, we can deal with that fairly quickly. We say this is fact-sensitive, and certainly the FCA is not entitled to any sort of blanket declaration. This is probably the category into which the somewhat quaint or homespun example of the tailor might fall, but one would also include, perhaps more realistically in category 4, the example of a high street estate agent or letting agent whose business includes operations carried on online. The regulations didn't require the estate agent's premises to be closed if used for those purposes. Likewise, movement restrictions in regulation 6 would not prohibit attendance at premises by the estate agent if this was reasonably necessary, for example to update the website, if that was something that couldn't be done from home, or to access paper files

Category 5, you heard something on this from Mr Gaisman and also from Mr Kealey. I don't want to

repeat their submissions. Category 5 businesses are of great importance to Arch as well; it represents 38% of the total. These businesses were not required or advised to close, and we submit that there was no prevention of access to those premises; the premises in question remained fully accessible throughout.

Category 6 is not relevant to Arch.

Category 7, we have the sum total of two businesses in category 7, two policies , so I am not going to develop any submissions on that orally .

Where does that take us? You will see that we have accepted, and this has been our position prior to this litigation , we have accepted that where businesses were advised to close or required to close pursuant to the regulations , and did close , that the extension has been triggered for those policyholders . That has not been disputed or doubted by Arch. On the contrary , that is the position we have taken.

The point which then arises, which is also a point which the FCA seeks to deal with by way of these broad declarations, concerns the calculation of the indemnity where the clause has been triggered.

Our main point on causation is essentially a point that goes to the determination of the appropriate indemnity, rather than to the operation of the insured peril . Our point is a fairly obvious one and you can see it coming: a policyholder whose premises have been closed is not entitled to claim from Arch a loss of gross profits which the policyholder would not have made if the premises had remained open.

What the FCA is seeking to do by the broad declarations sought in these proceedings is to prevent Arch from adjusting claims on the basis that some or all of its policyholders under Arch1 would not have realised their expected profit even if their premises had not been closed, because of the economic effects of the pandemic, including the reduction in footfall caused by the lockdown restrictions, but also by the general fear of COVID and the general lack of consumer confidence. None of which comprise the insured peril.

Despite having set out to prove this, we say that the FCA has singularly failed to prove a rule of law which makes that argument unavailable to Arch simply as a matter of principle.

So we say it is a necessary part of the policyholder's burden of proving that a reduction in gross profit has been proximately caused by the operation of the insured peril, to show that the loss would not have been suffered or, in other words, the gross profit would have been earned if the insured peril

had not operated. And the fact that the emergency is the first link in the chain of causation in the insured peril does not mean that the other effects of the emergency fall to be excluded from consideration when examining what would be the position if the insured peril had not operated. There is no principle of law which requires the cause of the insured peril to be ignored.

To pick up a point that was addressed by Mr Kealey in his submissions, I think on Ecclesiastical1, it is not entirely clear from the FCA's submissions on the Arch policy whether the FCA's position on the counterfactual turns on the fact that the emergency is one of the stipulated requirements for cover under our clause, extension 7.

So one could test this point, as indeed Mr Kealey did, by asking what would be the FCA's position if the clause had simply stopped at government or local authority action or advice. So that the clause would apply, the extension would be operative, irrespective of what it was that caused the government or local authority to respond.

If one assumes the facts are the same, that you have got the emergency, which leads to the government or local authority action or advice in this case, would the

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

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

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

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

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

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

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

Can I just deal now with the assertion that it is or may be impossible to distinguish between the loss caused by the closure and loss which was caused by the pandemic or the restrictions on movement, the recession,

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

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

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

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

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

lack of consumer confidence.

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

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

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

is the emergency, it 25 {J/106/5}:

1	"All claims for business interruption raise	1	meaning of " civil authority ". It accepts that the term
2	hypothetical issues, and whilst the tribunal would	2	as used in the Zurich policies encompasses central
3	acknowledge that the evaluation required on the facts of	3	government.
4	the present dispute is more difficult than most, this	4	I will endeavour in my submissions to avoid
5	cannot affect what is the correct approach in	5	duplicating points that have already been made by other
6	principle ."	6	insurers .
7	I would respectfully suggest that that is correct.	7	My Lords, could we start, then, by going to the
8	My Lords, unless I can assist your Lordships any	8	Zurich wordings. There are two lead policies; they are
9	further, that is all I propose to say on behalf of Arch.	9	in $\{B/21/1\}$ and $\{B/21/1\}$. The relevant wordings in each
10	Obviously the written argument is taken as read.	10	policy are in materially the same terms, but the
11	LORD JUSTICE FLAUX: I don't have any questions, Mr Lockey.	11	policies are different in structure and there are
12	Thank you very much.	12	relevant differences between them to which I should draw
13	Who do we have now?	13	your Lordship's attention.
14	MR ORR: My Lords, can you hear me?	14	Ms Mulcahy took your Lordships to the combined all
15	LORD JUSTICE FLAUX: Yes. You might need to turn up your	15	risk policy at $\{B/21/1\}$. That comprises a policy
16	sound a bit .	16	document and a schedule.
17	(4.03 pm)	17	Can I take your Lordships to the second lead policy,
18	Submissions by MR ORR	18	known as Zurich2, which is in $\{B/22/1\}$.
19	MR ORR: Is that better?	19	If we can start at page 1, this is known as the
20	LORD JUSTICE FLAUX: Yes, that is fine.	20	Acturis policy and, as its front page indicates, it is
21	MR ORR: I am obliged, my Lords.	21	designed for manufacturing businesses .
22	My Lords, as you know, I appear for Zurich. There	22	The Contents page identifies the types of cover
23	are two Zurich wordings relied upon by the FCA; they are	23	provided . Section B, business interruption , begins at
24	both public authority prevention of access clauses .	24	page 28 of the document {B/22/28}.
25	They each provide cover for loss resulting from	25	The primary business interruption cover, the
	, ,		
	165		167
1	interruption or interference with the insured's business	1	insuring clause for that is at page $\{B/22/30\},$ and your
2	in consequence of action by the police or other	2	Lordships will see in the middle of the page "Cover":
3	competent local, civil or military authority following	3	"In the event of any incident occurring during the
4	a danger or disturbance in the vicinity of the premises	4	period of insurance and in consequence the business
5	whereby access to the premises is prevented.	5	carried on by you at the premises being interrupted or
6	There are notifiable disease clauses in the Zurich	6	interfered with then we will pay you"
7	policies , but these are not alleged by the FCA to be	7	"Incident" is defined at page $\{B/22/28\}$ as being:
8	triggered by the COVID pandemic or the government's	8	"Damage to property used by you at the premises for
9	response to that pandemic.	9	the purposes of the business."
10	In terms of a route map for my submissions,	10	And "Damage" in turn is defined on page $\{B/22/13\}$
11	I propose first to take your Lordships to the Zurich	11	as:
12	policies , and to make certain preliminary points on the	12	"Physical loss, destruction or damage."
13	wordings and the policies in which they appear.	13	If I can take you back to page $\{B/22/30\}$ your
14	Second, I will address the coverage issues between	14	Lordships will see there that for the basic business
15	Zurich and the FCA, focusing in particular on two	15	interruption cover are set out at page 30, "Basis of
16	issues: first of all, whether the government measures	16	claim settlement" clauses . There are various types of
17	responding to the COVID-19 pandemic were taken following	17	bases of claim clauses, but by way of example item 1 is
18	a danger in the vicinity of the premises, within the	18	dealing with gross profit :
19	meaning of the clause; and second, whether the	19	"The amount payable as indemnity under this item
20	government measures prevented access to the premises	20	will be:
21	within the meaning of the clause.	21	"(a) in respect of reduction in turnover: the sum
22	Third, I will address certain discrete issues	22	produced by applying the rate of gross profit to the
23	concerning causation of loss and trends.	23	amount by which the turnover during the indemnity period
24	As regards the coverage issues, I should explain	24	falls short of the standard turnover in consequence of
25	that Zurich does not pursue an argument about the	25	the incident."
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The trends clause, as we have been describing it, appears at the top of page $\{B/22/30\}$ under the heading "Notes to the special definitions". Your Lordships will see:

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

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

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

"Additional cover extensions applicable to subsection $B1 \dots$

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

in consequence of:

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

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

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

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

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

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

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

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

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

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

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

And so on:

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

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

"Excluding:

"(i) any infectious diseases which have been

declared as a pandemic by the World Health Organisation."

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

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

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

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

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

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

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

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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 between access to the premises being prevented, and access to the premises being hindered. Thirdly, they also distinguish between access to the premises being prevented and use of the premises being hindered or becoming subject to restrictions.

So these are the same distinctions that have been made by insurers preceding me.

The second preliminary point is that the phrase " vicinity ", "in the vicinity of the premises" or "within the vicinity of the premises" is used not only in the AOCA extension but also in the loss of attraction and the prevention of access extensions. We say that this phrase has the same meaning in each of the $\,$ extensions , namely that it means in the immediate locality of the premises; it requires the relevant event to have occurred within close spatial proximity of the premises, ie close to or nearby the premises. That is especially clear from the prevention of access extension. Unless

173

the damaged property is near or close to the insured's premises, the damage to that property would not or would be unlikely to prevent or hinder access to the insured's

The third preliminary point is that the extensions to the business interruption cover provide pockets of cover, each one of which is limited by its own specific requirements; there is no blanket coverage, for example, in respect of danger or notifiable diseases. That is particularly apparent from the notifiable diseases extensions

The same circumscription of cover is apparent, we submit, from the AOCA extension. The circumscription includes the geographical location of the danger or disturbance: it must be in the vicinity. Secondly, the requirement that the danger or disturbance in the vicinity must cause the action by the relevant authority, ie the one must follow from the other. And thirdly, the type of public authority action which triggers cover, namely that it must prevent access to the premises.

Those limitations are fundamental, but they are ignored by the FCA in their arguments.

We also emphasise at this stage that the vicinity limitation, and accordingly the causal link between the

vicinity and the authority action, is an important distinction between the Zurich wording and the government authority clause in Arch's wording.

My final preliminary point is to note the composition of Zurich's policyholders. As Ms Mulcahy informed your Lordships, the Zurich1 and 2 wordings were purchased by insureds falling within all seven categories of business identified by the FCA, but with a heavy leaning towards category 5.

Now, in fact 84% of the policies in issue were purchased by policyholders in category 5., that is service businesses and manufacturers. The relevant figures are in a table at bundle H, tab 44, page 15, {H/44/15}. That is a schedule that has been compiled by the FCA on the basis of information from insurers, and your Lordship will see there on the right-hand side, the final column, a box containing the various percentages of policyholders across all Zurich wordings.

Of course none of the business, as your Lordships know, in category 5 were required to cease or close their premises.

My Lords, we also echo Mr Kealey's observation that these policies were not all sold to SMEs. Zurich1 policies, for example, are sold mainly to mid-market companies with substantial turnovers, and not SMEs.

175

That is a point that is made in our skeleton at paragraph 41.

My Lords, can I then turn to the construction issues .

Before focusing on the main two issues I make this general point about the AOCA extension. Reading the clause as a whole, it is clearly directed to occurrence of a danger or disturbance in the immediate locality of the insured's premises which leads to the police or other relevant authority taking action to prevent access to the insured's premises. And it is common ground, as others have told your Lordships, that "access" in this clause means the means to approach or enter the premises. Access is therefore agreed to be a physical concept: the clause is concerned with obstruction to the physical means of the approaching or entering the

The paradigm case contemplated by the clause is a bomb scare, a brawl, a serious traffic accident. In response, the police or other relevant authority takes action which prevents access to the premises, ie shuts off access altogether for all purposes, because access to the premises is unsafe or needs to be kept clear for the emergency services or for police investigations .

That is the vanilla risk that is insured by this clause.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LORD JUSTICE FLAUX: Yes, sure.

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MR ORR: It is this: that having positively relied in its pleadings upon the notifiable diseases extension in Zurich2, the FCA now appears in its skeleton to be trying to distance itself from the other extensions in the Zurich policies.

We deal with this in paragraphs 61 to 63 of our skeleton. I don't need to take your Lordships there now. But our short point is that we submit that the court can and should have regard to the other extensions in the Zurich policies as well as the other provisions of those policies when construing the Zurich wordings.

The two policies before the court are those in tabs 21 and 22 of bundle B. $\{B/21/1\}$ and $\{B/22/1\}$. Those are the policies that have been selected to be tested in these proceedings.

The FCA, as I have said, has relied on other extensions and provisions in those policies to support its case and we must be entitled to do the same.

So it is not open, in our submission, to the FCA to say, well, a particular policyholder might not have purchased a notifiable disease extension, therefore the court shouldn't take that into account.

My Lord, as I say, we have to construe the policies that are before the court.

My Lords, is that a convenient moment?

181

LORD JUSTICE FLAUX: Yes, that is a convenient moment. 1 2 Now, is there any need to start earlier tomorrow 3 morning?

MR ORR: My Lords, I have been asked if we could prevail upon your Lordships to do so in order to make sure that insurers do finish tomorrow.

LORD JUSTICE FLAUX: I am conscious also that, you know, you obviously won't be that long, but we haven't heard from Mr Howard or Mr Salzedo yet.

10 MR ORR: No, my Lord. In terms of allotment I have another 11

12 LORD JUSTICE FLAUX: Yes, okay. In that case subject to 13 Mr Justice Butcher disagreeing I will say $10.00 \ \text{am}$. Are 14 you happy with that?

MR JUSTICE BUTCHER: Yes, certainly. 15 16

MR EDELMAN: My Lord, can I just say something.

We have been faced with 850 pages of written submissions and a full four days of argument. They have had their extra half an hour on two days, which is what we had. Why they should now require four days to reply to only three days of our submissions in circumstances where we also had to spend some time, for example, going through the legislation to explain that to the court, leaves us in a state of some bemusement.

There has been a good deal of repetition from

insurers on the causation issues . Even though Mr Kealey was supposed to be dealing exclusively with that we have been hearing the same argument repeated and developed and they in a sense have wasted their own time and not done what they were supposed to do in accordance with the framework agreement.

It is a matter for the court, but I put down a marker as to why this extra time is necessary.

q MR ORR: My Lords --

10 LORD JUSTICE FLAUX: Does anybody want to say anything about that on behalf of insurers before I say anything? 11

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

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

183

extremely important firstly that everybody who is separately represented has the opportunity to make the submissions on behalf of their clients, so that everybody feels that they have had a fair trial, and secondly that we complete this case in its totality by 4.30 on Thursday.

Given that there is a risk -- and there has always been a risk in relation to the timing of the whole exercise -- it seems to me giving you an extra half an hour tomorrow morning is probably wise, because once we get to 4.30 on Thursday requests, for example, to sit late on Thursday will not be met kindly, and requests to sit on Friday will be met with the short answer "no", because I have another hearing on Friday.

So I am very anxious that we do finish this case by 4.30 on Thursday. To ensure that we will sit at 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

182

Thursday.		
MR EDELMAN: Yes, my Lord, but if they do take a full day,		
as I anticipate they will, then we would want our extra		
time on Thursday as well. I think there would be some		
disquiet if we weren't having felt that we were		
pressed with our three days to fit everything in, and we		
will be pressed on Thursday, that there ought to be at		
least equality between the parties, which there will not		
be if we don't get the extra half an hour on Thursday.		
LORD JUSTICE FLAUX: Subject to anything anybody wants to		
say at close of business tomorrow, I will be prepared		
and again subject to Mr Justice Butcher to sit at		
10.00 am on Thursday, to avoid any more forensic		
ping-pong about who has had whatever length of time.		
I understand the point you make, Mr Edelman, but		
I must say I am not overimpressed. But we will sit at		
$10\ \text{o}^{\prime}\text{clock}$ both days running as necessary, and we will		
see you at 10.00 am tomorrow.		
(4.36 pm)		
(The hearing adjourned until 10.00 am on Wednesday,		
29 July 2020)		
- /		
185		
INDEX		
PAGE		
Submissions by MR GAISMAN1		
(continued)		
Submissions by MR KEALEY17		
Submissions by MR LOCKEY130		
Submissions by MR ORR165		
186		

Opus 2 Official Court Reporters

169-22

138:4

151:4

179:11

apt (1) 35:4

165:9

109:25

183:3

arisen (1) 9:21

arising (1) 47:7

arose (1) 177:4

artifice (1) 4:1

4:6

158:19

a1428 (1) 33:6 a148 (1) 103:14 a229 (1) 38:24 a230 (1) 103:25 a240 (1) 80:18 a245 (1) 56:3 able (13) 2:7 7:11 9:19 61:18 62:6,15 69:19 72:2,14 101:18 102:3 114:12 183:18 above (4) 39:2,2 81:16 135:14 absence (4) 126:1 127:22 128:13 177:11 absolutely (18) 9:20 34:4 36:4 39:22 42:6 44:19 64:17 75:7 85:3,11 105:2 109:7 120:7,7,14 125:5 146:8 148:14 absolutist (1) 148:24 absurdity (1) 2:24 academic (1) 75:7 accept (13) 33:25 35:14 61:25 72:5 77:4 109:1 148:17 152:12,18 153:17 154:5,18 161:1 acceptable (1) 27:3 accepted (10) 38:18 66:10 68:21 123:1 134:21 155:2 158:12,13 180:3,3 accepts (5) 56:17 66:7 80:14 81:1 167:1 access (154) 2:8 18:21.23 22:12 24:3,16 29:12 39:12 48:18 49:15,25 50:1,3,17,22 51:1,2,2,9,9 52:11 58:11 61:21 62:1 81:11 98:6,7,14,15,19,23 99:1,3,5,8,18,19 100:1.2.3.5.8.10.14.16.19.21 101:8.10.15.18.21.24 103:7,12,23 105:7,10,14 107:18,19,20,25 108:23 113:10,14,15 117:18 118:6 120:17,23 121:3 134:2,7,8 140:18,21 142:5,17 143:3,14,19 144:14,19 145:1,8,18,22,23,24 146:12.13.16.18.20.23 147:18.23 148:1,4,17,19,23,25 149:4,10,11,11,13,16,18,19,2 150:3,9,13,16,24 151:6 152:10,15,21 153:11 154:1,5,6,19 155:8,24 156:20 157:22 158:5 165:24 166:5.20 172:9.13 173:6,8,9,10,19,25 174:3,20 176:10,12,14,21,22,22 177:11.13 accessed (2) 101:7 142:12 accessible (2) 27:8 158:6 accessing (3) 145:3 147:17 156:15 accident (2) 118:17 176:19 accidental (2) 136:8,13 accordance (3) 93:20 97:4 183:5 according (6) 10:1 53:7 56:5 77:6 81:23 104:24 accordingly (3) 25:18 39:3 174:25 account (11) 5:6 25:17 27:15 70:16 77:25 102:13 123:23 124:10,16 125:2 181:22 accountancy (1) 107:3 accountant (1) 3:16 accounts (1) 64:21 achieve (3) 28:11 178:13,14 achieved (2) 137:16 163:7 acknowledge (1) 165:3 acknowledged (3) 27:3 84:25

acknowledges (1) 111:3 acknowledging (1) 67:17 across (3) 43:20 116:6 175:18 action (109) 6:15 13:8.10.15 14:2,4,10,15 18:25 24:17 29:14 32:12 39:9 48:8,18 49:17 50:4,5,7,8,9 51:3,4,4,10,11 52:3,4,6,7,10,11 53:8 55:19 56:7,14 57:14 58:12 61:20 62:2 76:15.15.24 77:12.21.23.24 78:24 82:2 87:20 88:3,6 97:25 98:3,7,11,14,19 99:21 103:8,9 109:15 110:24 111:7 117:19,25 118:2,3,13,15,24 119:1.3.20 120:24.24 121:4 129:15.21.22 130:23 133:22,25 134:24 137:4 140:11 141:14 142:9,25 143:2,20 144:8 145:1,2,6 149:21 151:1,2 155:25,25 160:19,25 166:2 170:12 174:17,19 175:1 176:10,21 actions (7) 39:2 53:19.20 144:10 148:7 149:23 152:21 activities (4) 18:12 60:15 133:15 155:9 activity (2) 177:5,7 acts (1) 96:22 actual (10) 26:4 72:14 79:20,21 81:17 82:3 88:17 91:23 125:9.15 actually (41) 1:13 8:7,11 26:8,20 39:16 40:4,10,13 41:9 44:16 55:16 57:9,10,24 58:17 60:19 63:25 64:2,5 65:9 67:19 69:3,11 72:8 73:1 74:1,21 77:16 83:19 86:6 88:5 96:21 105:2 106:12 107:4 127:3 128:9.10 129:21 149:5 acturis (1) 167:20 acute (2) 108:14,16 ad (1) 76:17 add (3) 34:13 76:4 116:21 added (1) 34:11 additional (9) 13:13 34:10 90:11 93:2 111:20 119:17 24 126:11 135:25 169:22 address (7) 8:7 9:20 47:7 117:23 130:25 166:14,22 addressed (7) 3:2 53:6 79:11 122:23 127:9 160:9 162:14 addressing (2) 39:9 149:14 adjacent (1) 3:5 adjectival (2) 34:10.21 adjourned (1) 185:20 adjournment (1) 97:11 adjust (3) 122:21 125:6,7 adjusted (5) 123:8,15 137:8.15 169:11 adjuster (3) 65:16 69:9,10 adjusters (6) 5:15 6:3 65:6.14 69:1 70:25 adjusting (2) 125:17 159:8 adjustment (4) 123:23 137:20 164:12,20 adjustments (2) 123:10 169:6 administration (2) 64:1 65:19 admissible (1) 26:12 adopt (3) 96:5 113:16 115:1 advance (1) 12:22 advice (71) 13:10 19:7 21:10,20 22:2,6 23:10

24:13 33:12 35:17 37:22

38:9 39:1,4,24 40:9 55:25

82:2 102:14 103:1.1.11.21

120:13 141:8 142:14.25

143:2,15,20 144:10

145:1,2,6 148:2,3,7,9,11,13,15 149:21,21,23 151:1.2.5.7.17.17.19.19.21 152:13.13.15.16.18.20 153:12,18 155:25,25 156:22 160:19,25 162:19,24 163:1,2 171:18 advise (2) 70:15 151:24 advised (5) 134:6 147:22 158:4,14 162:7 advising (3) 70:11 151:8,20 affect (4) 61:22 101:19 137:10 165:5 affected (8) 62:4 123:13 124:16,17 137:11 169:10 170:22 171:5 affecting (5) 62:12 123:12 138:15.16 169:9 afforded (1) 179:8 afraid (4) 17:4 25:7 36:9 107:17 after (12) 21:8 67:9 68:12 69:25 123:13,18 124:2 137:10 152:3 163:6,9 afternoon (1) 130:8 afterwards (2) 6:22 68:12 again (15) 3:10 4:4,14 51:1,14 95:1,5,9,25 105:20 133:8 144:8 150:20 162:15 185:12 against (16) 16:5 25:5,15,20 28:21 31:16,23 39:18 40:4 44:21 91:18 120:3 132:6 141:7.18 170:24 agent (3) 157:14,15,20 agents (1) 157:17 ago (2) 8:10 161:25 agree (4) 47:24 54:12 91:17 180:9 agreed (9) 1:24 42:10 54:10,10 151:11 162:20,21 164:2 176:14 agreement (5) 9:13 25:19 27:25 28:16 183:6 agrees (1) 80:7 agricultural (1) 115:20 ahead (2) 146:24 147:10 ai (1) 171:14 aiii (1) 79:8 aimed (2) 3:3 137:20 allaved (1) 47:23 alleged (4) 2:24 4:12,13 166:7 allotment (1) 182:10 allowance (1) 97:6 allowed (2) 15:13 102:1 allowing (1) 1:25 alluded (1) 66:3 almost (7) 10:7 21:23 24:10 30:7 38:10 60:25 122:5 alone (5) 2:3 45:14,23 73:18 80:12 along (5) 36:19 49:24 63:11 97:24 120:18 already (20) 4:13 6:1 8:3 12:11 17:14 67:16 68:3.4.15 109:21 110:20 111:16 121:24 128:23 130:4 148:17 152:9 167:5 170:13 172:16 also (50) 11:3 19:21 20:3,22 21:15,17 23:12 24:5 33:5 42:7 44:18 56:3,24 62:8 66:22 70:14 83:14 91:8 92:9 99:4 104:9 108:15 131:3.9 132:1 133:5 139:21 144:21 145:25 150:1,15 152:20 155:14 157:5,13,25 158:19 159:13 163:10 164:6 172:5 173:7,10,18 174:24 175:22 177:9 182:7,22 184:18 alternative (1) 62:3 alternatively (4) 13:25 80:20

81:12 82:18 although (10) 7:10 10:10 12:20 20:16 81:2 123:19 128:8 132:5 150:4 153:7 altogether (2) 52:17 176:22 always (8) 3:25 8:25 25:15 32:23 68:14 102:10,10 184:7 nended (4) 38:22 80:19 103:24 178:22 nlin (10) 76:11 78:14 79:13.14 81:10 97:15 107:5 116:14 121:9 125:13 amlin1 (8) 39:15 78:16,21 79:2 94:16 106:24 111:14,17 amlin2 (4) 79:3 94:15 111:15.16 amlin3 (2) 115:2,4 among (3) 53:19 67:17 169:5 amount (11) 90:7 91:4 116:18 120:13 135:15,18 149:5,7 150:2 168:19,23 amounted (1) 103:22 amounts (2) 67:7 129:18 analogy (1) 117:5 analysed (1) 12:13 analysis (5) 23:2 59:6 82:15 94:14 138:3 anathematised (1) 3:15 andor (2) 82:17 135:10 necdotal (1) 6:24 annex (6) 131:13,16 132:12,15,23 153:1 nexes (1) 131:12 announcement (1) 103:12 announcements (2) 103:18 104:17 another (18) 4:12 8:9,17 9:23 40:16 42:3 45:3 48:15 72:12 76:20 83:25 97:2 118:18 127:8 146:20 179:23 182:10 184:14 swer (13) 15:16.21 34:12 40:15 61:3 66:5 67:5 74:9 86:12 110:19 137:21 149:20 184:13 answered (3) 2:3 75:24 110:19 anticipate (1) 185:3 anticipated (2) 81:18 82:3 anticipation (2) 129:6 163:2 anxious (1) 184:15 anybody (4) 107:12 115:7 183:10 185:10 anyone (4) 4:18 110:14 115:5 164:2 anything (18) 4:19 10:14 13:4 45:23 47:18 60:5 63:13.13 84:21 96:12 109:20 113:16 116:21 138:22 140:5 183:10.11 185:10 anyway (9) 7:4 60:19 68:16 69:23 115:21 116:2,13 120:19 129:2 aoca (8) 170:11 173:18 174:13 176:6 177:16 178:1.16 179:3 apart (3) 10:14 53:15 118:24 apologise (2) 49:13 153:3 apparent (8) 23:22 24:5,14 32:8 40:14 124:24 174:10.12 appeal (4) 11:23 37:7,9 54:2 appear (12) 17:11 18:18 20:4 42:1 122:5 130:8 132:20 137:1 139:5.8 165:22 166:13 appears (20) 14:18 18:19 40:7 43:14 63:18 82:11 89:11 90:19 94:2 99:8 122:17 124:22 131:7 132:24 156:19 162:1 169:2.20 172:20 181:3 applicable (3) 125:25 138:10

application (5) 47:4 66:4 121:20 122:14 133:6 applied (3) 93:19 126:6 applies (8) 25:22 80:3 94:14 127:20 131:5 137:4 140:18 apply (17) 15:18 16:1 22:14 36:10 71:13 75:5,6,8 82:14 122:10 123:2 131:9 138:7 140:2 160:20 177:24 applying (7) 52:18 75:15 90:7 108:8 135:17 136:4 appointed (1) 6:3 appointing (1) 5:15 apportionment (4) 11:23.24.24 12:4 apposite (1) 50:24 appreciate (2) 108:15,15 approach (10) 6:10,20 9:5 39:23 107:18 126:2,3 134:12 165:5 176:13 approaching (4) 12:18 13:24 176:16 177:19 appropriate (6) 31:1,11,21 37:11 50:25 158:24 appropriately (1) 123:8 arch (32) 130:8,13,15 131:2,4,5,18,23 132:2,6,16,24 134:21 137:3.20 140:3 145:16 153:8 155:12.15.15 158:2,7,17 159:3,8,18 160:12 161:8,24 162:1 arch1 (6) 39:13 130:20 131:22 133:8 134:16 159:9 architecture (1) 32:11 archs (3) 131:20 133:3 175:3 area (14) 5:4 65:19 72:13 79:23 80:3.5 85:8.16 86:13,14,25 87:1 88:23 arearose (1) 10:22 areas (2) 85:14 177:10 arena (4) 4:9 6:14 85:9,9 arent (2) 7:19 110:13 argue (2) 10:17 148:8 argued (4) 6:1 12:20 139:5.9 argues (3) 146:15 150:1,15 arguing (2) 35:25 178:6 argument (17) 5:13 13:1 14:24 15:2 17:21 19:17 83:17 95:13 126:16,18 149:20 159:18 165:10 166:25 178:11 182:18 arguments (3) 145:25 174:23 183:16 arise (10) 65:2,20,20,21 66:6 71:7,9,10 79:12 161:8 arises (4) 80:1 99:25 100:4 around (2) 5:21 11:16 arrangements (6) 19:12,21 29:19 42:13,17 79:1 arrest (1) 102:22 arriving (1) 137:21 article (2) 34:17,20 artificial (5) 3:13.22.23.25 artificiality (2) 3:10 178:10 ascertained (1) 28:23 ascertainment (1) 69:15 ascribe (1) 64:2 available (8) 5:17 26:1,9,13 aside (1) 105:25 ask (13) 1:12 2:15 7:8 15:24 average (2) 26:21 72:2 16:23 34:8 40:5 43:1 48:25 avoid (2) 167:4 185:13

67:18 69:2 155:23 172:5 asked (8) 55:7 59:9,10 60:25 71:4,15 130:14 182:4 asking (4) 4:24 87:3 160:17 183:17 asks (1) 114:4 aspect (1) 31:2 assaulted (1) 10:24 assert (1) 81:10 asserted (1) 10:16 assertion (2) 125:8 162:9 assess (1) 127:17 assessed (1) 150:17 assessing (2) 68:21 161:4 assessment (2) 126:7 164:12 assignee (3) 28:1,3,19 assignment (1) 27:20 assist (4) 95:17 129:25 164:6 165:8 assistance (1) 61:10 assume (10) 5:25 56:5,13 57:22 60:4 61:21 76:21 106:2 119:19 184:22 assumed (7) 72:25 73:3 74:2 132:16,19,23 133:2 assumes (2) 80:6 160:23 assuming (3) 7:6 43:15 162:6 assumption (3) 73:5 150:22 162:3 assumptions (2) 73:4,10 assured (3) 7:11 8:11,20 astrazeneca (1) 54:1 astute (1) 74:20 atlantic (1) 119:12 attach (1) 140:16 attached (2) 20:17.23 attempted (1) 6:13 attempting (1) 178:12 attend (2) 59:24 61:23 attendance (1) 157:19 attended (2) 57:24 61:15 attention (10) 30:10 40:12 132:21 133:8 140:17,21 141:15 162:16 167:13 170:23 attracted (1) 50:12 attraction (6) 68:9 69:2 141:17 171:7 173:18 177:14 attributable (2) 63:23 65:5 attributed (1) 68:24 attributing (1) 55:4 audiences (1) 155:5 authorised (1) 32:13 authorities (11) 33:12 34:15 37:3 43:7 78:24 83:11 98:1 119:14 170:12 177:9,18 uthority (116) 5:20 13:7,8 14:2,4,10,15 19:1,8 21:11,21 22:3,7 23:11.12.13 24:13 29:15 32:17.20.23 33:15,22,23,24 34:1,6,7,17,18,23,24,25 35:2,3,5,9,18,19 36:1.10.20 37:23 38:5,10,18

140:11 141:9.13

142:9.15.25 143:16

174:18,19 175:1,3

33:9 163:5,14 164:6

176:10,20

144:8,11 160:19,22,25

165:24 166:3 167:1 171:19

39:5,8,10,13,14,20,25 40:1.2.9.21.25 41:3 42:22 44:14 48:19 50:8 53:8.19 61:20 79:18 86:3 98:4,7,11 99:21 103:3,8,11,16 104:3,12 108:22 110:25 117:19.25 118:2.3.13.15 120:24,24 121:3 130:23 133:22,25 134:24 137:4

avoiding (1) 90:13 award (2) 164:23,24 aware (3) 115:6 116:14 117:4 away (6) 1:25 2:18 101:16 116:11 119:20 120:11 awful (3) 42:3,4 147:9

b (20) 30:23 31:13 32:5 47:19 62:18 79:17 100:23,23 101:9,12 119:12 130:17 132:15,23 142:13 153:16 155:10 167:23 **b1 (1)** 169:23 b1010 (1) 101:2 **b1011 (1)** 92:11 **b103 (1)** 91:10 b1058 (1) 79:15 b1059 (3) 89:18 91:23 92:25 **b1060 (1)** 91:2 **b1065 (2)** 78:17 97:16 b1067 (1) 98:22 **b1142 (2)** 95:6 112:8 **b1144 (1)** 94:17 b1146 (1) 113:21 b1147 (4) 111:19 112:6 113:23 114:2 **b1148 (2)** 113:12 114:3 **b121 (1)** 115:4 **b21 (2)** 130:18 133:9 **b211 (4)** 167:9,9,15 181:13 **b221 (2)** 167:18 181:13 b2213 (1) 168:10 b2228 (3) 167:24 168:7 170:18 b2229 (1) 172:7 b2230 (3) 168:1,13 169:2 b2234 (1) 169:19 **b2235 (1)** 171:8 b2236 (2) 171:21 172:9 b232 (1) 134:14 b233 (3) 136:6.18 138:11 b234 (2) 134:17 137:13 b235 (1) 139:18 b236 (2) 141:12 144:8 b29 (1) 133:9 **b41 (1)** 18:4 **b442 (1)** 18:6 **b445 (3)** 18:6 21:25 29:11 b446 (1) 20:5 b447 (1) 21:1 **b539 (1)** 123:3 back (19) 4:15 9:4 10:9 22:12 40:18 52:15,21 53:4 69:17 70:5 112:5 113:20 117:12 128:20 136:6 138:11 150:5 156:24 168:13 background (15) 25:5,12,15,20,25 26:6,12,25 27:1,2,5 28:18.25 32:16 80:22 bad (3) 16:11 36:9 170:24 badly (3) 41:16 42:19 73:23 bankruptcy (1) 28:12 bar (2) 153:11.14 barristers (1) 107:2 base (1) 107:10 based (1) 39:19 bases (2) 92:5 168:17 basic (3) 72:1 168:14 170:8 basically (1) 71:19 basis (20) 4:16 6:12 7:5.9 12:3 60:7 73:5 89:3,25 90:22 94:4 126:7,24 127:11 152:7 159:8 168:15

becoming (1) 173:12

175:15 177:22 183:24

bear (2) 48:25 156:24

bearings (1) 17:20

62:19

bearing (2) 17:19 154:16

become (3) 28:13 52:14

becomes (2) 106:18 127:21

battle (1) 1:12

bed (1) 44:23 before (33) 6:21 12:19 14:10 23:17 24:9 25:3 34:12 41:18 47:5 63:17 66:18 67:14.25 68:8 76:11 87:2 95:24 112:8 117:6 123:12 128:21 129:23 134:6 137:10 140:13 162:19,23 163:4 169:9 176:5 181:12,24 183:11 beg (1) 97:19 begging (1) 83:9 begin (2) 17:21 169:18 beginning (5) 18:2 38:25 57:18 137:2 170:19 begins (2) 112:5 167:23 behalf (6) 10:2 17:15 74:5 165:9 183:11 184:3 behaviour (1) 13:9 being (48) 11:21 12:13.13 13:22 14:19 18:23 21:6 24:16 29:12 33:8,18,20 35:15 36:6 43:10 44:14 53:17 54:3 55:5 58:13 65:10 70:7,10,13 71:4,15 82:17 89:5 94:6 98:14.15.16.17.19 99:3.4 101:16 107:13 109:5 121:7 141:8 168:5,7 170:18 173:8,9,10,11 believe (1) 84:16 below (1) 170:3 bemusement (1) 182:24 benefiting (1) 152:10 best (1) 63:4 bets (1) 36:3 better (6) 6:25 16:23 19:16 114:13 165:19 180:21 between (34) 2:14 9:24 11:10 12:5 14:1 16:18 22:9 24:6 33:1 48:13 49:20 63:9 65:21 83:4,6 88:16 99:5,6 119:5 127:1 131:4 137:3 146:1 147:25 162:10 166:14 167:12 172:3 173:6,8,10 174:25 175:2 185:8 beyond (4) 42:6 79:22 104:20 122:12 bi (7) 68:22 89:15 95:10 117:17 122:18 125:24 136:12 big (2) 15:8 83:9 bigger (1) 77:19 billyo (1) 35:25 binding (2) 104:21 106:3 bit (6) 37:25 76:4 83:15 113:3 117:5 165:16 bite (1) 105:17 bitten (1) 116:11 bizarrely (1) 155:5 blanket (2) 157:10 174:8 block (1) 120:20 blocks (1) 9:22 blood (1) 155:6 boil (1) 156:19 bold (1) 113:25 bomb (3) 106:9 176:19 177:9 bonhomie (1) 69:7 bonnington (1) 84:19 book (2) 1:25 134:18 boozefest (2) 152:7,11 boris (3) 102:21 104:5,9 borrow (2) 15:23 104:15 both (19) 11:4 15:3,5,6,25 17:12,17 41:13 61:8 63:7 73:21 90:18 99:3 118:12 119:10.11 165:24 172:23 185:17 bottom (3) 53:18 123:4 bound (4) 28:1,2,4 177:10 boundaries (2) 56:25 57:1 box (1) 175:17

breach (1) 148:20 breadth (1) 122:20 break (6) 36:18 46:24 96:25.25 143:24 144:2 breath (1) 13:15 briefly (5) 15:8 48:22 76:20 141:16 153:1 brings (2) 7:22 170:8 broad (7) 38:8,10 82:17 110:8 124:4 158:20 159:6 broader (3) 56:22 76:21 77:7 broke (1) 46:12 broken (2) 49:2 73:1 brought (1) 70:2 budget (1) 5:9 budgeted (1) 163:7 building (1) 3:5 buildup (1) 142:8 built (1) 109:16 bullet (2) 91:19 95:2 bundle (11) 20:21 27:22 80:18 84:20 104:23 130:17 131:13 139:18 175:13 177:6 181:13 burden (12) 7:15,20 8:16,21,23 60:17,22 63:17 64:9.23 65:1 159:21 bureaucrat (1) 37:13 bursting (1) 106:10 bus (1) 163:15 business (152) 4:19,22 14:10 15:20 16:7 63:24 65:3.18 69:14 78:20 79:6 87:24 88:13,20 89:21,23 90:20 91-21 92-1 13 16 93:5.12.16 94:19.21 95:4 96:3,16 98:3 100:12,14,17,20 101:1,2,3,5,5,11,12,14,17,20 102:3,5,6,8,12 105:7,9,13 106:20 110:23 111:7 112:12,23 113:6 114:15,16,17,18 117:17 118:5.25 122:3.6.11.12 123:11.12.14 124:5,8,16,17 125:2 131:14,21 132:13 133:10,13,15,23,24 134:2,10,13,15,25 135:7 136:10,14 137:10,11,22,24 138:1,7,15,16,19,23 139:1.8.10.13.15 140:4 141:25 142:13 144:18 147:14 148:18 149:1,5,12 151:4,9 152:23,25 153:16,21,21,25 154:8 155:9,17 156:14 157:15 165:1 166:1 167:23,25 168:4,9,14 169:8,9,10,18,25 170:9,22 171:4.13 174:6 175:8.19 177:1.12 185:11 businesses (25) 6:24 103:22 106:21 107:1 108:9 115:9 147:12,21 153:17 154:20.22 155:16.24 156:1,16,21 158:1,3,8,13 162:18 163:9,21 167:21 175:12 butcher (24) 14:16 33:20 39:16 47:25 58:15 59:5 61:1,3 62:20 64:7 78:12 83:9 85:21.24 86:6 95:19 116:3 147:24 148:11 154:10 182:13,15 183:21 185:12 butchers (2) 69:17 70:6 bytheby (1) 146:22

calculate (1) 69:10 calculated (1) 162:6 calculating (1) 128:24 calculation (2) 5:2 158:21 call (4) 1:18 15:13 58:22 170:11 called (4) 5:2 27:11 127:23 139:16 calls (1) 9:22 came (1) 37:13 camera (1) 117:12 cameras (1) 117:12 cancellation (1) 67:9 cancelling (2) 67:11,22 candle (1) 5:16 cannot (11) 10:11 14:2 52:14 53:3 73:11 101:7 105:13 122:1 125:15 142:12 165:5 cant (24) 10:16 20:2 46:8 47:23 52:19.20.22 58:10 72:4,11 73:13 85:22 93:22 102:5,5 107:19,20 108:11 109:18 110:4 111:9 117:9 161:10,17 capable (3) 12:12 101:16 118:20 capital (3) 142:13 153:16 155:10 carefully (3) 1:24 53:25 140:10 carried (13) 79:6 88:21 92:14 93:5.12.16 95:8 101:11.16 113:6 152:24 157:15 168:5 carries (1) 144:18 carrying (3) 100:19 142:13 148:25 carve (20) 19:18,19,25 21:24 22:10 24:2,6,11,22 29:10.10 33:19.21 38:11 39:20,24 40:6 41:4 42:11 47:5 carved (5) 19:14 23:9 24:4 33:18 38:13 carves (1) 19:20 cases (14) 9:25 22:25 26:5 38:20 64:19,20,20 80:2,4 81:18 82:3 84:18 86:17 casual (1) 67:5 categories (9) 131:14,21 132:13 147:19.24 151:4.9 152:25 175:8 category (39) 108:8 131:24,25 132:1,3,9,10 143:13 147:11,11 153:6,9,24 154:18,21 155:2,12,13,14,16,17,17 156:15,16,17 157:1,1,3,8,11,14,24 158:1,7,8,9 175:9,11,20 causal (52) 1:22 2:14 14:1.5 48:5.10 57:16.18 67:1 80:6,7,8,9,10,15,22 81:2,12,15,24 82:8,10 83:1,20,21 84:2,3,6,13,22 85:2.5.18 87:6.6.10 88:15,25 90:24 91:8 92:3 95:15,16,21 110:21 111:4.4 118:11.18 119:6 121:18 174:25 causation (50) 1:6 2:1,17 3:20 4:11 7:25 8:1,6,25 9:6,11,15,25 14:12 17:15,17 47:2,6 48:3 52:22 54:14 62:18 66:5,8 71:12 74:4 75:2,16 76:10 79:11 82:15 85:10 87:3 90:19 95:14 109:14.19 117:2.15 121:9 125:24 131:7 133:6 137:19 158:23 160:2 161:20,22 166:23 183:1 causative (4) 12:4 82:20 87:5 96:14 cause (55) 3:7 13:13,17,19 16:20 30:2 48:12 55:14 62:3 80:12,13,13 81:16,25

82:17 83:5,5,5,6 84:9 85:10.12.23.25 86:10 87:17.17 89:12 95:16 109:15 118:19.20.25 119:16.20.24.25 120:13 121:5,8 122:22 124:5,11 125:8,18,19 129:16,21 135:9 140:8 153:4 160:7 161:11 162:25 174:17 caused (78) 5:22 6:15 7:6,13 8:21 12:13 14:13 48:8.8.12.14.15.17.18.19 51:10 55:5.8.19.20 56:12 57:7,10,14,15,20,21 58:11,12,25 59:1,14,15 61:20 62:1,1,8,18 67:20 68:22,22 70:24 77:12,12,23,24 81:11,22 88:10 93:22 94:22 105:24 111:5 117:17.18 118:2,6,16 119:2,6,9,10,19 120:23,23,25 121:3 122:6 136:5.16 142:16 143:13 159:12,22 160:21 162:10,11 164:13 causes (24) 11:19 13:18 21:9.19 22:1 30:2 52:11 54-12 117-24 118-7 10 119:9,10,11,14,15,21,23 121:7 124:5 161:14,15 171:17 177:18 causing (2) 38:8 118:21 cease (2) 154:21 175:20 celebrity (2) 67:24 68:25 central (10) 32:12,22 36:9,12 38:19 45:9.13 46:3.8 167:2 centralgenossenschaft (1) 146:5 certain (13) 21:14 26:17,19 47:17 76:14 93:8 112:14 145:13 151:6,9 152:21 166:12,22 certainty (2) 71:16,17 cetera (19) 13:10 22:8 50:17 52:7.10.12 53:8 64:21 69:12 70:2 76:23 91:12,15 95:7 103:21 113:7,8,15 chain (9) 2:13 48:5,10 54:12,14 118:11,18 119:6 160:2 chair (1) 147:7 challenge (2) 23:21,23 challenged (1) 131:19 challenging (2) 23:19,23 chambers (2) 107:2,13 champing (1) 117:5 change (4) 6:7 57:22 153:20 164:17 changing (1) 71:12 chapter (3) 4:22 5:2.3 chapters (1) 66:2 character (1) 76:15 charge (2) 2:25,25 chef (15) 16:7 67:24 68:3.9.12.17.25 69:3,4,5,12,23,24 70:1,2 chefs (1) 69:6 chimerical (1) 3:8 china (2) 110:11.16 choice (2) 44:22 107:16 choose (2) 107:15,15 chose (1) 157:2 chosen (1) 104:17 church (59) 54:19,24 55:1,17 56:8,10,19,23 57:5,6,24 58:2,8,9,10,13,16,25 59:11 60:3.4.6.9.9.20 61:13,15,15,16,16,18,23 62:9,13,15 63:4,5,11,20,21 64:5 65:8,15,16 66:12.16.19 70:12,14,16,19 72:1,2,13,15,17 73:8,16 128:25 churches (1) 35:16

churchs (1) 55:7 circumscribe (2) 1:24 22:22 circumscription (2) 174:12.13 circumscriptions (1) 24:25 circumstance (2) 68:8 139:11 circumstances (19) 28:13 32:7 49:17 61:18 68:19 74:16 85:2 123:12 124:14 128:5 137:9 138:13.21.25 139:7 141:23 161:1 169:8 182:21 citation (1) 4:24 cited (1) 177:2 citizen (1) 103:19 citizenry (1) 104:14 citizens (2) 102:22 104:25 city (1) 72:13 civil (7) 29:7.17.19 98:4 110:25 166:3 167:1 claims (13) 5:2,3 6:6 15:19,20 70:25 74:11 90:22 116:13 131:9,18 159:8 165:1 clarke (1) 54:1 classic (2) 45:20 68:2 clause (227) 3:3 7:12 13:7 15:18 16:1,5 19:17 20:7 21:12,13,13,19 22:4,10,11,13,15,17,17,18,19,21 23:8.13 24:7.8.9.15.25 25:1 29:11 33:17,19 35:10,11,14,23 37:5.12.20.23.23 38:1.2.4.10.11.13.15 39:9 40:19,25 41:4,22 42:21,22,25 43:5,25 44:1.12.13.24.25 49:2,6,8,20,23,24 50:5,15,17,18 52:16 66:1 71:11 76:2,13,21,22,25 77:1,2,6,8,11,16,20,22 78:5.23.24 79:2.4.12.13.20.20 87:20 88:7,8 89:9,16,19 90:20 91:24 92:24,24 93:3,20 94:8,8 97:15,17,22,25 98:21 99:3,8,8,11 103:9 105:16 107:4 108:11 109:16:20 110:22 111:16.17.18 112:13.19 113:11.13.17 114:4,14,20,23,25 117:16,24 118:9,11,14,22 119:18 121:2 123:21 124:25 125:12,20 126:9,15,22,23 127:8,15,17,23 128:7,11,12,13,19 131:4 133:5 134:1.24 137:1 139:6 140:17.18.22.24.25 141:5,6,10,13,16,16,17,17 142:19 143:10 144:8,25 145:12,16,17,21,24,24 146:12.15 147:12 149:10,12,15,25 150:15,22,24 151:4 158:22 160:15.18.19 161:16.18 166:19.21 168:1 169:1 170:9 171:1 175:3 176:7,13,15,18,25 178:12 180:7 clauses (54) 5:5,7,20,20 15:1,5,9,25 16:10,13 25:4 38:17 39:13 42:15.16 66:4 78:15.16 81:11 92:5 95:9 114:1 117:3 121:18.19.24 122:5,8,10,15,20 123:1 125:10,17,22,25 126:1,5 127:12 128:1,3,4,5 134:12 139:16,20 145:14 146:2,6 165:24 166:6 168:16,17 169:16 clear (16) 22:9 24:6 28:11 43:3 50:15 78:11,12 94:4,9

137:18 147:20 156:9 160:11 173:5.25 176:23 clearer (4) 15:12 64:19 123:20 177:17 clearly (7) 24:19 53:19 147:20 150:10 156:14 171:3 176:7 clients (7) 17:17 36:8 61:7,8 130:5 147:15 184:3 close (26) 102:9 105:7 106:22 107:2 115:10 120:21 134:5 147:22 150:12.13 151:25 152:8 155:18 157:2 158:4,14,14,15 162:7 163:21 164:19 173:23,24 174:1 175:20 185:11 closed (27) 3:4 14:10 54:20,24 55:18 57:6 58:2.6.14 60:4.4.9.10 61:15,16 63:12 70:8,16 107:24 141:4 148:22 151:10 157:17 159:3.11 161:5 172:7 closer (2) 81:13,24 closing (1) 35:15 closure (44) 13:9 19:6.21 22-5 23-9 24-11 37-13 40-8 48:7 55:13 56:18 57:11,14 58:25 59:14,16 63:4 64:5 70:14,24 72:1,10 73:8,16 77:23 134:6 145:7 148:10,12 151:22 152:16,23,23 155:3 162:11.19.19.24 163:1.2 164:5.8.10.13 closures (1) 37:2 cloud (1) 6:19 club (2) 153:11,14 clubs (6) 131:25 151:21,24,25 152:3,10 clue (1) 43:10 code (1) 5:19 collected (1) 70:10 collection (11) 57:25 58:1.8 59:21,22,25 60:1,5 61:14 63:16 73:16 collections (3) 67:15,16 70:9 column (19) 18:13,14 19:18 20:8 21:4 22:20 23:7 34:14.19 35:2 133:12 135:2.13.14 136:7.17 139:20 142:10 175:17 columns (3) 18:17 20:2 41:13 combination (22) 48:11,13,14,15,17,20 57:16 118:8,10,11,15,17,21 119:2,4,6,10,14,21 120:1 121:6 129:17 combined (7) 118:18 130:15,19 131:2,5 161:24 167:14 come (14) 10:9 36:18,19,24 63:21 69:8 72:15.16 116:5 126:8 135:11 142:1 150:11 180:14 comes (4) 4:20 63:11 91:23 115:25 coming (7) 63:14 65:15 69:17 70:5 117:1 129:22 159:2 commend (1) 132:14 commercial (7) 120:4 130:15,18 131:2,5 134:12 161:24 commercially (1) 150:16 committee (1) 104:7 common (11) 28:17 79:2 94:2 131:3,23 135:1 137:2 139:25 162:1 172:3 176:11

98:21 163:10.24 111:2 183:13.17 176:15 102:21.23 73:6

compared (3) 109:25 comparing (2) 5:10 133:2 comparison (1) 5:9 compellingly (1) 51:22 competence (2) 23:13 32:23 competent (53) 19:7 21:10,21 22:2,6 23:10,11 24:13 32:17 33:12.14.21.22.24 34:5.8.11.11.18.21.25 35:3.5.8.18.19.36:1.10.20 37:3,22 38:4,9,18 39:5,7,14,25 40:21,25 41:3 42:21 44:14 78:24 79:18 83:11 97:25 98:4 110:24 141:9 166:3 170:12 171:18 competently (2) 3:18,19 compiled (1) 175:14 complete (4) 40:3 105:11 146:15 184:5 completely (7) 1:19 5:12 50:24 85:7 86:25 108:11 complex (4) 65:19 66:1 complexity (1) 5:5 complicated (5) 4:20 11:3 66:2 106:18 123:20 composite (3) 1:20 161:9,18 composition (1) 175:5 comprise (1) 159:15 comprises (2) 167:15 172:17 compromise (1) 6:5 compulsory (1) 102:15 concedes (2) 57:9,9 conceive (1) 12:11 concept (6) 98:18 108:19 115:14 146:21 147:25 concepts (1) 135:20 concern (4) 7:9 47:8,21,22 concerned (25) 47:12 72:22.23.24 76:13 92:25 98:19 109:10 121:23 124:25 127:12 133:21,24 134:1,1,18,19 136:3 145:18,19,21 146:12 147:20 149:2 176:15 concerning (1) 166:23 concerns (5) 128:21 131:21 138:21 151:17 158:21 concession (1) 55:17 conclude (1) 143:10 concluding (1) 1:5 conclusion (1) 122:14 conclusive (1) 43:22 concurrent (2) 13:17 82:19 condition (2) 11:16 30:13 conditions (2) 31:5 55:21 conduct (4) 102:3.5.5 134:9 conducted (1) 101:3 conducting (1) 105:12 conference (3) 45:17 confidence (3) 159:14 163:12 164:1 confined (7) 35:1 41:22 42:2 44:15.25 45:5 46:5 confining (2) 34:23 38:4 confirm (1) 139:25 confirms (1) 137:19 conflate (1) 71:5 conflating (1) 114:22 confronted (2) 75:9 76:6 confronting (1) 87:9 congregant (1) 59:20 congregation (3) 70:21 72:9 congregations (1) 59:6 conjunction (1) 23:7 connected (1) 133:15 connecting (2) 90:24 110:22

brain (1) 113:9

brawl (1) 176:19

c (2) 100:25 141:2

c112 (1) 151:18

c121 (1) 151:12

c142 (1) 162:21

c2287 (1) 104:24

cafes (1) 131:25

connection (28) 24:6

80:9,10,15,23

nonly (1) 42:16

companies (1) 175:25

compare (3) 48:14 69:20

comparative (1) 5:9

deal (14) 7:16 8:7 43:8 74:3

dealing (8) 10:5 41:5 44:1

dealt (11) 1:15 2:24 4:10

17:15 37:24 46:2 47:3

94:16 104:1 111:14.16

debate (5) 7:25 9:17 45:16

73:25 146:6 168:18 180:7

94:15 132:18 141:23 157:8

158:20 162:9 177:23 178:5

de (1) 154:12

181:6 182:25

deals (1) 108:10

70:3 85:13

debates (1) 132:6

debts (1) 134:18

decided (2) 92:20,21

deciding (1) 66:17

decision (1) 179:2

decisions (1) 27:4

159:7

declaration (1) 157:10

declarations (2) 158:21

declaratory (1) 164:15

declared (1) 172:1

declaring (1) 30:23

decreased (1) 68:18

deemed (5) 27:9 28:1,19

deem (1) 170:6

99:1 170:5

deep (1) 13:15

183:2

81:2.4.13.15.15.24 82:8 83:1.21 84:2.12 85:18 87:6,7,10 88:16,25 91:8 95:15,16 111:4,5 145:14 connections (1) 49:20 connotation (1) 87:5 connotes (1) 80:21 conscious (1) 182:7 consensus (1) 25:18 consequence (15) 85:10.11.12 87:16 92:14.18 93:13 94:5.12 120:12 166:2 168:4.24 170:1,22 consequences (2) 28:18 54:9 consequential (19) 79:5 88:12 92:10,12 93:4,8,9,19 94:6 95:5 98:24 112:3,6,7,9,16,19 113:25 114:4 consider (3) 15:24 23:15 130:14 considerable (1) 104:1 considerably (1) 116:10 consideration (4) 75:18 130:21 160:4 161:15 considerations (1) 5:4 considered (3) 15:6 26:4.7 considering (2) 2:16 75:13 considers (2) 3:17,21 consistent (2) 26:10 125:24 constituent (1) 49:3 constitute (1) 149:3 constituted (1) 152:15 constitutes (2) 149:22 151:16 constitution (1) 103:2 constitutional (1) 104:2 constrained (1) 172:24 construction (12) 5:8 22:14 39:11 76:7 99:13 133:5 134:12 142:19 145:11 150:21 176:3 180:13 construe (3) 20:2.3 181:23 construed (3) 25:5 27:17 28:5 construing (5) 28:16 49:6 53:25 126:4 181:11 consumer (3) 159:14 163:12 164:1 contagious (2) 79:17 141:3 contain (3) 30:25 126:22 127:8 contained (1) 16:21 containing (3) 100:21 119:7 175:17 contains (3) 24:9 126:23 141:3 contamination (4) 31:25 32:2,4 114:16 contemplated (4) 45:8 76:2 176:18 178:16 contemplates (3) 32:12 101:5 177:17 contemplating (1) 171:1 contend (2) 80:16 179:13 contends (1) 27:24 content (1) 3:1 contention (1) 142:2 contents (2) 59:22 167:22 context (34) 9:6 11:25 20:3,4 23:12,12 27:17,25 28:17,21 29:7 30:9 35:18 36:21 38:16.17 39:9 43:6 45:3 84:24 87:14 89:11 91:1 99:17 100:13 110:2 111:2.5 112:13 122:6.17 126:15 138:8 154:13 contexts (1) 90:18 contextual (2) 39:10 43:4 contingencies (4) 29:7,17 170:4,7 contingent (1) 32:6 continue (5) 19:24 28:19,20 48:3 93:14 continued (5) 1:3 54:25

115:15 152:4 186:3 continues (2) 103:16 171:6 contract (12) 20:4 33:7 75:16 79:14 87:2.4.12.15 89:17 91:13.16 161:21 contracted (3) 21:6,15 88:18 contracting (1) 26:13 contracts (9) 4:16 6:8 25:14,21,22 74:21 75:3 76:8 121:22 contractual (2) 75:5 87:7 contrary (5) 26:17 54:13 155:19 158:17 178:6 contributing (1) 80:13 contribution (8) 82:10,20 83:21 84:6,19,22 85:2,5 control (2) 31:14,17 controlling (2) 31:2,23 controversial (2) 25:6 53:12 convenient (5) 18:3 46:20 143:22 181:25 182:1 converted (3) 52:19,21 53:3 copy (1) 2:9 cordoning (1) 177:10 customs (1) 119:13

corner (1) 137:14 correct (14) 55:24 72:7 75:21 81:13 82:14 106:5 107:11 120:14 126:5 129:4 147:21 165:5,7 179:6 correspond (1) 43:17 corresponding (1) 123:6 cost (4) 90:3,11 135:22 139:22 couldnt (8) 5:14 61:23 63:13,13,15 102:11 128:25 157:22 council (3) 30:12 46:2,13 counsel (1) 27:24

counterfactual (14) 1:9 2:18 3:18 4:5 52:18,24 55:24 56:5 74:7,17 76:19 77:4 138:6 160:13 counterfactuals (1) 3:24 countries (1) 6:23 country (7) 3:23 27:6 43:20 63:1 71:21 81:18 104:15 counts (1) 50:6

course (28) 6:3 17:14 26:10,24 28:9 35:24 40:11 45:2 47:8 48:25 56:6 59:20.23 71:7 73:15 74:23 90:25 93:18 96:19.19 107:7 112:17 116:9 120:5 126:12 142:1 175:19 177:20 courts (2) 32:22 183:25

covenants (1) 28:2 cover (62) 3:1 13:24 17:12 18:10 22:23,24 23:5 24:24 33:17,18 36:3 39:12 41:6 44:2 49:5.5 50:1 52:12 78:20 93:2 95:9 99:23.24 105:14,15,21 106:7,13,17 107:6 114:14 118:9 121:1 134:18,19,20,22,23,25 136:2.12 137:24 140:4 143:6,11,12 160:14 165:25 167:22,25 168:2,15 169:18.22 174:6.7.12.20 177:12.14 179:8.12

coverage (30) 8:7 14:11 18:7 20:7 21:13 22:22 24:3,7,14,21 36:12 37:11 40:7 62:7.18 76:21 77:1,8,10,13,16,17,19 78:4.8 140:16 144:12 166:14.24 174:8 covered (21) 4:13 18:14,15,18 19:4,5,13,15 21:3,4,18 22:16 23:7 48:13

178:3 covering (2) 77:20 114:9 covers (5) 18:22 42:11 114:10.15 121:2 covid (12) 3:24,24 40:19

52:6,8 76:22 94:17 100:3,9

57:21 60:22 63:1 64:10 72:17 128:21 129:11 159:14 166:8 covid19 (25) 4:8 35:13,22 36:6 54:20 55:6.25 56:1,7,12,14 57:7 58:7 71:21 72:9 81:18 82:16,18 119:19 120:12 129:19 141:4 166:17 177:21 178:3 credit (1) 2:3 crime (1) 120:22 critical (2) 49:4 75:7 criticised (1) 49:11 criticism (2) 50:13 183:23 crossed (2) 56:21 78:10 crossexamine (2) 130:1,3 crossreferences (1) 151:10 crowden (1) 23:4 crown (3) 30:15 37:7,9 customer (3) 141:19,24 142:4 customers (9) 102:1 119:19 120:11 147:15 149:8,11 153:19 156:8,16

cut (1) 183:15

d (2) 11:10 21:8 d11 (1) 131:19 daily (1) 163:14 damage (71) 15:11,19 16:6 29:22 30:1 68:22 89:22,24 90:4.9.16 91:6.21 92:1.4.5.6.15.22 93:13.22 94:1,20,25 95:4,8 98:24 112:16 122:7,12,16 123:8,13,14,17,18,25 124:2,10 125:8 127:3,5,19 135:7,10,11,18 136:1,5,7,8,13,16 137:10.12.17.23 138:2.8 140:19 141:19 168:8.10.12 170:2 171:8 172:12,14 174:2 177:12,14 damaged (3) 99:2 172:12 174:1 damagerelated (1) 112:2 danger (24) 98:5 105:21,24 108:12.14.24 109:5.6.9.14.22 110:25 166:4.18 171:2.5 174:9,14,16 176:8 178:9 180:4,10,13 dangerous (1) 74:1 dangers (1) 180:8 danton (1) 104:6 data (2) 163:14,16 date (2) 7:4 123:8

dates (1) 109:21

185:2

daunting (1) 11:18

55:9 67:25 68:12

day11126 (1) 55:10

day11131 (1) 66:25

day11151 (1) 58:2

day210917 (1) 124:20

day211421 (1) 67:25

day263 (1) 57:2

day2941 (1) 125:9

day2951 (1) 125:12

day311210 (1) 80:25

day31136 (1) 82:10

day31301 (1) 89:16

day31454 (1) 33:4

day31461 (1) 42:7

day31488 (1) 44:8

day31536 (1) 126:13

day32718 (1) 150:18

days (11) 9:18 97:22 120:22

182:18.19.20.21 185:6.17

day3341 (1) 157:6

134:6 163:4

69:21,21,22 105:1,3

day (17) 1:15 4:9 8:17 12:17

122:19 152:7 184:22,23

defective (6) 19:11,20 20:6 42:12 78:25 140:25 defendant (1) 11:5 deference (1) 2:19 define (3) 22:21 50:6.21 defined (13) 1:21 49:15 92:12 101:1 112:6,10 114:5 133:14 144:16 168:7,10 170:17 172:6 defines (4) 50:2 79:13,14 118:22 definite (1) 34:20 definition (20) 30:6,7 35:16 51:5 92:10.11 93:7.19 94:6 95:6 110:8 112:3,7,13,15,20,21 135:11 136:7 141:3 definitions (4) 133:10 136:18 169:3,5 deft (1) 93:24 deftness (1) 113:4 degree (5) 80:8,10,15 82:25 112:14 deliberate (1) 179:1 deliberately (2) 47:11 80:21 delineation (4) 22:23,24 23:5 41:5 deliver (2) 71:15 73:4 delving (1) 71:18 demonstrate (1) 179:1 demonstratio (1) 15:14 denial (3) 39:12 113:14 177:13 denied (1) 58:25 denotes (1) 111:4 depart (1) 126:6 departing (1) 130:2 departure (1) 9:5 depend (6) 7:11 59:22 64:18 67:6 120:5 161:10 dependent (2) 37:12 150:25 depending (4) 3:12 35:7 67:11 109:9 depends (5) 59:18 67:21 86:13 110:2 177:14 deprived (2) 72:13 73:6 deputy (1) 23:3 dereliction (1) 46:10 described (7) 19:17 22:16 38:23 70:8 84:21 133:16 139:1 describing (1) 169:1 descriptions (2) 128:3,6 designated (1) 130:19 designed (1) 167:21

despatch (1) 128:17 despatched (1) 128:16 despatches (2) 96:9,11 despite (2) 106:17 159:16 destruction (2) 136:8 168:12 detail (8) 11:11 25:3 29:3 104:1 116:19 132:13 133:1 136:21 detailed (2) 106:18 127:21 details (1) 91:12 detained (1) 121:12 detected (2) 183:21,22 determination (1) 158:24 determine (4) 11:19 71:2 73:11 120:10 determined (5) 9:25 53:17,24 74:8 75:11 determining (1) 86:24 develop (1) 158:10 developed (3) 11:3 82:6 183:3 developing (1) 132:6 devices (1) 177:8 dictate (1) 39:11 dictatorship (1) 104:8 didnt (19) 4:23 6:24 8:18 11-22 34-7 35-5 7 37-16 40-1 44-21 46-18 47-15 25 50:19 55:1 58:3 61:22 119:24 157:16 die (1) 120:19 died (1) 72:9 differ (1) 145:11 difference (12) 63:9 83:4,6 85:3.11 95:20 99:5.6 109:4 127:1 146:1 148:16 differences (1) 167:12 different (31) 10:11 12:12,13,14,21 13:12 38:16 39:18 43:6,6,10,13 48:10,11 49:20 57:18 59:10 62:11 79:24 85:7,25 86:25 90:24.25 92:2 106:20 111:2 114:6 134:9 153:21 167:11 differently (2) 15:19 59:7 difficult (12) 7:7 8:5 41:8,11 71:8 73:14 84:14 99:25 115:16 138:24 156:4 165:4 difficulties (4) 7:18,19 39:17 178:8 difficulty (7) 3:6 4:14 5:23 6:11.17 85:24 153:4 dilute (1) 100:13 diminishing (1) 90:13 direct (8) 37:17 82:9 86:1,2,9 87:17 88:15 89:12 directed (4) 105:20 147:17 176:7 179:18 directly (5) 16:16 29:19 88:10 114:10 133:15 disabilities (1) 11:4 disagree (2) 180:16,20 disagreed (1) 11:23 disagreeing (1) 182:13 disagreement (1) 151:16 disappeared (1) 147:2 discern (2) 2:21 84:14 discerned (1) 49:5 disclaimer (1) 28:10 discovery (1) 19:9

discrete (1) 166:22

67:16

discussed (3) 61:9 65:10

discussion (2) 12:17 70:3

disease (84) 19:9,11,18,24

24:2,6,7,11,18,21,24 29:10

31:15 33:13,19 34:4 35:13

38:17 40:19 41:23 42:1,16

44:1,3,7,10,10,13,16 45:19

79:9.13.14.15.17.24.80:3

131:10 157:22 172:16

donor (5) 54:18,22,23 55:1,3

183:5

47:5 53:7.21 78:25

85:18 86:3 87:24

20:6.17 21:5.12.24

22:8.10.11 23:8

43:8,19

88:11.14.16.23 89:4 93:6.17.21 94:7 95:23 96:10 109:3 111:16,18 112:4 113:8 129:19 140:24 141:3 166:6 171:14.22 172:6,19,24 179:9,10 180:5 181:21 diseaserelated (1) 13:18 diseases (33) 19:20 20:9,10,12,19,22,24 21:2,14 24:3,5.24 29:1 32:19 36:7.23.25 37:1 41:22 43:14.17 44:17.19 45:15,18 171:10,25 174:9,10 178:21,25 179:20 181:2 disentangle (1) 11:18 dismisses (1) 57:8 dismissive (1) 55:11 dispatches (1) 96:7 displace (1) 95:19 displacing (1) 95:18 dispute (7) 33:1 71:1 144:9,10,12,13 165:4 disputed (1) 158:17 disputes (2) 65:20 146:7 disquiet (1) 185:5 distance (2) 55:2 181:4 distancing (3) 149:21 152:13 156:22 distinction (2) 173:5 175:2 distinctions (2) 53:21 173:13 distinguish (4) 48:13 162:10 173:7,10 disturbance (10) 98:5 105:22 109:6 166:4 171:2.6 174:15,16 176:8 180:11 disturbances (1) 180:8 divider (1) 17:21 divides (1) 9:8 dividing (1) 9:14 divisibility (1) 13:23 divisible (1) 10:8 division (1) 12:16 divisions (1) 9:21 document (5) 91:14 132:14 167:16,24 172:17 documents (1) 104:23 does (47) 26:19 33:22 36:20 37:20 39:11,20 42:23 43:1 58:19 59:20 62:16 74:24.24 81:22 83:4 86:16 87:20 95:19.20 100:13 103:14 105:7,8 114:4,13,14 115:7 116:12 118:16 124:19,20 141:4,23 143:9 146:15 149:2,13,25 150:22 154:10 158:11 160:3 164:17 166:25 172:19 178:9 183:10 doesnt (49) 11:11 12:23 14:14 16:1 19:19 22:25 23:23 29:20 33:21 47:23 48:6 50:19 52:16 59:16 60:17 80:16 84:13 87:19.21 88:24 89:6 95:17 98:14,15,16,17 105:16 107:9 109:4.5 110:9 116:3 119:4 120:19.20 127:25 129:7 137:1 139:5.8 142:6 143:7 148:4,12 149:5,6 163:17 179:11,13 doing (9) 10:4 14:4 33:25 37:18 68:8 71:18 74:14,15 126:20 doleman (1) 27:11 donation (14) 54:22.25 55:2.4.6.15.18 56:11.23 57:5,6,20 59:3 155:6 donations (1) 61:24 done (16) 3:18 35:6 59:7,20

77:18 83:15 86:19 103:10 110:13 112:1 113:2 130:4

donors (1) 57:20 dont (75) 1:8 4:14 7:16 8:23 14:11 15:10 17:23 18:17 22:15.17 25:6 26:16 29:2 36:11 37:24 44:5.6.20 45:24 47:17,20 48:9 49:12 50:24 57:12,16,19,19 66:22 71:8,15,21 72:24 75:19,25 77:5 83:19 84:16 86:17 96:24 104:7 105:23 108:5 110:14 115:22 116:9.17 117:7 120:16 128:12 130:1.3.9 136:20 140:5 144:23 148:8,14,18,23 150:19 151:12 152:12 154:2 155:21 157:25 162:15 165:11 172:6.15 181:7 183:21.23 184:23 185:9 door (6) 11:19 52:15.21 53:4 69:6 179:15 doubt (7) 6:4 33:20 36:19 44:20 69:10 102:25 112:18 doubted (1) 158:17 down (13) 49:2 55:6 58:17 60:21 62:21,22 63:12 68-13 89-25 94-23 152-8 156-19 183-7 downturn (1) 13:8 draconian (1) 45:10 drafted (2) 41:16 114:24 drafting (2) 92:20 177:24 draftsman (1) 179:2 drags (1) 43:23 drains (3) 19:11,20 42:13 dramatically (1) 2:1 drastic (1) 163:14 draw (6) 30:9 141:15 162:16 167:12 170:23 173:5 drawing (1) 115:19 drawn (2) 1:12 40:12 dreamt (1) 47:18 driven (1) 150:25 drugs (1) 119:12 due (34) 11:1 13:9 19:1.7.22 22:6 23:10 24:12,17 29:15 40:8 49:18 50:9 51:3,5 52:10 54:20 55:13 56:18 57:11 76:14,15,24 77:20 96:19 117:19 118:13 121:4 135:18,25 142:1 143:11 148:1.3 duplicating (1) 167:5 duplication (2) 93:9 183:15 during (24) 82:6 90:8,15 91:5 94:21 115:8 123:6,17 124:2 127:2,4 135:8,19,24 137:17,22 148:21 163:15 164:10 168:3,23 170:21 171:4,5 duty (2) 46:10 154:14 dwell (3) 4:18 37:24.25 dysentery (2) 20:15,24 e (1) 53:18 eagle (1) 110:21 145:23 182:2 early (1) 184:24 earth (1) 37:10 easiest (1) 126:19 easily (1) 27:14 easy (2) 5:11 69:1 ecclesiastical (25)

earlier (4) 101:23 112:9 earned (2) 127:19 159:25 easier (3) 7:18 35:6 126:15 17:11,18,22 23:6,22 24:23

26:15,19 28:25 36:8 38:20 39:7 40:20.22 41:21 44:21 47:3 54:10 61:8 64:11 76:11 78:14 123:1 125:13 126:14 ecclesiastical1 (1) 160:10

ecclesiasticals (4) 24:20 48:23 62:24 65:8

echo (5) 17:9 21:23 22:9 37:21 175:22 economic (6) 63:1 159:11 161:3 163:11.16.25 economy (2) 64:10 164:8 edelman (38) 9:9,18,22 10:2 41:20 42:7 44:19 45:17 47:10 49:11 50:13 55:9,21 56:17,22 57:8 58:2 66:10 67:21.23 69:19 89:13 91:9 104:25 115:4 122:19 124:19 125:11 126:12.17 129:5 139:1 182:16 184:18,21,22 185:2,15 edelmans (6) 5:8,13 63:6 66:9 69:18 107:23 effect (30) 6:7 13:24 28:4 31:3 33:2 84:13 86:1,2,6,9 96:2 98:10.13.18 99:12:20:21 102:25 103:2 106:1 125:22 128:10 138:22 143:1 145:6 146:4 149:23 151:2 153:18 156:1 effective (1) 128:11 effects (18) 11:13,19 57:12 62:13 63:1 64:10,13 77:9 78-1 2 124-4 129-10 150:17 151:1 159:11 160:3 161:3 164:7 effort (1) 58:17 eg (1) 13:9 eggers (1) 23:3 egress (1) 149:7 eight (1) 127:7 eio (4) 17:22 48:16 76:13 127:13 eio11 (1) 126:21 either (14) 8:2 13:22 14:6,12 34:24 41:19 59:10 73:11 84:22 123:12 124:16 169:9 179:7 180:15 elastic (1) 108:18 elderly (2) 66:11,15 electricity (1) 148:21 electronically (1) 55:2 elegance (3) 92:20 96:8 113:4 element (1) 93:8 elements (10) 7:12 8:11,19 10:11 49:3,4 54:11,14 55:23 77:6 elias (1) 27:21 eloquent (1) 13:4 else (14) 8:22 10:14 34:13 44:4 45:24 73:18 75:20 85:14 118:19,20 138:22 151:24 162:4,8 embarking (1) 7:7 embodies (1) 48:5 embody (1) 51:14 emboldened (1) 112:19 emergency (83) 19:1 24:18 29:15,21 30:8,11,12,21 31:3,6,9 48:20,20 49:18 50:9 51:5,12 52:1.6.7.11.14.21.23.24 53:4 54:6,9 55:13,20 56:6.13.18 57:4.7.11.13.15.17.17.21 58:11.12 59:1 60:11 61:19,21 62:4 65:1 76:16,17,18 77:2,5,8,9,13,14,15 78:1,1,2,5,6 142:15,23,23 143:1,6,7,12,17,21 144:9 160:1,4,13,24 161:2,4 162:25 164:7 176:24 emergencys (1) 52:2 emphasis (1) 100:12 emphasise (4) 121:16 137:8 138:13 174:24 employees (5) 147:15 149:8,11 156:8,14 employer (2) 11:4 85:17 enclave (1) 84:25

180:4 encompasses (1) 167:2 encompassesabsorbs (1) 13:16 encountered (1) 178:8 end (3) 55:3 117:1 164:5 endanger (4) 19:1 29:15 50:9 142:23 endeavour (2) 167:4 183:14 ending (1) 170:20 endorse (1) 180:17 endorsements (1) 91:15 ends (2) 78:7 112:5 enforced (2) 37:3 100:18 engage (1) 8:6 engaged (2) 172:4,10 engages (2) 170:9 171:8 england (3) 27:7 31:25 46:1 english (2) 26:6,7 enough (4) 24:15 88:22 124:4 148:9 enquire (1) 34:9 enquiry (3) 7:6 137:25 ensuing (1) 5:3 ensure (2) 183:18 184:16 enter (1) 176:13 entered (1) 33:8 entering (2) 176:16 177:19 entire (1) 57:4 entirely (7) 6:10,16 35:4 72:19 160:11 180:9.17 entirety (1) 78:6 entities (1) 35:1 entitled (6) 68:16 157:10 159:3 164:11.15 181:18 entry (2) 144:20 151:18 entwined (1) 11:16 envisage (1) 76:2 envisaged (1) 99:7 envisages (1) 99:3 envy (1) 71:15 epidemic (1) 43:19 episode (1) 12:11 equal (1) 162:8 equality (1) 185:8 equally (5) 25:22 34:6 109:7 156:9,16 equate (1) 89:12 equipment (2) 102:4,7 equivalent (1) 131:6 error (1) 126:17 errors (1) 133:4 escaped (1) 110:21 especial (1) 6:17 especially (4) 5:4 6:5 132:3 173:24 essence (5) 49:12,13 50:16 74:16,18 essential (5) 102:4,7 106:23 108:10 119:23 essentially (4) 49:23 74:4 144:21 158:23 establish (3) 60:13 61:19 164:21 established (6) 2:17 8:3,4,19 27:5 75:6 establishes (1) 8:20 establishing (1) 8:24 estate (3) 157:14.16.20 et (19) 13:10 22:8 50:17 52:7,10,12 53:8 64:21 69:12 70:2 76:23 91:12,15 95:7 103:21 113:7,8,15 162:13 etc (3) 49:17,18 50:22 evaluated (1) 28:22 evaluation (3) 69:15 70:3 165:3 even (57) 2:2 4:15 5:7 14:20,23 22:16 28:2,19 37:8 44:5,6 45:5 53:6,15

58:8.16 60:20 62:16 63:20

64:1.9,12 66:19 70:16,19

83:7,18 84:18 85:22 86:10

71:9 72:14 73:7 77:18

103:1 105:10 107:9 115:3 122:5 125:25 127:25 129:2.13 139:5 147:22 149:6 155:1.5 156:4.7 159:10 163:5 183:1 event (17) 4:3 29:21,25 65:24 80:21 94:22 106:10 107:1 124:11 125:14 140:19 146:22 168:3 172:21 173:22 179:15,19 evential (1) 63:17 ever (3) 60:19 66:21 116:5 every (7) 49:9,25 57:24 59:6 64:17,23,24 everybody (3) 150:14 184:1,4 everything (14) 10:10 74:17 75:19 77:25 113:16 115:1.17 123:22.23 125:1 162:4,8 180:17 185:6 everywhere (1) 85:14 evidence (14) 5:22,22 6:18,24 10:14 63:20 71:1,24 73:17 131:17 151:25 163:5,18 178:9 evidential (6) 7:14 8:16 64-9 23 65-1 71-7 exact (2) 21:23,23 exactly (17) 30:6,7 35:9,10 40:6 41:7 65:2 70:3 74:15 84:5 88:1 96:4 105:18 106:8 113:4 125:3 148:14 examining (1) 160:5 example (66) 12:10 25:1 32:13 35:15 38:21 39:15 41:1,25 45:20,23 48:6 49:24 50:11 52:5 53:5 54:18 55:11,11,17 57:8,22 58:1 61:12 63:10,22 65:10 66:10,10 67:23 68:2 69:18 70:6 72:12 73:5,16 74:7 85:14 86:14,22 90:5 100:16.20 101:14.17 102:2 105:23 107:24 108:20.20 114:1 117:24 120:11 128:20,23 133:1 148:20 154:2 157:12,14,21 168:17 174:8 175:24 179:19 182:22 184:11 examples (3) 107:23 108:3,7 exceeding (1) 90:16 exceeds (2) 123:9 135:19 excellent (1) 23:2 except (2) 172:18 179:16 exception (1) 84:25 exceptional (1) 85:16 exclude (1) 179:2 excluded (3) 135:9 160:4 161:15 excluding (2) 18:19 171:24 exclusion (12) 18:19 22:17 39:6,8 41:6 43:4 44:5 47:5 171:23 172:20 178:21,25 exclusive (3) 37:4 179:14,16 exclusively (2) 106:25 183:2 excuse (1) 156:10 executive (1) 38:5 exempting (1) 22:18 exemption (1) 22:18 exercise (12) 2:1 3:20 6:14 8:6 69:1,16 74:8 105:3 133:2 137:20 164:16 184:9 exercised (1) 32:1 exercises (1) 164:20 exercising (1) 105:1 exist (5) 48:12 66:22 83:22 85:3 119:23 existed (1) 14:6 existence (1) 118:14 existing (1) 71:21 exists (1) 114:22 expanded (1) 78:7 expanding (2) 71:11 99:24 expect (4) 45:13 46:2,4 112:21

87:2 95:19 96:1 101:25

expectation (1) 110:13 expected (3) 5:14 110:7 159:10 expenditure (2) 90:12,14 expense (1) 122:9 expenses (1) 135:25 expensive (1) 156:21 experience (1) 42:15 expert (1) 178:9 explain (3) 59:13 166:24 182:23 explained (7) 15:1,2,3 48:4,6 148:16 177:1 explaining (1) 148:6 explains (1) 131:13 explicit (2) 121:24 123:21 explode (1) 177:9 exploring (1) 8:2 express (1) 178:20 expressed (2) 47:22 135:3 expressly (5) 106:23 155:19 156:1,5 161:23 extend (2) 44:4 110:14 extended (1) 18:10 extension (57) 18:9 43:11 44:6 107:7,7 122:12 130-23 131-1 6 9 133-22 137-5 138-10 140-11 12 141:17 142:11 143:9,12 154:17 158:15 160:15,20 161:9 162:5 164:17 170:7.11.12.13 171:8,10,22 172:4,9,19 173:18,25 174:13 176:6 177-4 16 24 178:1.3.17.22.25 179:3,11,11,18,20,22,23 181:2,21 extensions (26) 112:18 122:4,18 134:23 138:7 139:14,15,17 140:3,14 142:1 145:24 169:17,22 171:7 172:8 173:19,20 174:5.11 179:9.13.15 181:4.9.17 extensive (1) 34:2 extent (6) 63:1 68:24 111:18 145:13 164:7 183:16 extra (6) 113:18 182:19 183:8 184:9 185:3,9 extract (1) 101:10 extraneous (3) 122:21 125:6.7 extreme (1) 7:1 extremely (2) 153:9 184:1 extricability (1) 6:11 eye (2) 11:1,3 eyes (1) 110:21 face (6) 60:12 62:17 73:17 106:12 147:8 156:4

faced (2) 11:17 182:17 faces (1) 23:22 facie (18) 7:12 8:13,20 60:24 61:12.19 62:7.16.24.25 64:12 70:5.9 71:20.23 72:5 73:12,19 factors (1) 126:8 factory (3) 100:22,23 101:9 factsensitive (1) 157:9 factual (7) 6:12 26:11 27:3 72:22 73:25 74:2 80:22 fail (2) 82:14.15 failed (5) 1:19 3:19 55:12 120:2 159:17 fair (3) 39:16 131:23 184:4 fairchild (2) 84:24 85:14 fairly (5) 45:9 106:13 136:22 157:8 159:1 fall (14) 35:16 62:22 90:9 91:6 130:21 132:4.10 145:15 149:25 154:21 155:16 157:12 160:4 173:2 fallacious (1) 179:5

fallen (2) 63:3 126:17

69:19

firms (2) 107:3,3

first (36) 1:18 9:10 10:19

17:18 20:1 24:1 25:11 26:2

27:14.16 36:15 40:13 42:9

45:4 52:1 55:9,12 57:10

falling (1) 175:7 falls (2) 84:24 168:24 falsa (1) 15:14 falteringly (1) 64:13 familiar (5) 4:4 131:16 135:20 136:23 155:21 fancourt (1) 27:24 far (19) 4:5 15:13 63:24 68:10 77:7,13,16 103:20 127:11 131:21 132:20 133:25 136:2 138:21 147:19 148:18 149:2 164:20 178:15 farrier (4) 115:25 116:4,6,7 farriers (1) 115:22 fast (2) 10:25 11:14 fault (1) 64:15 favour (1) 120:16 fca (94) 1:19 2:3 6:9 9:3,10 10:2 14:4.6 15:16.24.25 23:17,19 26:17,22 35:24 36:7,17 37:24 38:19 40:20 41:12.20 50:13 53:7 54:7 57:4 66:7 67:18 75:24 76:18 77:3,6,14 78:5,9 80:7,14,19 81:8,23 82:24 89-3 95-17 103-13 16 107:9 111:3 20 112:24 123:2 125:8 131:4,15,19 132:5,17 134:21 137:3 140:12 141:1 142:3 144:22 145:11 146:15.20 150:1.15 153:7 154:13,25 155:13 157:9 158:20 159:6,17 161-1 164-14 165-23 166:7.15 170:24 172:4 174:23 175:8,15 178:6,11,12,15,20 181:3.16.19 fcas (35) 1:14 10:10 15:8 33:5 55:22 56:4,5,15 74:16 81:7 82:6,12,23 83:2 94:2 132:16,22,23,24 133:4 141:12 149:12.20 152:5.9.12 156:2.19.25.25 160:11,12,17 161:6,12 fear (2) 126:17 159:13 fears (1) 47:22 feature (2) 48:10,11 featuring (1) 48:20 feel (1) 9:19 feels (1) 184:4 fell (1) 27:17 felt (1) 185:5 ferocity (1) 109:9 fever (4) 20:18,25,25 45:24 few (7) 1:5,17 14:21 19:23 97:22 153:8 161:25 fifth (2) 107:24 108:1 figures (7) 68:6,19 123:14,23 137:15 169:11 175:13 file (1) 98:22 files (1) 157:23 final (3) 164:19 175:4,17 finally (4) 12:19 142:7 163:20 172:8 financial (3) 36:17 62:14 137:22 find (15) 18:17.18 20:20 29:8 34:14 40:10 42:15 49:10 58:10 78:17,23 97:16 114:3 116:6 136:24 findings (1) 11:9 finds (2) 7:14 38:16 fine (4) 97:7 128:8 147:6 165:20 finger (1) 7:24 finish (5) 180:24 182:6 183:18 184:15,23 fire (7) 67:25 68:5,7,9,20,22

firstly (13) 24:20 25:10 30:11 32:16 33:10 42:9 51:25 63:4 71:9 81:22 83:20 142:22 184:1 fit (3) 15:2 16:1 185:6 five (1) 108:8 flaux (113) 1:4 2:7,9 7:23 9:2 14:9 17:2.6 18:1 22:23 35:12,24 40:15,24 41:9,16 42:11 45:12 46:7,20,22 47:15,17 51:16,19 54:2 60:3,17 61:2,6 63:6,9 72:12,21 73:20 75:10,23 76:9 78:20 83:25 84:7.11.17 87:19.23 88:3 96:24 97:4,7,13,17,19,23 105:16,19 106:6,12 107:8.12 108:20 109:2,5,11 111:10 115:5,7,11,13,20,24 116:1,16,21 117:11 120-5 9 128-18 129-5 9 24 130-3 6 9 143-22 24 144:4,6 146:3,10 147:1,6,8 150:2,5,12 152:6 165:11,15,20 172:21 173:1 180:1.12.19.25 182:1.7.12 183:10,20 184:20,25 185:10 fleas (1) 42:5 flock (1) 152:4 flood (1) 106:10 floor (2) 107:24 108:2 focus (2) 136:21 149:10 focusing (2) 166:15 176:5 follow (3) 14:14 63:7 174:18 followed (4) 18:19 149:21 152:20 153:13 following (67) 18:12 23:25 35:12 79:7 80:2.6.8.15.20 81:2,11,22 82:7,25 83:17 87:5,9,13,15,24 88:8,13 89:10,13 90:4,8,15,17,22 91:6,21 92:4,6 93:6,16 94:7,10,25 95:4,8,11,14,22 98:3,5 102:16 104:3,4 110:20.22.24.25 111:1.3.7.11 112:4.16 113:7,8 127:10 142:22 162:17 163:24 164:5 166:3,17 follows (3) 10:18 129:7 135:4 food (7) 3:4 10:25 11:14 19:11,20 20:6 42:12 fool (1) 40:3 foot (4) 102:20 133:13 136:24 138:12 footfall (5) 141:19,24 142:4 156:22 159:12 footnote (3) 4:22 177:3,8 forbidden (1) 103:16 force (7) 40:4 103:10,15 104:11 146:2,6 178:6 forcing (1) 2:13 forefront (2) 9:11 86:23 forensic (1) 185:13 forge (3) 115:23 116:3,8 forges (4) 115:5,8,13,15 forgive (3) 19:23 51:17 113:24 form (11) 12:16 20:16 76:17 91:16 106:2 112:2 113:2 126:22 127:7.9 163:4 formatting (1) 153:4 formed (1) 155:9 former (1) 104:21 forms (3) 32:3 35:2 162:1 formulation (1) 136:3 fortiori (3) 26:24 41:5 71:14 fortunate (2) 130:24 131:3 fortune (1) 114:13

79:2 86:14 92:19.22

107:10 133:10 140:17

142:19 143:6 145:17,20

160:2 166:11.16 170:11

173:5.6 183:20

forward (1) 1:16 found (6) 54:5 109:17 110:3 127:16 130:14 179:10 foundation (1) 6:16 four (5) 50:23 99:7.11 182:18,20 fourth (1) 7:10 framework (8) 9:13 26:20 33:2,10,16 87:8,8 183:6 fraudulent (5) 86:15.15.17.18.21 fraudulently (1) 86:22 free (1) 147:13 french (2) 69:7 104:15 frequently (1) 113:25 friday (2) 184:13,14 friends (5) 12:25 13:1 15:23 96:22 117:4 froing (1) 6:4 front (1) 167:20 full (6) 76:24 77:21 182:18 184:22,23 185:2 fully (1) 158:6 function (1) 52:2 fundamental (7) 9:14,21 75:21 76:6,7 153:20 174-22 fundamentally (1) 43:13 funding (1) 23:1 funds (1) 64:22 furnace (1) 115:17 further (15) 25:3 31:14 35:21 80:20 82:6 109:18,20 111:9,10 119:25 127:22 129:25 161:13 165:9 179:24 furthermore (1) 5:18 g (2) 11:10,12

gain (4) 100:1 101:10 105:10 107:20 gaining (1) 99:19 gaisman (26) 1:3,4,5 2:10 7:23 8:18 9:3 14:9,16,18 17:2 49:22 53:5 59:10 66:3 72:25 73:22 101:23 102:2 113:17 114:7,12 115:1 149:6 157:25 186:3 gaismans (3) 103:19 139:19 150:5 game (1) 5:16 gas (1) 106:9 gateway (1) 56:21 gather (1) 70:19 gathering (1) 70:17 gave (9) 4:21 57:23 61:3 66:10 67:23.24 76:21 102:2 118:23 general (15) 15:3,5 25:17 32:5 64:10,12 121:21,21 126:7 129:11 159:13,14 164:4 176:6 179:23 generally (6) 32:3 75:16 103:9 121:18 133:24 161:20 generous (1) 55:3 genuinely (1) 65:22 geographical (1) 174:14 georges (1) 104:6

genericus (1) 53.3 genuinely (1) 65:22 geographical (1) 174:14 georges (1) 104:6 get (23) 17:19 41:23 46:14 63:13 64:8,14 71:1 73:2 84:1 85:22 100:4,6,7 107:9,23 117:5 120:16 140:13 141:11 152:25 184:11,21 185:9 gets (5) 14:11 69:22 87:2 116:11 120:25 getting (1) 64:4

give (17) 11:22 36:11,18 50:10 58:18 61:24 63:16 77:16 95:22 108:3,7 125:22 141:24 144:23 146:4 151:10,25 given (26) 4:2 8:2,10 58:1,7,21,24 59:23

encompass (3) 124:4 179:4

60:3.8.8.19 68:3.4 71:22 73:9.25 99:12 101:23 103:21 114:23 120:6 151:7 152:14.18 184:7 gives (4) 58:22 60:5 68:12 113:19 giving (5) 54:19 58:4 82:2 125:18 184:9 goes (10) 21:19 25:10 42:20 43:2 49:24 67:15 126:18 142:20 158:24 178:15 going (63) 1:18 3:11 7:18 8:2 14:20 15:14 16:16 17:12,18 22:24 23:17 25:3,8 27:12 28:7 32:9 34:12 36:3,23 37:12 40:18 41:23 46:16,17 47:2 48:24 67:4 68:14,15,18 69:9 70:17 78:13 79:1 83:12 87:12 95:25 96:12.18 97:15 107:13 108:4 110:16,19 113:20 115:3 116:17.25 117:15 119:18 121:11 127:21 128:19 132:11 139:4 140:10 147:9 150:5 151:25 152:8 158:9 167-7 182-22 gone (9) 5:15 58:17 62:21 69:14 70:20,21,22,22 117:12 good (16) 8:11 17:9 23:16 25:8 47:16 48:2 60:23 62:17 69:12,12 88:22 97:7 117:15 130:8 143:25 182-25 goodness (3) 37:16 41:14 115:18 gordon (1) 154:3 governed (1) 169:19 government (111) 13:9,10 18:25 29:14 32:12,13,19,23 34:15,24 35:15,20,25 36:9,13 37:4.5.15 38:19 39:3.9 41:1.15 44:15 45:9.13 46:3,6,9 48:8,19 49:17 50:4,5,8 51:3,4,4,10,11 52:3,6,7,10 53:14 55:19,25 56:7,14 57:14 58:12 59:1 60:11 66:18 76:15,24 77:12.21.23.24 81:17 82:1,21 87:20 88:3,6 89:2 102:14.24 103:17 104:19,20 105:1,24 109:15 118:24 119:1,3,20 120:12 128:21 129:15,20,22 130:22 133:22,25 134:24 137:4 140:11 141:13 142:8,14,24 143:15 144:7,11 145:1,2 155:24.25 160:18.21.24 166:16.20 167:3 175:3 177:22,25 178:5 governmental (1) 143:20 governments (1) 166:8 grammatical (1) 34:22 grapple (1) 1:19 grateful (4) 48:2 103:5 116:24 130:5 great (2) 69:6 158:2 greater (3) 39:23 59:3 131:24 greatest (2) 5:23 96:14 gross (31) 90:1,7,23 94:23 122:8 134:20,22 135:3,17 136:2,4,15,19,19 137:7 140:1.6.9 141:18 142:16 143:11.13 159:4.22.25 162:22 163:7 164:9,13 168:18,22 ground (10) 14:11 94:2 131:3 135:1 137:2 139:25 162:1,15 172:3 176:11 group (5) 66:11,15,21

growing (1) 138:19 guarantee (5) 27:16,19,25 28:13.16 guarantor (2) 28:3,22 guarantors (1) 28:10 guardian (1) 46:18 guidance (3) 103:18 104:18,19 guide (2) 6:22 68:19

h (1) 175:13

h4415 (1) 175:14

ha (2) 36:8 78:5

hadnt (1) 129:3

hall (2) 66:12,16

hamblen (1) 126:4

mers (1) 116:11

ncock (2) 46:11,15

hang (2) 43:18 69:23

38:7 115:7 152:8

happy (1) 182:14

harm (2) 108:14,17

hat (1) 69:6

182:8

hate (1) 147:8

181:1 185:5

headed (1) 97:25

health (12) 20:12

31:12,14,17,23

124:23 172:2

184:14 185:20

heats (1) 116:9

heavily (1) 43:11

heavy (1) 175:9

hedged (1) 36:2

heels (1) 152:20

held (1) 27:16

hello (1) 130:10

help (1) 177:6

hence (1) 24:21

hepatitis (1) 20:18

herself (1) 37:18

hesitate (1) 130:1

104:2 157:14

highlight (1) 125:11

highly (3) 53:12 61:25 65:18

i1263 (1) 54:18

i1264 (1) 66:13

i1287 (1) 81:8

169:2

hapless (1) 3:16

happen (1) 4:2

185:9

himself (3) 37:18 67:23

hinder (2) 172:12 174:3

hindered (11) 18:24 24:17

29:13 61:21 98:14,17

hindcastle (1) 28:5

116:8

99:4,4 150:9 173:9,11 hinders (3) 98:25 140:21,23 hindrance (18) 48:18 50:3 55:19 76:14,24 77:12,20 99:7,16 100:3,9 108:1 113:15 145:22 146:1,9 150:2.8 hindsight (2) 45:6,6 hired (1) 16:7 hiscox (5) 2:4 3:1 4:5 81:1 half (8) 12:15 73:5 97:3 113:13 182:19 183:18 184:9.24 hit (1) 12:19 hoaxes (1) 177:9 hodge (1) 23:1 hole (1) 178:7 home (12) 67:7,12 101:18 102:3,6,12 107:15 115:17 151:20 152:13 156:17 157:22 homespun (1) 157:12 happened (8) 4:2.3.6.6.8 hoof (1) 116:10 hope (9) 9:16,19 19:23 41:19 happens (10) 6:22 14:19 59:19 68:5 69:8.13 70:4 78:11 97:18 120:19 131:10 134:10 110:6 120:20 129:12 hopeless (1) 156:3 horse (3) 115:25 116:4.11 hard (3) 2:9 15:12 72:25 horses (1) 116:10 hardly (3) 3:21 53:14 113:9 horseshoe (1) 116:4 horseshoes (3) 115:20,22 hasnt (3) 8:15 63:23 121:12 116:6 hospital (3) 11:2,5,15 host (1) 155:6 havent (4) 4:25 13:20 51:23 hotel (1) 110:1 hour (9) 97:2,3,3 182:11,19 having (17) 3:14,18 9:18 183:18 184:10,24 185:9 15:6 16:19 33:9 42:8 49:8 hours (1) 106:7 75:6 81:12 92:22 103:10 house (1) 102:22 130:25 148:16 159:16 howard (2) 96:18 182:9 however (8) 2:20 34:2 62:10 head (3) 46:12 68:3 131:18 70:14 84:1 105:15 118:4 179:18 heading (12) 7:10 22:15 huge (2) 69:6 96:8 25:12 98:22 125:11,14,15 hugely (2) 77:17 78:7 127:23 135:3,14 139:20 hull (1) 119:13 human (11) 19:1 29:15,22 headnote (2) 27:13.15 30:1.2.2 31:12.13 50:10 79:17 141:2 hundreds (1) 65:13 32:18,25,25 43:16 46:11 hurdle (1) 55:12 hurricane (7) 12:18,19 13:25 hear (4) 17:5,9 117:9 165:14 124:12 129:7,10 139:9 heard (6) 6:18 68:17 111:1 hypothesis (1) 86:1 129:23 157:24 182:8 hypothetical (4) 3:13 71:18 hearing (4) 130:22 183:3 164:22 165:2 i110 (1) 56:4 i1108 (1) 12:25 i1173 (1) 132:25 i1185 (1) 23:20 i1186 (1) 26:18 i121 (1) 17:21 helpful (2) 139:19 140:13 i12100 (1) 109:17 i12129 (1) 121:16 i12131 (1) 126:19 i12144 (1) 122:24 here (23) 3:11 4:8 6:25 13:16 36:3,18 39:18 43:23 44:5 i1223 (2) 102:17 104:4 59:5 65:13 78:18 86:25 i1228 (1) 102:19 87:1 104:18 114:16 116:14 i1229 (1) 103:6 i1238 (1) 17:22 119:17 126:6 127:23 i1243 (1) 26:16 129:10 133:21 134:22 hereafter (2) 74:10 75:2 i1244 (1) 29:4 heretical (2) 10:3 161:13 i1254 (1) 48:24 i1256 (1) 50:13 hes (3) 64:21 120:19 152:7 i1257 (1) 51:20 i1259 (1) 94:3 high (5) 15:13 23:3 37:8 i1261 (1) 53:2

i1290 (1) 111:22 i1294 (1) 99:15 i1296 (1) 108:7 i160 (1) 144:24 i164 (1) 105:5 i1736 (1) 96:11 i1737 (1) 96:19 i187 (2) 82:12,13 i1933 (2) 177:4,6 i332 (1) 2:6 i81 (2) 131:13 153:2 i82 (1) 153:3 ice (1) 73:1 idea (8) 9:10 42:6 81:17,25 96:9,11 104:9 148:1 identification (1) 75:12 identified (11) 2:2 9:14 20:9 24:25 75:14 119:18 161:11.16 170:14 173:4 175:8 identifies (4) 38:3,6 126:20 167:22 identify (6) 49:7 52:3 59:12 76:3 140:15 142:20 identifying (1) 34:1 ie (4) 5:10 173:24 174:18 176:21 ignore (2) 4:16 148:13 ignored (3) 148:15 160:8 174:23 ignores (1) 13:22 ii (5) 13:11.16 14:18 30:25 137:11 iii (1) 19:4 illness (6) 30:3 31:13 79:16.21 80:5 109:4 illnesses (1) 96:12 illogical (1) 125:16 illustration (1) 13:5 im (15) 2:8,10 13:11 17:4 32:9 36:9 43:22 48:2 73:21 107:17 110:19 115:6 116:24 147:6 170:15 image (1) 38:11 imagine (2) 4:1 16:22 imagining (1) 3:23 immediate (3) 102:24 immediately (2) 69:25 123:7 impact (4) 23:1 89:7 96:15 110:7 implemented (2) 86:11 177:22 implements (1) 115:21 implicit (2) 10:10 121:25 implied (1) 24:19 import (1) 83:1 importance (1) 158:2 important (14) 35:10 45:3 49:1-55:17 71:3 74:13 106:24 127:10 146:25 147:11 155:12.14 175:1 184:1 importantly (1) 171:20 imported (1) 90:20 imports (1) 82:8 impose (3) 35:19 86:4 108:22 imposed (7) 35:15 37:2 60:10 83:17 86:8.8 128:22 imposes (1) 41:2 imposing (1) 83:13 impossibility (4) 99:19,20,22 148-9 impossible (5) 100:1,7 146:18 148:5 162:10 impossibly (1) 3:17 impressionistically (1) 41:14

improve (2) 41:8,12

inability (1) 101:10

inappropriate (1) 36:16

incidence (2) 31:18,24

incident (30) 11:14,15

113:13 117:19.25

118:1.2.12.13.15.17.23

119:2,7,8 120:23,25 121:4

168:3.7.25 169:10.11.13 170:5,7,20,22 177:17 180:10 incidentally (1) 20:20 incidents (2) 11:13 180:7 include (15) 4:23 20:24 24:16 26:25 37:6,7,8,10 40:22,25 54:6,11 141:4 157:13 172:20 included (6) 20:23 38:14 42:16 50:6 127:6.12 includes (8) 20:22 26:11 30:16 112:21 140:22 157:2,15 174:14 including (11) 1:22 32:18 37:4 38:19 67:18 108:8 109:13 134:23 140:1 159:12 178:8 income (33) 18:5 55:5,7 56:10.12.19.57:21 58:6,13,16 59:13,13,15,17 60:2,6 61:25 63:3,22 64:2 66:16 67:5.14 69:19 73:6,16 126:23,25 127:1,3,15,18 128:20 incompetence (1) 3:15 inconsistency (2) 155:1,7 incorrect (1) 2:25 increase (4) 90:3,11 135:22 139:22 increased (2) 77:17 122:9 incur (1) 65:16 incurred (4) 7:4 90:12 135:22 138:2 indefinite (2) 34:17 110:8 indemnifiable (1) 136:15 indemnify (2) 135:6 139:21 indemnity (26) 4:21 68:23 90:8,15 91:5 123:7,9 127:2 135:3,19,24 136:19 137:23 139:12 143:8 158:21,25 162:5 168:19,23 170:16,16,17,20,25 171:3 independent (8) 62:13 117:23 118:20 119:17,21,25 120:13 121:5 independently (1) 118:21 index (1) 186:1 indicated (3) 61:11 72:6 109:21 indicates (3) 32:15 140:6 167:20 indication (2) 45:7 111:11 indications (1) 94:9 indistinguishable (1) 138:4 individual (4) 7:3 74:10,11 183:14 indivisible (9) 10:11,13 12:2,7 53:10,17,19,21 82:17 inescapable (1) 5:5 infection (4) 31:18.24 32:2.4 infectious (31) 19:8,10,18,19,24 21:24 22:7,10 24:2.3.5.6.11.17.21.24 29:1,10 32:19 33:13,18 34:3 36:7.23.25 42:16 79:17 129:19 141:2 171:25 179:9 infer (1) 179:8 inferred (2) 88:5 107:5 infestation (1) 140:24 influenced (4) 7:8 25:19 42:19.19 information (1) 175:15 informed (1) 175:6 ingenious (1) 63:6 ingredients (2) 124:23 129:17 inherent (1) 10:9 injured (1) 120:20 injuries (2) 10:25 11:1

injury (3) 12:5 30:3 31:13

insofar (5) 6:10 48:9 57:17

inner (1) 72:13

28:5.12.21 91:18 122:17.22 176:9.11 183:13 168:1 170:9 179:21 92:2 92:8 94:7 95:11 111:12

101:25 115:13 interested (4) 79:25 insolvency (4) 27:18 instance (1) 27:16 instances (1) 107:22 instant (1) 91:11 instead (2) 37:18 114:8 instructing (1) 151:9 instruction (1) 104:10 instructions (4) 39:1 103:11 105:25 106:2 instructive (2) 10:22 11:7 insurance (21) 4:19.23 6:6 9:6 18:10 25:23 54:8 65:19 75:3,5,17 91:13 94:22 118:11 121:22 135:8 146:7 161:20 168:4 169:18 177:2 insurances (1) 65:12 insure (5) 44:21 54:10,10,12 insured (128) 1:24 2:13,15 3:12 7:13 8:12,21,24,25 9:1 12:20 16:3 26:21 36:5 37:15 47:12 48:5 49:12,13 50:16 51:25 52:14,16 53:3,24 54:15 55:8 56:20.25 58:10 60:14.23 62:6 7 12 65:5 9 23 68:6 69:11 70:24 71:19,22,23 73:12,13,18 75:13,14,19 76:3,5,22 77:17,18,19 78:3.3.7.9 94:1.22 96:17 100:20 105:13 107:9 119:5,22,23,24 120-1 17 25 121-6 124:1,5,6,7,9,11,11,17 125:1,2,4,18,19,20,23 129:2.10.11.13.18.19.22 134:4 136:12 138:2,9 139:22,24 140:7,8 141:7 142:21,21 143:18 149:4 150:25 152:15,17 158:25 159:15.23.25 160:2.5.7 161:2.14.18 162:3 164:14 169:24 176:25 insureds (17) 5:14 7:3 17:13 37:11 65:12,21 68:22 74:10 122:3 124:5 127:18 166:1 174:1,3 175:7 insurer (25) 2:12.15 7:15.21 8:14.16.24 17:17 22:18 26:21 60:18,18,22 63:17 64:3 68:6 69:22,23 70:11 72:8,13,19 119:5 132:19 insurers (24) 16:5,11 17:15 54:7 65:22 68:16 70:15 74:6.10.18 82:14 131:24 143:4 145:14 167:6 169:16 173:14 175:15 180:2 182:6 183:1,11,24 184:22 insures (1) 141:18 insuring (18) 42:22 43:5,25 71:11 76:1 89:15,19 91:23 117:16 118:9,13,22 121:19 125:25 134:16 161:16 integral (1) 82:16 intellectually (1) 74:20 intended (12) 38:12,14 40:6 89:11 90:23 93:23,24 122:1.10 125:19 178:13 intent (1) 177:16 intention (3) 24:23 47:13 intents (2) 48:7 155:2 interchangeably (5) 89:14

132:1,3,7 interesting (1) 132:6 interests (1) 131:20 interfere (3) 100:19 101:12,12 interfered (3) 100:15,23 168:6 interference (48) 13:14,19 18:11 55:13 60:14 67:3,8,8,10,13,20 74:24 79:6 87:23 88:4.13.20 89:21 91:20 92:1.13 93:5,11,15 94:19 95:3 96:3,15,16 98:2 100:12,13 101:20 110:23 111:6,25 112:11,22,25 113:6 114:14,17,23 118:5 135:7 166:1 169:25 171:12 interlinked (2) 13:17 53:10 internally (1) 87:1 interposing (1) 14:5 interpret (1) 13:25 interpretation (2) 25:18 87:4 interrelationship (1) 49:19 interrupt (1) 101:13 interrupted (4) 70:7 100:15 24 168:5 interruption (88) 4:23 13:14,19,23 14:2,3,13,19 15:20 16:19 18:11 55:12 60:14 65:3.18 67:2,8,10,13,20 69:15 74:24 78:20 79:5 81:20 82-5 87-23 88-4 12 20 89:1.21 90:20 91:20.25 92:13 93:4,11,15 94:19 95:3,7 96:15,16 98:2 100:11 110:23 111:7.25 112:11,22,25 113:5 114:14,15,18,21,22 117:17 118:5 119:1 122:4,6,11,13 124:9 133:23 134:13,15,25 135:6 137:24 138:7 139:13.15 140:4 141:25 165:1 166:1 167:23,25 168:15 169:25 170:9 171:12 174:6 177:1,12 interspersed (1) 132:18 interveners (1) 2:4 intimate (1) 43:15 into (43) 5:6 25:3.16 27:15 33:8 41:23 43:23 49:2 52:21 53:3 57:25 63:21 64:1 69:14 70:15 71:1,18 72:11 74:2 77:25 85:23 102:13 105:14 107:13,13,23 109:16,18 112:13 116:19 117:5 123:22.23 124:10.15 125:2.3 126:8.17 137:25 157:11 178:7 181:22 introduced (1) 178:4 introduction (1) 139:12 introductory (2) 5:19 169:20 intrusive (1) 32:21 invasive (1) 32:21 investigate (1) 149:18 investigated (1) 72:20 investigation (3) 85:8.16 87:1 investigations (1) 176:24 invite (2) 140:17,20 inviting (3) 9:4 10:2 133:7 involve (2) 148:19 150:22 involved (3) 45:14 46:9 177:8 involves (4) 30:2 141:7 142:4 155:3 involving (3) 15:19,20 28:25 iron (1) 115:17 irony (1) 35:24 irrelevance (1) 72:10 irrespective (4) 60:1 119:1 120:12 160:20 islington (2) 109:24,24

67:11.22

groups (1) 66:20

interdependence (1) 119:15

interdependent (7) 117:23

interest (3) 46:18 108:6

131:24

118:1,7 119:9,21,22 121:6

lives (1) 62:14

24:13 29:14,19

isnt (10) 7:17 39:16 45:20 60:12.22 64:12 105:21 106:13 120:23 172:21 issues (27) 8:4.7 9:14.23 65:20.21 66:5.9 71:5.5.7 72:22 74:23,25 76:6 79:11 117:2 120:9 164:11 165:2 166:14,16,22,24 176:4,5 item (10) 18:20 19:4 89:20 94:18 121:10 134:20 135:5 141:2 168:17.19 items (1) 19:23 itinerant (1) 42:5 its (61) 2:3,5 3:21 7:7,13 11:24 14:7 15:24 16:4 26:18 41:12 43:20,20,24 44:3,22,23 49:2,8 51:8 54:7 56:10 59:8.12.13.22 61:14 64:18 78:10 82:1.19 85:4 87:13 93:20 100:16,20 101:18,19 103:13 111:21 112:20 125:20 126:22,23 127:9 128:12 150:16 153:16,20 159:9 164:7 167:20 172:7 174-7 178-22 23 181-1 3 18 183-13 184-5 itself (4) 43:20 120:25 129:10 181:4 ive (1) 2:9 ivy (1) 11:17

i1065 (1) 164:25 i118 (1) 20:21 i1327 (1) 23:1 j13513 (1) 23:4 j15443 (1) 4:25 j16 (1) 155:21 j164 (1) 102:8 j5115 (1) 31:19 i81 (1) 29:8 i812 (1) 30:5 i813 (1) 30:10 j814 (1) 31:5 jacobean (1) 103:19 jigsaw (4) 81:16,25 89:3 178:10 job (1) 3:19 jogger (1) 120:18 iohnson (3) 102:21 104:5.9 joint (3) 4:10 15:4 117:21 jolly (1) 97:7 judge (4) 11:9,11 23:3 27:16 judgment (6) 11:8 12:2 27:21 54:3 71:16 73:4 july (2) 1:1 185:21 jumping (2) 146:24 147:10 iurisdiction (1) 34:1 justices (1) 32:14 justification (7) 1:13 2:5,5,23 4:12 10:4 71:10 justifications (2) 1:16 10:5 justifies (1) 6:10 justify (1) 2:22

k1371 (1) 27:11 k13712 (1) 27:22 k20220 (1) 25:10 k20226 (1) 26:2 k991 (1) 10:22 k996 (1) 11:8 kealey (114) 1:6,15 3:22 9:17 17:3,4,8,9 18:2 22:24 33:20,24 35:13,21 36:2 39:22 40:23 41:7,11,17 43:7 46:4.8.20.21 47:1.16 48:2 51:17.20 58:20 59:8 60:16.25 61:3.10.11 63:2,8,11 64:7,15 72:18,23 74:12 75:21,24 76:10 78:12,13,22 83:20 84:5.10.16.18 86:5.12

87:21 88:1,6 95:25 96:4 97:1,2,6,9,13,14,18,21,24 105:18 106:5,8,14 107:11,17 109:1,3,7,11,12 111:13 115:6,9,12,16,22,25 116:2,5,17,23,24 117:15 120:7,14 129:4,8,13,25 130:4,5 139:3 157:25 160:9,16 162:14 180:3.16.20 183:1 186:4 kealeys (1) 175:22 kent (1) 176:23 kernel (1) 108:11 key (4) 74:22,25 130:21 134:15 kind (5) 47:19 56:7 108:24 177:17 179:19 17:11,14,23 21:17 37:1

kindly (2) 53:6 184:12 kingdom (1) 29:23 know (37) 1:11 3:10 5:18 8:5 43:11 45:22.24 70:1.17 71:22 73:20 92:23 99:5 103:13 105:23 110:9 113:4 115:7 116:1,9 117:7 124-10 147-6 155-17 162:17 163:8 20 164:3 165:22 175:20 182:7 183:21 knowledge (2) 26:4 43:15 known (10) 2:21

26:8,12,13,20 27:8,9 104:9 167:18,19 knows (3) 4:19 16:17 115:18

labour (1) 46:14 lack (3) 159:14 163:12 164:1 laid (1) 11:20

language (14) 13:3 114:6

landlord (1) 27:24

131:6 136:24.25 137:3.19 138:8,12,14 140:2 161:23,25 162:2 last (22) 9:18 10:7 12:7,23 14:17,21 21:22,25 40:17 48:3 59:9 62:21 69:20 76:10 77:21 97:22 117:24.24 121:10 163:11.25 171:2 lasted (1) 12:11 lastly (1) 7:10

lasts (1) 106:6 late (1) 184:12 later (6) 7:4 83:15 86:9,11 114:2 170:20 latter (2) 81:13 104:20 launched (1) 9:10

lazy (1) 121:14 lead (11) 3:13 45:18,22 126:20 127:13 130:19 133:8 145:8 161:23 167:8.17 leader (1) 66:20

leading (1) 88:4 leads (4) 86:3 115:2 160:24 176:9 leafs (1) 5:1

leak (1) 106:9 leaning (1) 175:9 learn (1) 69:22 learned (14) 1:15 2:19 3:22 5:7.13 10:17 11:11 12:15,24 13:1,5 15:23

96:22 117:4 least (20) 2:3 14:17 26:8 41:4 45:21 53:13 60:12 75:11 80:7,10,11 83:16 106:6 116:12 120:1 132:8 152:1 164:3 178:16 185:8 leave (3) 13:21 114:25 156:10

leaves (2) 16:15 182:24 leaving (4) 69:23,24 105:25 led (2) 11:15 142:3 left (7) 19:13 20:2 22:21 63:24 123:5 137:14 182:11 lefthand (8) 18:13 20:8 21:4 34:14 35:2 133:12 135:2 136:7

legal (29) 2:21 4:16 6:12 10:18 25:5,12,14,19,25 26:6,23,25 27:4 28:22 32:16 71:6,16,17 87:1 99:21 103:2.15 104:10.11 105:6 106:1 132:8 148:8 164:17

legally (3) 103:12 106:3 148:4 legionellosis (1) 20:15 legionnaires (1) 45:19 legislation (5) 27:6 32:9,11

43:16 182:23 legislative (8) 25:25 26:20.25 27:2,5 28:24 33:2,9 legitimate (2) 66:8 71:5 leicester (5) 36:5,11 37:14,17 45:8 length (1) 185:14

leptospirosis (1) 20:15 less (5) 59:3 83:5 143:18 156-22 183-22 let (12) 2:3 35:21 36:5 45:14,23 46:14 61:12 62:20 65:20 68:13 80:12 96:18

lets (10) 35:23 57:22 58:22 62:21 63:11 64:21 76:20.22 120:17.18 letters (1) 11:10 letting (1) 157:15

lewison (1) 25:10 liabilities (1) 28:19 liability (4) 22:18 28:10,22 54:4 liable (1) 28:3

lie (1) 44:23 lies (1) 32:21 life (8) 6:6 19:2 29:16 30:2 31:12 50:10 124:22 142:23 like (23) 5:21 11:17 22:19 35:25 42:12,18 50:19,19 54:11 59:9 62:17 67:5 71:19 72:5 74:25 83:21 84:19 85:14 107:3 108:5

113:19 146:4 178:1 likely (8) 19:10 28:13 45:20 61:25 71:10 75:1 109:11 142:23

likewise (3) 30:4 122:8 157:18 limit (4) 25:2 28:9 135:23

144:15 limitation (2) 172:25 174:25 limitations (1) 174:22 limited (13) 1:6.23 24:24 51:8 99:23 107:6 138:25 139:7 141:23 148:19 157:1

172:21 174:7 limiting (1) 44:3 limits (4) 5:14 6:5 71:11 101:4

limply (1) 7:17 line (16) 11:25 12:2 33:4 42:9,20 44:8 57:2 66:25 67:21 82:10 92:19,22,23 111:22 124:20 126:13 lines (4) 1:12 55:10,15

142:19 link (8) 14:1,5 81:19 82:4,9 91:8 160:2 174:25 linkage (1) 110:22 linking (1) 14:14 lipread (1) 117:9 list (17) 20:11,17,20,20,22,23 36:23,25 40:20 42:1

20:1.19 22:13 23:1 26:10.24 27:12 29:9 30:16 31:14 32:8 33:1 40:16 48:2,3,16 50:23 51:13,17 53:12 54:17 56:2 63:10 66:6 78:11,15,17,18 79:1,4 80:17 82:11,22 92:2 94:14 43:18,24 44:10,16,18 97:16 99:14 101:22 102:14 141:4 172:7 103:7 108:10 109:16.18 literalism (1) 16:1 110:18 112:7,18 113:10

litigation (1) 158:13 114:19 121:9 123:19 little (7) 37:25 51:8 65:15 126:10 128:16.23 129:25 76:4 113:3,19 121:10 130:5,13 133:7 136:20 live (3) 104:8.17 149:9 144:5 151:19 165:8.14.21.22 167:7 living (2) 156:11,13 169:17 173:2 175:22 176:3 local (94) 18:25 19:7 179:24 180:9 181:25 182:4 21:10,21 22:2,6 23:11,11 183:9,12 lordship (19) 2:10 7:14 11:10 32:12,19,24 33:14,22 12:23,24 14:23 16:17

34:7.16.17.18.22.24.25 20:11 22:25 34:9 40:12 35:3,8,18 36:1,10,20 66:24 89:17 108:4 116:25 37:4.4.22 38:4.5.9.18 117:6.9 147:5 175:16 39:5,8,10,13,14,20,25 lordships (81) 1:11,11 2:8 40:1,1,9,21,25 41:3,22,22 3:10 4:4,24 5:24,24 7:8 42:12,21,24 43:2,24 9:19 10:3,24 12:17 13:21 44:14,15 45:2,5 46:2,5 16:23,24 17:5,14 20:14 48:19 50:8 54:23 79:18 21:1 25:4 26:14 83:18 98:4 105:21 108:22 27:10.14.20 29:5 31:18

110:24 130:22 133:22.25 33:3.4 35:4 39:23 42:14 134:24 137:4 140:11 48:25 54:21 65:7 66:12 141:13 142:9,14,24 143:16 73:2,11 78:23 80:18,24 144:7.11 160:18.21.25 87:18 88:9 91:22 95:1 96:5 166:3 171:18 177:17 116:20 121:15 123:3,4 180:7,8,8,10 130:25 131:10,16 132:17 localised (1) 45:20 133:8,12 136:22 141:15

142-9 152-1 165-8 166-11

167:13 14 17 168:2 14

175:6,19 176:12 180:15

loss (156) 3:7 5:15 6:3,14

7:2.6.13 8:13.14.21

10:8.11.13 12:2.7.12

13:14,19 16:19 18:5,11

30:2 48:12,12,14,15,17

58:9,12 59:12,13,15,16

62:9,18,25 65:6,14,16

69:1.9.10.15.19 70:9.25.25

77:24 78:3 79:5 80:1 81:20

92:10,12,12 93:4,8,9,11,19

112:3,4,6,7,9,11,16,19,21

119:1,2,5,9,11,16,24 121:8

127:15,18 128:24 129:21

134:20,21 136:2,8,15

140:1,6,9 141:16,18,24

142:16 143:11,12 159:3,23

162:10.11.23.25 163:10.23

164:9.9.13 165:25 166:23

168:12 169:24 171:7.12

65:4,18,22,23 76:23

lost (4) 11:2 56:23 57:5 58:5

lot (6) 42:5,12,14,17 73:3

173:18 177:13

122:11 154:14

lots (3) 39:17 42:3.4

losses (8) 56:22

132:5

60:2,6,13,24 61:25

67:9,19 68:22,25

82:5 88:12 91:4,20

94:6 95:3,5,7 98:2,24

113:5,25 114:4,9,10

118:4.16.19.20.21

122:3,6 126:23,25

100:11

117:17.17

55:5 56:12 57:6.10.20.20

169:3,15 170:14,23

171:20,22 172:5,15

181:7 182:5

losing (1) 56:19

locality (13) 23:14 34:2,3 35:20 45:6 10 82:16 19 83:10 86:3 173:21 176:8 180:6 located (2) 110:3 119:22

location (5) 100:22,23 144:16,17 174:14 locations (1) 109:22 lockdown (6) 101:25 115:8.15 157:3 159:13

163:15 lockey (23) 130:8,12,13 143:22,23,25 144:5,7 146:8,11 147:1,5,7,9 148:3,14 150:4,11,15 152:9 154:12 165:11 186:5

logical (1) 74:20 logically (1) 138:6 london (3) 37:9.15 89:2 long (10) 2:11,13 5:21 27:12

72:25 124:16 142:7 177:20 longer (2) 97:1 145:4

look (47) 4:24 6:23 17:20 18:13 19:3 20:8 27:13 29:9 33:3 34:14 37:17 41:13.24 42:8 43:12 45:8 49:23 53:18 54:21 66:9,24 67:15 68:7 76:1 84:18,21 85:25

90:5 99:15 105:4 108:13 128:9 133:9 135:11,13 136:17 138:16 140:10,14 142:1,7 144:23 151:13

156:7.24 178:1 183:13 looked (4) 47:14 108:20 112:8 161:24 looking (17) 8:4 39:17 59:21

69:18 71:17 79:22 88:11 97:20 98:10 105:23 128:19 130:18 140:2 150:8.20 153:5 171:4 looks (12) 6:20,21 7:15

14:18 31:8 48:16 50:23 62:17 70:12 72:5 96:19 105:19

low (2) 5:14 6:5 loose (1) 84:2 lucky (1) 97:21 looser (8) 80:22 81:2,15,24 lunch (1) 96:25 84:13 90:24 95:15.15 lynch (1) 2:19 lords (86) 1:5 4:18 6:9 14:6 16:25 17:9,19 18:5,8,16,21

> macdonald (1) 23:3 machinery (2) 115:20 170:10 magic (3) 128:7,13,15 magistrate (2) 37:7,8 magistrates (2) 32:22 41:1 main (13) 26:2 65:25 66:1 68:9 90:20 95:10 106:10 134:25 136:12 137:24 140:4 158:23 176:5

mainly (3) 104:2 126:10 175:24 maintenance (1) 148:21 majesty (1) 30:12 maiestvs (1) 30:17 majeure (2) 146:2,6 makes (9) 8:11 60:6 71:23 84:5 85:10 111:20 120:3 148:15 159:18

making (19) 8:10 9:2 17:16 30:20.23 31:10 43:3 48:1 54:22 69:21 72:3 83:21 84:21 85:5 102:13 115:17 153:20 162:2 164:19 man (1) 10:24

management (1) 45:16 mandatory (1) 102:15 manipulation (2) 93:25 112-15

manufacturer (1) 85:17 manufacturers (1) 175:12 manufacturing (1) 167:21 many (16) 2:15 8:8 47:1 62:14 69:3 103:22 105:3 106:20 108:21 121:12 144:15 152:2 162:17 163:8.21 178:7 map (1) 166:10 march (22) 55:3 62:22,23

67:6,9,12 103:21 151:8,8,18 152:4,14,19,19 153:12.13.14 154:22.23 163:4,6,10 marker (1) 183:8 marsh (1) 65:11

material (4) 15:19 84:19,21 177:12 materially (3) 130:23 167:10 172:18

materials (6) 100:22,25 101:9,10 102:4,6 matrix (2) 26:11 27:3 matter (21) 10:13 11:11 12:7.23 14:12 25:24 26:23 29:20 47:6 61:9 67:19 71:12 87:3 99:12 121:25 125:13 147:1 148:12 154:10 159:19 183:7 matters (13) 2:14,17 6:21

21:2 29:5 32:25,25 69:13 121:17 122:22 125:6,7 173:6 maximilien (1) 104:6 maximum (2) 170:16,20

maybe (5) 44:3 51:23 97:21 107:21 117:3 mcdonalds (1) 154:6 me857 (1) 126:21 mean (20) 36:20 41:4 42:23 43:2 45:24 52:16

74:22.24.25 81:22 83:7 89:6 97:17 105:19 108:14 129:5 138:9 146:17,19 160:3 meaning (21) 6:7 23:18

29:20 39:11 43:6 81:23 90:24 94:13 95:11 100:14 103:9 110:20 112:20 122:20 144:10.13.21 166:19.21 167:1 173:20 means (31) 23:13 29:21 36:22 81:6,11 88:8,9,9 90:25 93:10 99:18 103:9 110:5 111:8 113:5.5 120:1 123:5 128:2 138:22,24 144:19 145:3 147:17 148:3 149:24 173:21 176:13.13.16 177:19

meant (9) 33:14 43:13 51:17 78:2 101:25 114:20,20 148:23 156:14 measles (5) 41:25 45:23 108:21 109:8 180:5 measures (7) 53:11 56:1 166:16.20 177:21.25 178:4 meet (1) 83:19

meetings (1) 66:18 meets (1) 151:5 member (2) 46:14 59:6 members (2) 70:21 104:14 meningitis (3) 20:16.16.25 mention (11) 15:7,10,11 18:16 20:11 23:17 82:22 87:19 96:11 101:1 127:25 mentioned (10) 10:21 24:9 35:22 41:21 52:15,20,23 88:17 89:10 177:7 mentions (2) 16:2,6 mere (2) 56:20 118:14 merely (4) 8:24 125:22 146:5 156:20 met (5) 55:22,24 95:22 184:12,13 method (1) 122:2 michelin (2) 67:24 68:11 middle (3) 37:14 110:1 168:2 midmarket (1) 175:24

might (49) 4:8 25:23 34:12 36:2,2,15 37:8 42:2,23 43:25 44:2,11,13,22 45:13 46:9 47:10 51:14 58:23 59:23 63:16,25 70:1,8 72:14 74:1 75:10 10 24 86-7 96-7 100-18 19 101:19,19 104:16,16 106:16 110:11,12 124:24 139:2 150:2,8 157:12 165:15 178:17 181:20 184:25

mile (2) 113:14 117:19 miles (9) 21:7,16 42:6 44:11 45:10 79:9 81:20 82:5 88:19

military (3) 98:4 110:25 166:3 millions (2) 65:12,13 mind (12) 9:9 21:22 48:25

65:17 73:24 75:17 86:24 110:15,15 139:13 156:24 163:18 mine (1) 121:23 minimis (1) 154:12

minimise (2) 67:7,12 minister (10) 30:15,16 31:15,21 37:11,15,16 41:1 151:7 152:14 ministerial (1) 104:17

ministers (2) 151:14,17 minority (1) 15:9 minute (4) 10:23 43:18 65:18 68:17 minutes (6) 14:21 16:15

46:22 143:24 150:6 161:25 mirror (2) 38:11,12 misleading (1) 47:11 misnomer (1) 19:19 misrepresentation (4)

86:16.18.19.21 misrepresented (1) 86:22 missed (1) 14:17 mistake (2) 16:10 56:24 misusing (1) 85:4 mite (2) 58:18 59:3 mitigate (1) 154:14

mitigated (2) 7:20 38:14 mitigating (1) 31:2 mix (1) 123:22 mixed (1) 78:18 modified (2) 112:2 113:2 moment (13) 8:10 10:6

46:20 68:14 87:12 96:20 110:4 135:1,12 140:10 143:22 181:25 182:1 money (9) 57:24 58:4.4.7 60:8,9,19 65:17 73:9 monthly (3) 55:4 56:11

months (7) 12:12 16:4 123:7,9 170:17,25 171:2 more (44) 1:8 3:23 9:7 12:14 13:4.20 14:8 18:3 23:22 27:2 40:14 42:12 53:20

54:11.12.14 57:3.3 66:22 69:9 74:20 81:3 82:9 84:11 89:17 94:15 99:25 105:1 106:18 107:20 110:4 113:19 114:11 115:22 130:4 140:5 143:18 154:12 155:5 156:20 157:13 161:20 165:4 185:13 moreover (2) 70:18 101:14 morning (10) 53:6 59:11 66:3 73:23 117:13 162:14 180:22 182:3 184:10.17 most (10) 7:2 13:2 20:10.13 29:6 30:4 32:20 43:18 102:22 165:4 motivation (2) 59:7 83:13 moulds (1) 116:10 move (10) 76:11 78:13 97:15 110:18 111:15 113:10 134:13 139:14 147:3 154:18 movement (6) 142:3 147:13 149:22 157:18 162:12 163:13 moving (2) 41:18 105:6 ms (10) 56:24 76:4 81:10 82-6 131-17 157-5 161-7 167:14 172:16 175:5 msa (1) 94:8 msamlin (1) 17:12 msamlin1 (1) 39:13 mlin2 (2) 111:24 112:25 much (25) 2:23 6:24 9:11 22:21 27:2 35:6 37:23 24 25 41:24 64:19 73:9 74:14 76:21 84:10 97:1 101:23 105:21 106:18 115:22 130:6 131:24 132:11 140:3 165:12 mulcahy (5) 76:4 82:6 167:14 172:16 175:5 mulcahys (3) 56:24 157:5 161:7 multitude (1) 44:17 mumps (1) 45:23 murder (3) 20:6 42:17 79:1 must (41) 2:12,17 28:1,17 30:19 37:6,7 40:25 41:3 44:23 52:3 53:21,24 81:14 87:10 91:14,15 93:24 124:15 125:6 129:21.22 136:16 140:7.8 143:2 148:8 149:1,13,15,16,16,18 150:15,23 174:15,17,18,20 181:18 185:16 mutandis (2) 108:9 113:18 mutatis (2) 108:9 113:18 mute (2) 2:8 14:16 mutually (2) 179:14,15 myself (5) 14:9 40:5,5 43:1 61:4

name (1) 129:14 namely (6) 11:13 76:15 99:8 143:14 173:21 174:20 narrow (3) 54:15 106:13 107:4 narrower (5) 54:15 77:11,13,16 78:4 narrows (1) 49:24 nasty (1) 41:25 national (3) 32:25 53:11 177:21 nationwide (1) 177:22 natural (3) 3:21 142:18 naturally (1) 115:2 nature (5) 30:21 32:5 50:20 124:14 180:10 nauseam (1) 76:17 ndda (1) 113:13 near (4) 77:2 98:25 137:15 174:1 nearby (1) 173:24

101:13 116:5 118:16 necessary (13) 14:1,22 26:5 28:11 33:11 88:25 98:13 123:10 157:20 159:20 169:7 183:8 185:17 need (31) 1:8 2:4 4:14 12:21 17:20 26:14 29:5 30:9 47:6.21 51:19 56:25 83:22 128:16 129:20 130:3 136:21 140:5 144:23 147:3 148:4 150:19 151:12 155:21 157:6 165:15 172:6 181:7 182:2 184:24,25 neednt (3) 33:3 50:11 99:15 needs (5) 2:10 10:19 154:12 176:23 183:13 negligence (5) 3:14,15 11:2 22:19 85:16 negotiate (1) 25:15 negotiated (2) 25:21,24 negotiating (1) 68:15 neighbourhood (2) 108-17 18 neighbouring (3) 19:2 29:16 50:10 neither (9) 55:14 103:2 104:18 106:22 116:14 124:22 127:23 147:21 155:8 never (12) 4:2,2 14:5 32:16 57:23 58:19 75:16 93:21.22 102:9 115:9 178:13 nevertheless (4) 63:22 88:7 145:15 178:15 newcastle (2) 46:12,13 newspaper (1) 102:19 newspapers (2) 152:2 164:3 next (8) 2:23 17:3 28:7 110:10 130:7 137:13 141:16 146:11 nhs (1) 89:5 nicholls (1) 28:6 nine (1) 127:6 nobody (5) 6:13 60:5,8,19 72:3 noncause (2) 83:6,7 nondamage (9) 15:20 16:2 18:21 22:13 107:6 112:17 113:11 122:3,18

none (9) 5:11 6:7 53:7 73:1

102:14 125:13 132:21

nonpoint (2) 15:22 149:14

nor (9) 55:14 104:19 106:22

116:14 124:23 127:23

normal (3) 9:5 12:14 75:15

normally (7) 8:1 54:13 58:22

147:21 148:16 163:1

115:23,25 116:7,11

northumberland (1) 110:2

note (11) 82:23 114:25

127:10 139:5 140:22

154:9,13 157:5 164:24

nothing (22) 16:23 43:23

56:19 58:13 59:24,25

105:3 121:5 123:20

125:5,16 145:6 150:24

notice (5) 67:25 68:3,4,5,13

noticeably (1) 64:22

20:11,17,19,23 36:24

43:17 44:2.7.9.10.13.17

78:25 79:9,13,14,15 87:24

notifiable (42)

63:15 69:21 72:3 73:18

78:4 99:21 100:9 103:10

north (1) 46:1

172:5 175:4

notes (1) 169:3

161:19

159:15 175:19

nonetheless (1) 101:15

nonexistent (1) 7:19

nearly (3) 123:15,24 169:12

46:3,5 51:23 64:16,17,23

necessarily (15) 35:1 45:2

71:9 72:7 77:25 90:12

88:10.16.23 93:6.16.21

112:4 113:8 141:2 166:6

171:10,14,22 172:6,19,24

174:9.10 178:21.25

179:10.20 181:2.21

notifications (1) 20:13

notified (1) 79:19

nourriture (1) 69:5

nowadays (1) 38:23

nowhere (1) 77:2

numbers (1) 70:23

nutshell (1) 142:11

objection (1) 3:7

objectively (1) 1:23

obliged (1) 165:21

obsessed (1) 153:7

175:22

objective (6) 12:4,5 28:12

123:20 177:16 178:13

observation (3) 25:13 42:10

number (6) 51:21 113:11

133:4 171:10 172:10 173:2

obstruct (1) 177:19 obstruction (1) 176:15 obtained (3) 123:17 124:2 169:14 obvious (16) 6:19 24:1 51:22,23 52:13 53:23 111:4 122:7 133:21 145:13,17,20 146:11,14 159:1 170:6 obviously (17) 11:21 33:15 40:2 64:18 73:20 98:7 99:5 108:13 109:15 112:14 143:5,7 146:17 165:10 182:8 183:12 184:23 occasion (2) 89:15 114:9 occasions (1) 103:22 оссиру (2) 16:16 109:25 occurred (12) 49:16 73:8 88:24 123:14 124:18 125:4 137:12,17,23 162:3 169:11 173:23 occurrence (15) 19:8,10 21:5,17,18 22:7 33:13 54:3 113:7 170:19 171:14 172:22,24 176:7 180:5 occurrences (1) 21:14 occurring (3) 94:21 135:8 168:3 occurs (1) 16:10 oclock (3) 96:25 97:8 185:17 offer (2) 107:6 153:15 office (1) 107:14 offices (2) 130:16 131:8 often (4) 2:20 65:20,21 164:20 oh (7) 8:22 41:13 42:23 46:13 65:14 75:25 107:21 oil (1) 105:24 okay (3) 97:7 129:24 182:12 old (3) 37:15 51:2,4 ombudsman (1) 36:18 once (5) 14:19 75:13 105:1 107:20 184:10 ones (4) 14:23 35:7 105:7 115:18 oneself (2) 87:3 114:5 online (2) 17:24 157:16 ons (1) 163:17 open (22) 28:9 44:11 56:8,9 58:8 60:20 63:21 70:20 72:15 73:21,21 106:23 152:3 153:19 155:20 156:2,6 157:3 159:5 163:6,9 181:19 opening (8) 3:2 4:13 10:21 54:17 66:11 102:16 104:3 108-6 operate (3) 119:10 155:16 156:21 operated (4) 62:8 129:3 160:1,6 operating (2) 118:10 121:5

operation (7) 2:21 8:24 119:25 138:9 158:25 159:23 161:14 operations (1) 157:15 operative (2) 28:14 160:20 ophthalmia (1) 20:18 opponents (2) 14:23 51:24 opportunity (1) 184:2 opposed (2) 37:14 109:8 opposite (1) 179:7 oral (4) 82:7 126:12 132:22 157:5 orally (2) 158:10 183:22 order (25) 19:7 21:10,20 22:2,6 23:10 24:12 30:12 35:17 37:22 38:9 40:9 54:23 56:11 57:12,23 67:6.12 136:15 141:8 142:14 143:15 164:14 171:18 182:5 orders (8) 32:21 33:12 39:4 45:10 56:1 162:19,24 163:2 ordinary (9) 6:1 22:14 69:14 124:21 139:1,8,9 146:8 177:13 organisation (1) 172:2 organisers (1) 66:17 organism (1) 19:9 orientexpress (9) 15:4 47:10 124:8 125:12 126:3 129:9 138:5 139:6 164:23 originally (1) 40:14 orr (15) 165:14,18,19,21 172-23 173-2 180-9 13 23 181:1 182:4.10 183:9.12 186:6 orthodox (1) 10:1 ostensibly (2) 63:18 70:12 others (4) 45:21 47:22 64:19 176:12 otherwise (8) 58:24 60:24 80:12 84:3 130:1 161:16 179:17 180:17 ought (2) 56:15 185:7 ourselves (3) 67:17 96:24 102:17 outbreak (9) 45:12,25 79:18 82:19 83:10,18 108:21 109:8 110:10 outbreaks (4) 41:23 45:19,22 83:16 outlets (1) 5:10 outlined (1) 11:16 outset (2) 50:16 173:3 outside (1) 150:6 over (20) 6:25 9:5,18 12:11 13:16 14:20 27:12 51:19 85:22 96:25 134:19 138:19 141:11 153:3 155:13,13,14 162:15.22 171:21 overall (1) 82:20 overcome (1) 23:24 overcritical (1) 51:15 overimpressed (1) 185:16 overlap (1) 50:25 overnight (1) 183:15 overrun (1) 89:5 overwhelmed (1) 89:5 own (13) 11:24 14:7 20:3 54:7 55:5 69:18 82:19 125:20 129:14,14 174:7 owner (3) 54:23 56:9 147:14

owners (3) 149:8,12 156:14 package (1) 53:11 pages (3) 117:22 151:12 182-17 paid (1) 66:16 pandemic (14) 82:18,21 143:5 159:12 162:11 166:8,9,17 172:1 177:21.23.25 178:4.5

pandemics (7) 4:7 178:17,21,24 179:2,4,10 paper (2) 17:24 157:22 paradigm (3) 3:3 16:3 176:18 paradoxical (1) 77:10 paragraph (63) 2:6,20 4:11 11:7 12:1,25 13:2,21 15:15 23:20 25:11 26:3,15,18,22 27:15,23 28:7 32:10,15 33:6 38:21.24 39:2 48:22.23 50:12 51:7.13.16.25 52:20 53:1.23 54:17.21.21 56:2.3 66:13,14 80:18 81:8 82:12 90:10 91:3 96:21 102:19 103:14,24 108:6 111:21,22 126:19,20 128:19 144:22 162:21 164:24 176:2 177:3 178:23.24 paragraphs (19) 1:10 14:22 16:21 23:4 29:3 49:1 81:16 82:24 90:2,18 94:24 99:14 102:16 104:3 109:13 117:22 121:15 122:23 181:6 paraphrase (1) 76:16 pardon (1) 97:20 parish (1) 126:21 parishioner (6) 57:23 58:4,5 59:19 64:3,20 parishioners (5) 61:22 62:5.15 63:14.21 part (28) 17:15 24:20,23 27:2 30:4,5 46:10 49:23 52:23 53:10 14 16 73:13 75:11 80:21 82:17 83:2 86:23 100:5,7 125:19 146:14 147:8 153:15 155:9 159:20 163:4 171:21 partial (2) 146:19,21 participants (1) 121:12 particular (27) 5:23 6:2 10:18,18 32:3,7 43:4 74:23 75:8.12 88:7 96:10 130:22 132:1.2 138:18 140:20 143:13,17 151:2 161:7,10 164:14 166:15 179:18,19 particularly (6) 27:13 32:22 47:9 146:25 147:11 174:10 particulars (4) 38:22 56:2 80:19 178:23 parties (19) 1:23 9:8.15.24 15:18 25:14 26:1,5,8,14 27:9 28:9 33:1,8 99:5,10 114:6,20 185:8 parts (2) 49:20 161:6 party (1) 46:14 pass (3) 60:17 108:11 119:4 passage (2) 103:4 177:2 passed (1) 83:7 passes (1) 156:4 passing (1) 121:7 past (1) 68:18 patterns (3) 138:15,15,16 pause (2) 27:18 51:18 pausing (1) 42:13 pay (8) 89:20 91:25 93:3 94:18 113:22 127:1 142:16 168:6 payable (2) 135:15 168:19 payment (1) 91:17 payments (1) 67:3 peace (2) 32:14 37:6 pearl (1) 54:4 peculiar (1) 13:2 peg (1) 178:7 people (18) 46:17 53:13 66:11,15 68:17 69:3,25 70:17,18,20 72:15,16

25:24 66:8

155:4

157:13

performance (3) 5:9,10

92:19,25 101:14 115:3

126:15 152:25 155:5

peril (80) 1:24 3:12 7:13

8:12,19,25 47:12 48:5

49:12.14 50:16 51:25

52:14.17.19.53:3.24

58:10 62:8 65:5,23

75:13,14,19 76:3,5

77:18,19 94:1 118:22

119:22,23 122:17,22

124:1,6,6,7,9,11,17

125:1.4.18.20.20.23

138:9 140:7,8 141:7

161:2,9,11,14,18 162:3

perils (3) 1:20,23 8:21

90:8.15 91:5 94:21

135:8,19,24 136:19

137:17,23 138:18,20

164:5.5.10 168:4.23

170:16,17,17,19,21

permit (3) 22:25 56:23

171:1,3,4,5

permits (1) 56:21

permitted (10) 70:18

156:2,5 163:6,9

31:10 36:15,19 58:21

personal (2) 46:17 116:8

persons (3) 21:15 32:13

persuaded (1) 41:19

persuasion (2) 73:21,21

39:12 49:7,25 50:1,2,6

52:5 92:18 94:5 144:21

122:7.12 124:10 148:8

picked (2) 47:20 51:23

picture (1) 82:20

pingpong (1) 185:14

placed (2) 124:13 147:13

places (1) 140:12

placing (1) 149:22

142:5 178:19

63:16 73:17

play (1) 126:8

83:2

plan (1) 97:4

79:21,23 148:12 151:20,23

152:4

per (2) 61:13 69:21

percentages (1) 175:17

perfectly (4) 12:10 24:1

perchance (1) 106:16

plain (2) 64:17 136:11

plate (10) 57:25 58:5,8

59:21,22,25 60:1 61:14

pleaded (4) 55:22 56:15 57:9

piece (1) 103:5

pis (1) 36:13

phraseology (1) 35:11

phrases (1) 94:12

79:16 88:18 92:20

156:10.12

88:18

183:25

peter (1) 23:2

phase (1) 50:7

173:15,20

160:9

132:25

148:22 163:11,15,24,24

performed (1) 49:7

perhaps (11) 27:3 29:6 51:8 54:6.15.16.55:8.56:20.25 129:2.13.18.20.22 136:12 142:21,21 143:18 150:25 159:1.15.23.25 160:3.6.7 period (41) 5:11 60:7 68:7 123-6 7 9 18 124-2 127-2 4 102:10.10 153:25 155:8.19 person (12) 21:6 30:20,23 perspective (3) 35:7 105:6 phrase (16) 15:23 38:8,10,17 physical (11) 99:19,20 100:1 168:12 176:14.16 177:19 pick (4) 47:15 133:10 138:12 place (11) 6:21 29:22 58:3 90:15 93:25 102:22 110:6 135:25 144:17 156:10,13 plague (3) 41:24 45:13 46:11 plainly (5) 124:3 138:14.22

pleadings (1) 181:2 pleads (2) 57:4 178:22 please (3) 80:24 129:25 156:24 plenty (1) 163:13 plus (1) 126:21 pm (7) 97:10,12 130:11 144:1,3 165:17 185:19 poached (1) 68:11 pockets (1) 174:6 pointed (3) 7:19 91:9 141:20 points (16) 1:17 4:10 8:8 16:20 38:22 41:18 51:22 65:2 99:13 103:24 145:10,12 162:17 166:12 167:5 173:2 poisoning (5) 3:4 19:11,20 20:6 42:12 police (19) 18:25 29:14 34:16.24 39:10 41:15 48:19 50:8 61:20 98:3 105:25 110:24 111:7 120:21 166:2 176:9.20.24 policies (36) 18:17 39:18 40:21 43:5 122:2,8,15 125:14 126:14 127:6 12 130-15 24 132-9 158-9 166:7,12,13 167:2,8,11 169:16 172:23 173:5 175:10,23,24 177:15 179:8 181:5.10.11.12.14.17.23 policy (49) 22:22 33:14 36:6 37:17 40:20 43:4 53:25 79-24 91-12 16 111-12 112:9 122:13 127:13 130:13,16,16,17,19,20 131:2,5,8,9,22 132:2 133:8.9 134:14 135:10 137:20,25 139:14,16 140:3 141:22 142:16 144:17 160:12 161:24 162:2 167:10,15,15,17,20 171:20 172:17.20 policyholder (10) 134:8 136:13 144:18 153:20,24 155:10 159:2,4 178:9 policyholders (14) 132:4,10 142:12 153:8 155:15 158:16 159:9,21 163:3 164:4 175:5.11.18 179:22 politely (1) 55:10 poor (2) 37:15 65:15 pose (3) 15:14,15 54:18 poses (1) 67:1 position (28) 1:9 5:25 15:24 16:14 28:24 62:24 68:20 81:14 106:18 125:3 130:25 131:3.14 132:13 147:19 153:23 155:1.7 156:8.8 158:12.18 160:5.12.17 164:18 179:6,6 positively (2) 46:8 181:1 possibilities (2) 99:7,11 possibility (2) 12:16 58:20 possible (7) 12:10 15:17 65:3 137:16 151:20 152:14 156:12 possibly (4) 53:6 132:21 150:4 184:20 postindemnity (1) 5:11 postulate (2) 66:17,19 postulated (1) 54:22 postulating (2) 58:20 72:12 potential (2) 45:21 119:16 pounds (1) 65:13 power (3) 30:10 32:1.20 powerful (1) 114:11 practicable (3) 123:16,25 169:13 practical (4) 145:5 162:17 163:8.20 practically (1) 148:5

practice (1) 121:21

precautions (1) 154:15

preceded (2) 13:8 14:3 preceding (2) 54:25 173:14 precious (1) 14:21 precisely (4) 28:12 65:6 69:2 172:23 predicate (1) 129:15 predominantly (1) 106:25 prefaced (1) 30:19 preferred (1) 23:18 preliminary (5) 166:12 173:2.15 174:5 175:4 premise (1) 6:12 premised (1) 6:11 premises (180) 18:23 19:6,22 21:6,7,10,15,16,20 22:2,5 23:10 24:12,16 29:12 35:17 37:22 38:9 40:8 79:7.10 88:19.21 89:23 92:14.15 93:6.12 98:6.11.25 99:1.20 100:2,5,6,7,16,17,18 101:6,6,7,9,11,15,16,19,25 102:8 103:12.23 105:8,9,10,12,22 106:4 107:24,25 108:17,25 110:3,7 113:7 117:18 133:11.18.19.24 134:3.5.9 136:9.14 140:20.22 141:8,20 142:12 143:3,14,19 144:14,16,19,20 145:2.4.7.9.18.20.22.23 146:13,13,16,19,23 147:14,18,18,23 148:10.18.22.25 149:4.8.16.19.24 150:9.24 151:7,9,23 152:16,17,22,23,24 153:11.19 154:1.19.20 155:24 156:5,15,18 157:17,19 158:5,5 159:2,5,10 161:5 162:7 163:5 166:4,5,18,20 168:5.8 171:9.13.15.18 172:11.13.13.22 173:7,7,8,9,10,11,16,17,22,23 174:2,4,21 175:21 176:9,11,14,17,21,23 177:11,20 180:4 premium (1) 91:17 prepared (3) 107:6 114:24 185:11 presence (2) 82:16 178:24 present (3) 27:7 165:4 183:16 presentation (1) 147:2 presents (1) 68:6 president (1) 104:7 press (2) 102:21,23 pressed (2) 185:6,7 presumably (1) 77:3 pretty (1) 47:17 prevail (1) 182:4 prevent (8) 105:7 135:23 147:18 159:7 172:12 174:3,20 176:10 prevented (37) 18:23 24:17 29:12 61:20 98:6.8.9.15.16.20 99:3.4.9 100:21 101:8.15.19 103:8,12 107:13,19,19 149:1,13,16,17,18 150:10.13 153:12 156:15.17.20 166:5.20 173:8,11 preventing (6) 31:2,22 151:6 152:15.21 177:11 prevention (96) 18:21 22:12 24:2 48:17 49:15,25 50:1,3,17,22 51:1,2,3,9,10 52:11 58:11 62:1 76:14,23,23 77:11,20 81:10 98:23 99:6,18,18 100:2,8,8,10,14,16,18 101:21.24 103:23

107:25 108:1.22 113:10 117:18 118:6 120:22 121:3 129:16 134:2.7 140:18 142:5,17 143:3,14,19 144:14 145:8.22.24 146:1,9,12,13,16,18,19,21,22 147:23 148:1,4,7,17,23 149:4,7,22 150:8,16,23 152:9 153:25 154:4,6,19 155:7,23 158:5 165:24 172:9 173:19.25 prevents (5) 98:25 105:8 140:21 145:1 176:21 previous (1) 13:24 previously (2) 4:7 70:13 prima (18) 7:12 8:13,20 60:24 61:12,19 62:7,16,24,25 64:12 70:5,9 71:20.23 72:5 73:12.19 primary (4) 87:14 95:13 167:25 169:18 prime (6) 30:16 104:17 151:7,14,17 152:14 principal (2) 30:17 144:13 principle (12) 2:21 4:17 8:5 25:25 26:11,23 71:6 74:3 120:10 159:19 160:6 165:6 principles (7) 10:1 22:14 26:7 75:5,6,16 133:6 prior (6) 4:7 13:14,17 123:7 154:7 158:12 priori (1) 126:7 pro (2) 59:16 120:1 probably (15) 42:8,14 46:13 64:15 72:4.8 97:2 108:5.24 109:24 117:10 132:25 157:11 180:21 184:10 problem (1) 3:9 procedure (2) 10:4 11:2 proceedings (3) 121:13 159:7 181:15 process (2) 49:6 183:17 produced (6) 69:5 77:19 83:24 90:6 135:17 168:22 professional (2) 3:14 101:17 4proffer (1) 2:4 profit (30) 90:1,7,23 94:23 116:18 122:9 134:22 135:3,17 136:2,4,15,19,20 137:7 140:7,9 141:18 142:16 143:11.13 159:10.22.25 162:23 163:7 164:9.13 168:18.22 profits (3) 134:20 140:1 159:4 prohibit (2) 103:17 157:19 prohibited (1) 104:25 prohibition (4) 103:14 104:11,12 105:11 prompted (1) 82:21 promulgating (1) 82:1 pronouncements (1) 102:25 proof (3) 4:14 7:21 26:4 proper (5) 25:18 87:4,14 125:10 150:21 properly (3) 25:19 110:13 126:8 property (25) 19:2 29:16 50:10 89:22 92:15 93:13.22 94:20 98:25 112:2,16 135:10 136:9,13 138:2 140:19 141:20 142:24 168:8 170:2 171:9 172:11.14 174:1.2

prove (11) 2:13,15 7:11 9:1 10:19 71:19 86:17 118:16 159:16.17 178:9 proved (5) 10:17 25:7 80:2.4 85:15 proves (1) 78:9 provide (10) 6:22 24:21,23 31:17 122:2 123:10 143:9 165:25 169:7 174:6 provided (9) 25:1 33:17 54:8 93:2 95:10 106:6 122:11 156:9 167:23 provides (7) 21:13 80:16 99:23 118:9 142:11 143:11,12 providing (2) 31:23 76:25 proving (1) 159:21 rovision (17) 18:7 24:15 31:1.9.22 32:5.6.6 90:1 95:10 134:16 135:20 141:12,21 142:8,9 154:15 provisions (14) 31:16 127:11 130:21 133:23 136:21 139:12,15 140:1,15 141:23 154:16 173:3 181:10,17 oximate (14) 13:18 55:14 81-15 25 83-4 5 84-9 87:2,17 89:12 95:14,16 121:8 140:8 proximately (4) 81:11,22 88:10 159:22 proximity (1) 173:23 psychological (1) 11:4 pub (2) 153:11.14 public (27) 4:9 5:20 13:7.8 14:2,3,10,15 31:14,17,23 32:18,24,25 43:16 53:8,18 104:7 117:18 118:3.23.25 119:7 120:24,24 165:24 174:19 publicly (1) 163:13 published (1) 163:17 pubs (6) 131:25 151:21.24.24 152:3.10 purchased (3) 175:7,11 181:21 purely (2) 43:3 85:8 purport (1) 143:9 purported (2) 1:16 102:21 purporting (1) 44:2 purpose (9) 31:1.11.22 34:10 90:13 92:16 123:21 148:19 170:6 purposes (29) 27:7 29:25 39:5,6 48:7 57:1 76:5 77:4,8 81:19 82:4 89:8,23 94:21 101:11 105:12 122:14 136:9,12,14 141:12 142:13 148:25 150:7 155:2 156:11 157:18 168:9 176:22 pursuant (1) 158:14 pursue (1) 166:25 puts (1) 56:18 putting (6) 8:9 40:16,18 58:4 83:25 86:2 puzzling (1) 84:8

32-18

qualification (4) 34:10,21 qualifies (4) 12:2 50:1,2,22 qualify (5) 50:6,21 54:15 134:2 142:15,22 143:1,21 42:2 45:1 49:16,16 50:4 64:4 99:24 107:4 114:11

qbe (2) 23:4 96:22

qbes (3) 96:5,6,9

quaint (1) 157:11

51:6 76:18

152:20.24

quality (1) 13:4

qualified (1) 24:16

qualifications (1) 34:22

qualifying (7) 52:4 67:8

quantification (2) 4:21

qc (1) 27:24

proportion (1) 59:3

proposals (1) 153:23

172:15

proposed (1) 4:5

161:13,21

proposition (3) 25:22

proprietor (1) 105:9

prose (1) 92:20

protect (1) 31:16

protecting (2) 31:12,22

protection (3) 20:12 29:19

propose (3) 165:9 166:11

quantifying (1) 122:2 question (35) 1:12,19 2:2 10:8 11:5 15:14,21 25:21 26:6 27:17 35:4 39:24 40:16 55:7 59:9 61:1 67:1,2,4 69:18 70:6 74:9 75:2.11 83:9 85:6 107:12 109:21 110:18 118:4 128:25 137:21 147:22 149:15 158:6 questions (3) 9:20 71:4 165:11 queuing (1) 150:6 quick (1) 42:8 quickly (5) 14:25 94:15 153:6 154:18 157:8 quite (20) 1:22 8:18 10:14 13:11 24:10 42:14 45:22 46:16 53:15 73:13 76:25 97:19 109:25 115:16 117:1,15 121:11 127:21 132:5 184:20 quote (2) 12:1 150:18

receiving (1) 56:11 recent (1) 43:18 recession (3) 162:12 163:12,25 radical (1) 9:5 radius (20) 21:7,16 25:1 84.25 42:22 79:9,21,23 80:3,5 87:25 88:11.19 89:7 95:23 96:2,10,13,14 113:14 117:20 rahman (1) 10:22 152:16 raise (3) 7:12 164:12 165:1 ramseys (1) 154:3 reconvene (1) 66:21 rang (1) 46:12 rat (1) 48:6 59:16 63:5,13 78:4 rate (6) 90:7 135:17 136:4,19 137:7 168:22 59:2.4 162:24 rather (19) 7:17 41:6,25 recovered (1) 12:21 49:1 54:11 59:8 60:23 64:13 71:20 73:23 82:9 red (1) 156:4 92:18 104:18 142:7 145:12 146:7 158:25 164:8 180:22 141:19 163:3 rational (1) 12:3 reduction (16) 12:18 rats (7) 42:3,4,5 48:6,8,9,11 raw (3) 100:21 101:8,10 reach (1) 8:13 reached (2) 11:22,24 162:18 168:21 reaching (2) 6:4 25:17 reductions (1) 163:14 react (1) 177:10 reaction (3) 118:23.25 119:7 reactions (1) 53:14 read (22) 1:11 14:22 16:24 27:14,14 28:17 48:24 51:13 91:14,15 94:1 96:21,21,23,24 103:4 116:22 123:19 146:19 150:16 164:2 165:10 references (1) 25:9 reader (7) 43:12.15 143:10 178:2,18 179:1,7 readers (1) 163:19 readily (3) 23:24 27:8,8 reading (8) 125:15 131:11 132:17 138:8 144:25 176:6 178:2 179:7 refine (1) 50:21 reads (2) 93:18 122:7 refinement (1) 51:5 ready (1) 97:13 real (6) 7:23 23:22 40:14 137:8 146:8 62:19 180:6,9 reflected (1) 121:22 realised (1) 159:9 reflection (1) 73:23 realises (1) 38:6 refrain (1) 82:11 realistically (1) 157:13 reality (1) 83:3 161:3 181:9 really (32) 2:10 7:16 13:20 37:11,12 41:10 42:23 regardless (1) 119:20 43:2,10 46:16 71:15 73:24 regards (1) 166:24 74:3 76:17,25 84:1 96:7,21 regime (1) 104:8 97:23 105:20 106:16 regrettably (2) 35:6,7 107:19 108:10 109:25 regularly (1) 61:13 110:9,16 111:9 128:15 132:7 140:5 156:3,3 reams (1) 163:16 reason (26) 6:2 8:15 15:17 25:16 34:19,20,21 35:9

139:10.17 141:1.5.6.18 37:1 39:1 44:18 66:18 82:2 142:14 146:3 172:3 101:25 102:9 104:18.20 reasonable (11) 43:12 105:2 106:19,21 134:5,7 103:19 110:12 142:18 148:20 152:19.22 153:13.14.18 154:7.23.24 143:10 154:14 156:10 178:2,18 179:1,7 155:4,20 157:16 158:15 reasonably (12) 26:1,9,13 163:23 33:9 46:4 90:12 110:6 reinforces (1) 114:19 123:16,24 156:12 157:20 reinvents (1) 3:16 rejected (1) 104:13 169:12 reasoning (1) 179:5 relapsing (2) 20:18,25 reasons (11) 4:4 23:16,25 relate (1) 148:7 65:4.25 66:2 67:11.22 86:8 related (2) 6:9 76:14 101:23 114:7 relation (30) 4:8 7:25 17:17,22 21:2,14 27:19 recall (5) 66:12 131:11 132:17,20 151:19 29:18 32:2,3,18,19,24 37:5 receivable (4) 91:3,4,5,7 44:24 47:2,9 56:1 61:7 receive (3) 61:16 63:15 71:3 74:4,11 79:12 96:3 100.24 113:17 114:8 135:20 received (7) 61:13 67:4 170:16 180:2 184:8 70:13,13 127:2,3 132:20 relations (1) 1:22 relationship (4) 2:14 16:18.20 49:8 relative (2) 123:17 124:2 relatively (2) 25:13 65:8 recognise (2) 82:15 108:16 relaxation (1) 163:22 recognised (3) 12:18 24:14 relevant (43) 4:3 18:7 23:14 25.5 26.12 29.20 30.5 6 7 recognises (2) 12:15 93:18 31:15 41:2 75:5 78:16 92:9 recollection (2) 152:6 180:19 108:8 118:4 121:19 recommend (6) 133:1 143:2 131:1,5 133:5,6 134:22 145:7 148:11 151:22 138:9 139:11 141:11.21 142:8 149:17 151:16 154:4 recommends (2) 145:3 148:9 155:23 156:7 158:7 167-9 12 171-7 172-8 recover (7) 56:23 57:5 58:9 173:22 174:17 175:12 176:10,20 177:18 recoverable (5) 56:16,17 reliable (1) 68:19 reliance (2) 140:13 179:23 relied (6) 140:14,25 165:23 recovery (2) 55:22 56:21 178:11 181:1,16 relief (1) 164:15 reduced (4) 69:25 70:23 relies (2) 43:11 154:13 rely (3) 16:4,6 91:9 relying (1) 23:6 remain (8) 77:9 106:23 152:3 90:2,6,13 128:20,23 155:20 156:2,5 163:6,9 135:16,23 136:4 139:21 142:4 150:23 159:12,21 remainder (1) 50:18 remained (8) 58:8 60:20 63:20 70:20 72:15 157:3 refer (8) 33:3 54:1 77:1 92:5 158:6 159:5 95:1.5 121:14 128:1 remaining (1) 127:7 reference (21) 4:21 40:6 remains (2) 162:4.8 44:6 75:3 76:16 77:3 99:14 remarkably (1) 113:12 104:2,24 109:17 117:21 remarking (1) 104:5 122:25 127:18 131:2 remarks (6) 1:5 3:2 4:13 140:15 144:23 145:15,25 5:20 10:21 137:2 150:17 162:20 170:25 ember (4) 10:24 61:4 151:13 152:1 referred (14) 26:14 33:10 remind (2) 29:9 91:22 39:2 44:14 75:2 77:15 78:5 reminded (2) 1:7 111:20 88:5.7 128:4 131:15 reminding (1) 102:17 136:25 153:22 161:2 remiss (1) 121:13 referring (2) 94:1 114:21 remote (1) 155:5 refers (3) 77:7 128:1 144:19 removed (1) 3:12 removes (1) 80:4 rendition (1) 24:10 reflect (5) 90:19 95:9 121:18 rent (5) 67:3 91:2,4,5,6 rental (1) 66:16 reopen (2) 66:20 154:3 reopened (1) 163:22 reopening (1) 163:24 regard (5) 49:8 92:10 125:10 repairs (1) 134:9 repeat (5) 5:19 61:5 139:4 regarded (2) 119:5 121:8 143:4 158:1 repeated (1) 183:3 repetition (2) 182:25 183:22 reply (5) 33:5.5 103:13 178:23 182:20 report (1) 27:23 regulation (9) 105:4 142:2 reporting (1) 152:2 147:17 149:2 154:22,23 represent (5) 123:15,24 155:20 156:9 157:18 137:15 149:3 169:12 regulations (46) 20:13,17,24 representation (1) 86:15 30:11.13.19.20.22.24.25 represented (2) 69:3 184:2 31:4,7,9,10,16,21 36:10,13 representee (2) 86:19,20

80:22 158:2 reread (1) 2:20 resolve (1) 71:8 resort (1) 12:8 169:5 174:9 149:14 165:7 177:13 83:13 166:17 177:25 164:8 163:13 171:17 173:12 179:21 result (39) 3:4 10:18 14:14

representees (1) 86:23 represents (4) 55:6 59:2 reputation (1) 68:10 requests (2) 184:11.12 require (9) 3:25 4:1 103:15 121:20 143:2 145:7 157:16 163:18 182:20 required (25) 87:7 89:8 100:22 101:9 102:9 106:22 107:2 112:3.15 115:10 134:5 137:19 146:23 147:21 148:22 152:23 154:21 158:3,14 161:23 162:7 163:21 165:3 175:20 requirement (11) 80:17 90:19 92:3 109:14 111:24 112:24 125:23.24 151:6 155:18 174:16 requirements (4) 115:14 121:19 160:14 174:8 requires (24) 49:25 79:20 80:8,10,11,15 81:3 82:9 87:5 103:15 106:3 108:14,16 113:3 118:12 127:17 142:21.22.24 145:3 151-1 160-7 162-2 173-22 requiring (2) 82:25 131:7 rereading (1) 132:14 researching (1) 97:22 resilience (1) 65:10 resolved (1) 9:12 resolving (1) 148:6 respect (14) 5:24 14:7 21:13 30:22 31:3 41:16 81:10 135:5,6,16 139:21 168:21 respectful (12) 23:16,21 36:16.22 38:7.12 47:4 55:16 89:6 111:6 126:2 respectfully (11) 27:1 94:4 96:4,8 99:11 138:3,23 150:20 151:22 161:19 respond (3) 83:12 160:22 responding (4) 81:17 82:3 responds (1) 109:20 response (16) 31:17,24 32:7 51:11 52:4 82:21 132:15,23 133:3 142:15,25 143:16,20 166:9 176:20 responsibility (1) 12:4 responsible (3) 11:6 12:5 rest (2) 20:19 103:4 restaurant (19) 3:4 10:25 11:14 16:3 54:20,23 55:5 56:8.9 57:20 58:6 63:25 67:24 68:2,11 69:4 153:12,15 154:3 restaurateur (2) 56:9 63:23 restrict (1) 50:21 restricted (1) 141:8 restriction (17) 16:2 19:6,22 22:5 23:9 24:12 37:13 38:8 40:8 45:1.2 51:6 60:10 86:4,7 129:12 141:9 restrictions (30) 3:6 6:21 15:10 21:9.19 22:1 35:14,16,20 37:2,21 41:2 83:14,17 86:11 124:13 128:22 142:3 145:19 147:12,16,16 149:22 157:18 159:13 162:12

105:11,14,14 106:17

18:12 19:8,10 22:7 33:13

58:25 60:4.11.21 65:23 67:10.14 72:17 79:5 85:4 87:16 88:12 90:21 93:4.15 94:11 98:10.13.24 100:11.15 101:21 111:8 128:20 135:7 140:7 141:19 143:15,19 150:23 151:2 resulted (1) 83:23 resulting (38) 18:11 19:9 60:13 76:23 79:16 80:23 89:14.22.24 90:21 91:20 92:1.4.12.17.19.21 93:11 94:11.20 95:3.7.12 98:2 111:11 112:11,22 113:5,14 114:9,10 118:6 139:23 140:6 165:25 169:24 171:12,13 results (11) 123:16,25 137:16,22 138:1 161:4 164:4.22 169:13 170:21 171:4 resume (1) 144:5 resurrected (1) 43:19 retail (2) 132:2 155:15 retailers (2) 130:16 131:8 retrospective (1) 13:23 retrospectively (1) 14:5 return (2) 2:13 91:16 returning (1) 127:15 reveals (2) 56:24 133:3 revenue (5) 123:4,6 150:18.23.25 reversals (1) 76:5 reverse (20) 48:6,7,9 57:3 3 4 12 13 15 17 19 19 74:7.17 75:17.19 77:5.5.14 78:6 reversed (5) 48:17,21 52:17,25 76:19 reverses (1) 48:4 reversing (1) 77:15 revolution (1) 104:16 rewrite (1) 4:16 righthand (12) 18:14,20 19:3.17 20:2 34:19 135:13,14 136:17 139:20 142:10 175:16 rightly (2) 72:21 81:1 rights (1) 72:19 riley (5) 4:22 66:2 127:25 128:4 177:1 rise (4) 63:16 118:23 125:18 141:24 rising (1) 16:7 risk (7) 108:14,14,17 167:15 176:25 184:7,8 road (8) 9:22 109:24 120:17,18,20,21,21 163:15 robespierre (2) 104:6,9 role (1) 49:7 room (2) 114:21 115:19 rougier (2) 11:12.22 rougiers (1) 11:9 round (2) 11:17 178:7 route (1) 166:10 rows (1) 151:11 rsa4 (1) 39:13 rules (1) 71:12 run (1) 151:3 running (1) 185:17 rural (2) 110:1 115:14

safety (2) 31:12 104:7 sale (1) 63:25 salzedo (1) 182:9 same (50) 8:9 13:12 16:9 24:10 30:6,7 35:10 39:12 41:4 57:22 61:1 79:24 83:15 84:9 87:15,17 89:25 90-19-25-91-8 94:10.13.14.24 95:11.14 96:9 98:22 101:23 111:17 117:4 118:25 125:3 128:10 130:23 137:17 138:6 144:15 146:17 154:5

184:17,20 185:18

seeking (2) 159:6 164:21

seeks (3) 158:20 164:15

seem (2) 42:3 117:11

170:3

shows (5) 16:11 32:16 71:24

sickness (4) 88:17,18,23 89:7

116:16 141:22

shut (1) 55:5

shuts (1) 176:21

shrinking (1) 138:19

seemingly (1) 38:18

161:6,12 184:9

seems (5) 73:20 81:21

en (5) 21:6 113:12

145:23.25 169:15

sees (2) 5:1 11:10

seizure (1) 119:13

seeing (1) 147:8

seek (1) 63:5

178:20

160:23 162:4 163:11.24 167:10 173:13.20 174:12 181:18 183:3 sanitary (5) 19:12,21 42:13.17 78:25 sanitation (2) 20:7 140:25 sars (3) 43:20 44:20,21 satisfaction (2) 80:11 89:8 satisfactory (1) 88:25 satisfied (6) 1:21 30:13,14,25 31:10 85:19 satisfies (1) 84:23 satisfy (4) 84:3,13 87:10 119:11 save (1) 111:18 saying (24) 3:6 9:9,23,24 40:20 43:22,23 44:9,24 47:18 54:11 62:20,23 64:8.16.22.24 69:7 71:19 72:6 84:1.5 108:12 117:11 scare (2) 106:9 176:19 scarlet (2) 20:25 45:24 scenario (4) 73:25 132:16,23 scenarios (2) 74:2 132:19 scene (1) 120:22 schedule (12) 89:20 91:17 94-18 101-3 133-17 20 135:5 144:17 153:22 167:16 172:18 175:14 scheduled (1) 20:12 scheme (1) 50:15 schools (1) 108:23 scientists (1) 163:18 scope (7) 22:22 31:6 49:4 77:17 149:25 170:8 179:3 screen (3) 144:8 147:3 153:5 screens (1) 17:23 second (16) 36:3 45:16 52:12 69:24 91:19 92:22 95:2 114:11 142:24 145:21 161:22 163:8 166:14,19 167:17 173:15 secondly (11) 24:22 32:20 33:15 45:5 52:20 57:11 71:9 122:1 174:15 183:25 184:5 secretaries (1) 30:17 secretary (1) 46:11 section (20) 18:5,10 28:4 30:6.10.14.31:6.7.15.20 124:9 126:24 127:10 134:14 139:13.23.24 157:4 167:23 169:24 sections (3) 122:13 132:18 135:10 see (71) 2:4 9:12 17:24 18:2,7,14 19:4,4 20:8 21:3,4 23:2 25:11 27:10,23 29:18 30:5 31:19 32:10 33:5 40:4 43:12 46:15 49:3 63:24 72:24 76:1 80:17.25 81:16 87:13 88:9 89:18 90:2 92:3,25 94:23 96:5 98:22 103:13 113:20,24 116:18.20 121:22 124:20 133:12 134:22 135:2 136:6,18 137:6 138:25 141:7 142:10 146:18 147:5.16.24 156:4 157:4 158:11 159:2 168:2,14 169:4 171:22 175:16

selected (1) 181:14 selfservingly (1) 51:8 send (1) 46:16 senior (1) 30:15 sense (18) 3:21.25 7:23 8:5 9:8 38:1 40:15 41:13 47:15 94:11 115:13 118:1 120:4 129:5 132:8 179:16 180:1 sensible (5) 93:25 122:14 134:11 138:16 142:18 sentence (2) 14:17 40:17 separate (6) 11:13 17:16 62:13 118:24 119:6 137:1 separated (2) 10:12 53:8 separately (1) 184:2 sequential (1) 111:8 serial (1) 3:15 serious (9) 10:25 29:22 45:22.25 46:16 112:1 113:1,3 176:19 seriousness (1) 61:6 serve (1) 50:21 serves (1) 50:18 service (7) 57:25 58:1 59:23,24 60:2 70:7 175:12 ervices (4) 58:3 101:17 153-15 176-24 sessions (1) 155:6 set (16) 1:9 16:14 29:3 31:6.7 32:7 109:12 131:11.17 132:22 137:1 155:10 159:16 164:24 168:15 179:21 sets (5) 11:8 91:12 131:20 132:12.15 settlement (6) 90:1,23 92:5 126:24 127:11 168:16 settlements (1) 5:3 seven (4) 131:14 132:13 152:25 175:7 several (7) 1:21 9:18 12:12 16:11 100:17 101:6 120:22 shall (3) 17:16 123:15.24 shaw (1) 27:11 shell (1) 54:4 shield (1) 67:7 shielding (1) 66:23 shift (3) 7:15 64:24 65:2 shifted (2) 8:22,23 shifting (1) 64:9 shifts (1) 8:16 ship (1) 119:13 shoes (1) 116:4 shop (2) 27:20 156:17 shops (3) 150:12 157:1,2 short (18) 2:20 25:9 41:9,11 46:24 76:12 90:9 91:6 97:11 99:22 100:10 144:2 145:6 162:5 168:24 180:14 181:8 184:13 shortly (2) 117:2 121:11 should (33) 18:16 20:10 22:13 23:17,24 25:4,6,12 28:7 41:3 65:17 66:6 74:15 76:18 93:1.25 94:14 96:10,20,21,23 101:1 116:13 126:5 127:25 138:25 166:24 167:12 170:15 172:5 179:3 181:9 182:20 shouldnt (7) 42:18 65:13 71:18 72:23 74:13 146:4 181:22 show (10) 12:23,24 26:20 63:19,20 71:20,22 134:25 145:10 159:23 showing (3) 141:5.6 164:6 shown (4) 14:3 86:7 91:17

side (7) 7:16 18:20 19:3 75:7 120:18.21 175:16 sidestepped (1) 179:22 sight (1) 11:3 significance (2) 95:21 98:12 significant (7) 29:6 79:11 81:12,24 83:16 154:7,10 significantly (1) 7:20 silent (1) 106:21 silver (1) 6:19 similar (14) 21:24 39:11 80:23 113:12 114:8 127:7.8.13.16 131:6 146:2 161:25 169:15 172:18 similarly (1) 30:15 simple (9) 23:25 27:10 62:3 73:15 104:21 107:18 117:16 124:3 145:10 simpler (1) 101:14 since (6) 1:20 55:23 85:8 163:22,22 179:11 single (6) 9:7 57:16 64:17,25 82:17 131:1 singularly (1) 159:17 sit (6) 184:11,13,16,25 185:12,16 sitting (2) 23:3 184:18 situation (20) 3:3 7:1,2 8:13 16:22 29:21 30:1 55:24 61:22 62:4,10,11,14 64:25 71:21 79:22 99:25 100:4 119:11 170:2 six (1) 16:4 skate (2) 155:13,14 skates (1) 155:13 skeleton (54) 1:10 2:6 4:10 12:1,22,25 13:1 14:24 15:2,4,15 16:14,21 17:20 19:17 23:19 26:15.18 29:3 32:11,15 48:23 56:4 81:7 82:12,23 94:3 96:5,6,9,22 99:15 102:16 111:21 117:21 121:15 122:24 126:16.18 131:11 132:12.15.18.25 141:21 144:22 145:25 153:2 157:4 170:24 176:1 177:3 181:3,7 skeletons (1) 7:16 skill (2) 96:8 113:4 slightest (1) 103:2 slightly (5) 57:22 62:10 74:20 146:24 147:3 slip (1) 97:5 slow (1) 33:20 small (4) 65:8,9 109:25 153:5 smaller (1) 45:11 smes (2) 175:23,25 snapshot (1) 138:17 social (6) 66:11.15 149:21 152:12 156:22 163:18 socially (2) 70:17,19 society (1) 62:12 sold (2) 175:23,24 sole (4) 13:13,18 16:20 90:13 solely (4) 16:16 101:4 114:10 135:23 solicitor (1) 3:16 solicitors (2) 107:2.14 somehow (3) 12:20 47:11 53:16 one (5) 37:5,17 103:16 104:12 106:3 something (33) 4:1 5:19 8:22 14:25 22:19 27:7 34:13 43:13 44:4 45:1 46:1 58:21 83:7.22 84:11.22.24 85:1,10 86:20 88:24 103:15 108:13,23 110:6 118:19,19 119:17 121:14 151:24 157:21,24 182:16 ometimes (3) 40:3 45:6 75:25

soon (2) 38:3,5 sort (8) 6:18 14:19 121:2 126:8 147:2 152:7 154:25 157:10 sorts (1) 6:6 sought (3) 125:11 134:4 159:7 sound (1) 165:16 sounds (1) 123:19 source (1) 57:18 sources (1) 163:17 spatial (1) 173:23 speak (1) 47:24 speaking (2) 14:9 103:10 speaks (2) 54:3 98:7 special (2) 139:7 169:3 specific (6) 32:6 49:7 96:2 126:14 141:22 174:7 specifically (5) 25:23 29:6 61:7 75:17 89:18 specified (20) 20:6,9,10 21:2,5,12,14 22:10 23:8 24:7 35:13 40:19 42:1 44:16 49:16,17 51:12 101:3 133:16,20 specify (1) 179:16 specifying (1) 30:21 speech (1) 152:3 speeches (1) 151:14 spend (4) 1:8 10:23 14:21 182:22 spent (2) 97:22 132:5 spill (1) 105:24 spouting (1) 66:7 spread (4) 31:18,24 43:20 68:10 spreading (1) 89:4 square (1) 178:7 stabbed (2) 120:18,19 stage (3) 144:12 174:24 179:25 stages (2) 63:2 143:5 stand (1) 116:19 standard (12) 90:9 91:6 93:2 122:9 123:4 135:18 136:20,22 137:7 138:17 168:24 169:6 standing (3) 54:22 56:11 57:23 star (2) 16:7 68:11 starred (1) 67:24 start (13) 38:25 66:25 93:1 115:17 118:18 128:25 133:7 134:9 139:18 153:24 167:7,19 182:2 starting (1) 51:1 starts (1) 134:14 stated (5) 37:9 50:16 104:13 133:19 144:17 statement (9) 30:20 53:12 102:23 131:18.20 133:16.19 153:22 155:10 statistical (1) 5:8 statutory (3) 28:18 33:16 103:3 stay (4) 67:6,12 113:24 119:19 staying (1) 120:11 stem (5) 16:17 139:18.19 169:20 178:11 step (1) 143:6 steps (1) 1:21 still (12) 15:16 28:1 56:8,10,10 95:17 97:24 100:24 105:10 117:1,8 155:4 stipulated (2) 79:19 160:14 stop (6) 76:24 77:21 89:4.5 109:5 121:5 stopped (8) 54:19 55:18 58:4 63:14 67:14 70:8 117:14 160:18 surgeries (2) 130:16 131:8 stopping (2) 55:4,15

straightforward (4) 49:21 145:12 153:10 164:21 strand (2) 57:16,19 strands (1) 11:17 strategy (3) 53:11.15.16 stray (1) 74:2 street (1) 157:14 stress (1) 5:18 strict (1) 179:16 strictly (1) 93:20 stripped (1) 2:18 stripping (1) 68:23 strong (2) 83:5 103:1 structure (1) 167:11 struggle (1) 146:20 subcategory (1) 51:9 subject (5) 63:6 173:12 182:12 185:10.12 sublimit (1) 164:17 submit (18) 75:15.15 85:20 134:11 136:11 137:18 142:5,17 145:5 147:20 149:3 150:20 151:22 156:2 158:4 161:19 174:13 181:8 submits (1) 15:25 submitted (2) 9:4 122:20 subparagraph (1) 29:24 subsection (6) 29:25 30:11,18,19 31:8 169:23 subsequent (3) 11:2 153:18 163:1 subsequently (2) 103:22 163:16 substantial (3) 154:8,11 175:25 substantive (2) 10:7 25:11 substitute (1) 122:16 subtracted (1) 57:1 succeed (1) 73:19 succession (2) 85:7,9 successiveness (2) 81:3 84:12 sued (1) 11:4 suffer (2) 100:18 162:18 suffered (13) 8:14.15 10:25 13:14 56:13 60:2 69:20 78:3 128:25 129:2 159:24 163:10,23 suffice (2) 127:22 145:8 sufficient (6) 4:16 25:24 60:13 81:19 82:4 86:21 suggest (24) 25:4 27:1 51:21 53:13 55:21 64:3 74:12 75:25 81:5 94:5 99:12 133:4 134:4,11 136:3 138:3,22,24,25 146:9 148:5 154:2 165:7 170:25 suggested (7) 47:10 81:21 82:24 89:13 107:21 110:5 154:25 suggesting (1) 85:21 suggestion (4) 2:22 48:1 66:19 142:2 suggests (7) 23:18 26:22 54:7 66:20 89:3 138:14 171:1 suicide (3) 3:5 42:17 79:1 sum (4) 90:6 135:16 158:8 168:21 summarises (1) 131:16 sumption (2) 4:9 102:18 sunday (1) 57:24 superfluity (1) 93:9 supplementary (1) 1:17 support (2) 161:21 181:17 suppose (9) 6:2,16 25:16 58:15 83:10 94:15 110:9 115:21.24 supposed (3) 6:11 183:2,5 sure (9) 2:10 9:9 13:11 46:18 47:19,24 125:1 180:25

182:5

surprise (1) 58:9

suspect (1) 46:15

surgery (4) 112:1 113:2,3,9

straight (1) 67:1

34:12,13

straightaway (3) 29:18

somewhat (1) 157:11

somewhere (1) 45:25

suspend (1) 66:17 sustain (1) 172:14 sustained (6) 7:3 65:4,22,24 79:16 88:18 swaziland (1) 36:14 sweden (2) 4:6 6:23 swiftly (4) 110:18 115:3,4 117:16 switch (1) 148:20 sympathy (1) 39:23 tab (4) 130:17.17.17 175:13 table (2) 151:11 175:13 tabs (1) 181:12 tailor (3) 102:2,11 157:12

tailoring (1) 102:3 takeaway (3) 153:15 154:3,8 takeaways (3) 132:7,8 153:8 taken (22) 5:6 31:19 33:8 54:8 90:15 104:16 118:3 124:15 125:2 134:10,11 135:25 142:25 143:20 153:23 158:18 165:10 166:17 170:24 177:25 179:1.4 takes (8) 10:7 13:15,16 14:20 104:23 112:20 124:10 176:20 taking (4) 72:1 82:2 123:23 176:10 takings (1) 62:21 talk (8) 49:11 84:19 98:14.16.16.17 113:1 147:6 talked (1) 108:21 talking (5) 59:5,8 85:6 99:16,17 talks (2) 29:11 98:15 tant (1) 36:13 tanto (2) 59:16 120:1 target (1) 150:21 task (2) 11:18 35:6 tb (2) 45:24,25 tells (2) 81:5 149:15 temporal (9) 12:16 13:22 80:17 81:3,4,14 84:12 85:6,9 ten (2) 46:22 143:24 tenancy (1) 27:20 tenants (1) 28:2 tendentiously (1) 9:22 tennants (1) 146:4 tens (1) 65:12 tense (2) 98:9,12 tension (4) 40:11,13 147:25 148:6 term (6) 19:24 95:11 112:7 114:5 141:3 167:1 terminate (1) 28:10 terms (20) 39:19 93:20 98:13,18 102:23 108:18 109:19.19 120:9 127:16 128:14,18 129:11 135:9 145:5 164:4 166:10 167:10 172:18 182:10 terrible (2) 16:9 68:14 terribly (3) 45:3 68:13 71:3 territorial (1) 101:4 territory (1) 12:8 terrorist (3) 106:9 177:4,7 test (27) 9:10 57:2 76:20 80:4,12 83:1,8,19 84:3.14.23 85:1.19.23 87:11 95:18,20 119:4,12 120:2 121:7,20 150:3 156:5 160:16 180:21.21 tested (1) 181:14 thank (11) 16:25 17:2,6,10 18:1 51:20 97:9,14 130:6 165-12 177-6

thanks (1) 47:1

theatre (1) 155:4

thats (10) 17:10 26:21 40:9

46:7 72:23 86:13 97:21

107:17 111:13 115:24

2 (22) 29:24 30:4 31:8 32:1

90:2.10.18 94:24 96:25

97:8 114:1 122:19 130:17

134:19 154:18,21 155:2

152:19 153:12 163:4.6.10

20 (9) 30:10 129:1 151:8

2010 (3) 20:13.18 44:17

21 (5) 30:14 31:6 153:13

152:4,14 185:21

154:22 181:13

22 (2) 31:7 181:13

2152b (1) 82:12

152:19

2020 (8) 1:1 55:3 151:8,8,18

23 (5) 62:22.23 130:17 151:8

24 (3) 106:7 130:17 154:22

50:1,7 52:5 69:25

175:6

164:24

200 (1) 97:12

2004 (2) 29:7,17

theatres (1) 155:8 theft (1) 135:10 themselves (5) 3:6 8:8 39:4 53:20 69:2 thereafter (2) 129:15 170:21 thereby (1) 177:10 therefore (43) 6:16 12:7 25:8,16 27:8 33:14 52:23 56:15 61:4,24 63:15 64:1 69:24 70:20.24 72:9 73:4.7.7.17 77:3.7.13 78:2.7 87:10 99:10 103:7 127:10 132:4 137:25 144:25 145:5 147:19 149:20,24 154:4 163:3 164:4 176:14 179:3,14 181:21 therein (1) 172:14 thereof (1) 146:14 thereto (1) 172:13 thing (12) 10:19 12:24 13:12 26:17 45:4 71:3,17 83:15 84:9 86:14 97:20 151:23 thinking (1) 97:21 third (5) 53:23 111:22 163:20 166:22 174:5 thirdly (9) 3:9 6:9 32:22 53:1 122:19 143:1 146:11 173:9 174:19 though (15) 14:20 28:2,3,20 58:16 70:12,16 83:18 86:7.10 106:25 119:22 122:5 155:1 183:1 thought (3) 58:16 74:13 114-17 threat (1) 108:15 threatens (2) 29:21 30:1 three (10) 35:1 49:3 94:12 130:15,24 131:11 142:19 173:6 182:21 185:6 through (14) 4:15 5:1 29:2 32:10 35:12 61:14 73:1 96:23 102:23 103:17 133:1 151:3 157:3 182:23 throughout (3) 60:20 115:15 158:6 throw (1) 1:25 thrust (2) 180:6,9 thursday (19) 47:7 48:4 59:9 60:25 61:11 72:6 74:6 75:15 79:12 184:6.11.12.16.19 185:1.4.7.9.13 thus (3) 123:15 169:11 178:22 time (27) 1:6,8 4:25 5:21 13:20 16:4 22:25 29:2 33:7 40:13 45:8 55:18 60:7 63:3 96:9 108:5 110:10 116:18 128:1 132:5.25 150:7 182:22 183:4.8 185:4.14 times (6) 12:14 15:13 102:18 105:3 108:21 144:15 timing (1) 184:8 tin (4) 124:19,21,24 125:5 tiny (1) 37:25 titles (1) 128:6 today (1) 7:5 together (3) 70:18.19 91:15 toing (1) 6:4 token (2) 146:18 154:5 told (4) 69:22 105:6 150:13 176:12 tolerably (1) 50:15 tomlinson (1) 6:18 tomorrow (9) 180:14 182:2,6 183:19 184:10,17,21 185:11.18 too (4) 25:6 36:8 37:24 147:9 took (3) 85:21 115:4 167:14 topic (2) 10:8 156:25 topics (1) 14:8 tortfeasors (1) 12:6 tortious (1) 84:23 tortured (1) 13:3

total (4) 90:16 148:11 158:3,8 totalitarian (1) 104:8 totality (1) 184:5 totally (3) 50:25 64:24 72:7 toulson (1) 23:1 towards (6) 117:1 133:13 169:20 170:18 171:21 175:9 town (3) 72:16 108:22,23 trade (3) 1:18 2:12,23 trading (2) 5:11 164:22 traditional (3) 126:22 127:9 128:11 traffic (1) 176:19 train (1) 163:15 transcript (6) 33:4 47:14 66:24 124:20 150:18 151:13 transform (1) 105:13 translated (1) 104:11 transplant (2) 112:1 113:2 transpose (1) 93:7 travel (5) 67:7,13 102:11 156:11 163:15 treat (2) 22:15,17 treating (2) 10:13 31:13 tree (1) 11:17 trend (2) 123:11 169:7 trends (58) 5:5,7,8 14:25 15:5,8,18 16:13 66:1,4 117:3 121:10.18.24 122:5,8,15,20,25 124:14,25 125:10,12,17,22 126:1.5.9.14.22 127:8.12.17.23 128:1,3,7,11,11,13,14 131:4 136:24,25 137:3.8.18 138:8,12,13,14,14 139:6 140:2 161:23 166:23 169:1,15 trial (13) 6:13 8:3 11:9 26:18 55:9 56:4 71:2 73:11 81:7 82:23 94:2 111:21 184:4 tribunal (3) 126:3 164:23 165:2 tries (1) 105:19 trigger (6) 13:7 50:4 55:21,23 56:20 143:7 triggered (9) 52:12 93:21 118:14 147:12 158:16.22 162:6 166:8 178:17 triggers (3) 49:5 154:16 174:20 trodden (1) 162:22 trouble (2) 2:5 5:15 troubled (2) 7:25 84:7 troubles (1) 61:8 true (4) 56:22 115:24 164:3 179:6 truly (1) 13:17 truth (1) 161:9 try (1) 61:4 trying (7) 11:18 64:8,13 117:9 178:6 180:20 181:4 tuesday (1) 1:1 turf (1) 162:22 turn (19) 17:18 18:3.6 21:1 27:21 72:4 73:7 83:4 123:22 140:12,15 165:23 106:19 134:15 136:6 177:14 178:11 181:2 182:5 141:11 143:16 150:19 uppers (1) 60:21 155:21 157:6 165:15 urgent (1) 148:21 168:10 176:3 used (42) 28:17 39:8,12 69:6 turning (3) 22:12 31:5 72:3 89:14,22,24 90:18 turnover (32) 12:19 92:7,15,17,18,22 68:6,18,24 90:3,6,8,9,14 94:6.10.10.20 98:9.12 101:20 122:9 99:10 106:25 111:12 135:16,18,19,23 136:5,20 113:25 114:5,6 115:5 137:7 138:17 139:22 122:21 125:10.15.16 162:18,23,23,25

type (12) 43:19 50:7,22 51:12 107:1 123:1 124:13 126:14 127:13 143:17 174:19 177:4 vacuum (1) 25:14 types (6) 24:3 106:20 151:6 vaguely (1) 61:4 152:21 167:22 168:16 valders (1) 131:17 typical (5) 69:7,7,14 107:9 validity (1) 104:10 136:3 valuable (1) 102:25 vanilla (1) 176:25 ш variant (1) 146:20 uk (8) 4:7 39:3 55:25 56:7,14 177:5,22 178:5 169:8 ultimate (2) 25:17 85:18 ultimately (1) 53:24 unavailable (1) 159:18 unconnected (2) 122:22 168:16 175:17 125.7 vastly (1) 70:23 uncontroversial (1) 25:13 underlies (1) 124:7 verbatim (1) 24:10 underlines (1) 124:7 verbs (2) 50:19.24 underlying (3) 125:17,19 127:16 undermines (1) 5:12 171:10 version (1) 113:12 undernoted (1) 170:4 underpin (1) 2:22 understand (11) 2:7 9:2 14:11 33:11 40:11,15 47:25 62:20 64:7 178:18 185:15 understanding (3) 33:16,17 vicissitude (1) 139:10 38:1 vicissitudes (3) 124:22 understood (3) 13:3 76:9 139:2,8 103:19 viral (1) 20:18 undertake (2) 10:3 102:12 virtual (1) 102:22 undertaking (1) 133:2 virtually (1) 132:21 undoubtedly (1) 126:5 unemployed (1) 72:17 virtue (1) 178:20 virus (1) 110:10 unfairness (2) 38:4,6 vital (2) 33:16 38:1 unfortunate (1) 97:23 vitally (1) 74:12 unhelpful (1) 110:8 viz (3) 49:16,18 50:17 unhelpfully (1) 4:23 vocabularist (1) 50:20 uninsured (2) 124:4 149:7 voluntary (1) 13:9 unintended (1) 125:16 unitary (1) 44:1 w united (1) 29:22 unknown (1) 110:10 waiting (1) 15:16 unless (9) 15:21 16:2 24:15 waitrose (1) 150:6 71:23 112:1 116:21 129:5 wales (2) 27:7 31:25 165:8 173:25 unlikely (5) 45:18 62:2 66:20 104:15 185:10 174:3 179:20 unlucky (1) 41:20 warnings (1) 124:23 warrant (1) 10:12 unorthodox (1) 10:3 unpersuaded (1) 41:20 warranted (1) 183:24 unprecedented (2) 7:1 178:4 unprincipled (1) 74:19 163:1 unrestricted (1) 24:4 wasted (1) 183:4 unsafe (1) 176:23 water (1) 106:10 unsavoury (1) 42:18 way (28) 8:9 9:23 13:5 unspecified (3) 43:24 44:10,13 unthought (1) 74:19 until (6) 71:23 82:23 96:25 129:11 143:24 185:20 upbraided (1) 47:20 168:17 177:20 undate (1) 157:21 upheld (1) 54:3 85:25 86:12 upon (15) 16:6 23:6 37:12 59:18 64:18 106:19 110:2

128:9.10 136:9.13 145:4

146:2.17 154:20 157:17

westfalische (1) 146:5

westminster (3)

110:12.14.17

year (5) 54:25 62:22 69:20

163:11.25

1990s (1) 177:5

1a (1) 29:25

167:2 168:8 173:17

usual (3) 6:4 18:12 156:23

useful (1) 45:7

using (1) 40:21

veve (1) 89:4 whatever (23) 7:5 8:15 14:14 v (4) 10:22 23:4 27:11 146:4 34:25 35:3 38:23 59:19 60:7 69:8.13 83:23 88:4 95:21 96:12.13 106:10 107:14 128:14 129:12 139:2 180:5 183:15 185:14 whatsoever (2) 96:15 124:13 wheels (1) 147:7 whereas (1) 54:13 variations (3) 123:11 124:14 whereby (1) 166:5 wherever (4) 34:2 36:14 variety (8) 23:15 34:15 37:3 83:11 94:9 whilst (5) 15:25 40:2,5,11 44:18 45:9 86:12 128:2.5 165:2 various (9) 5:6 8:11 11:18 85:25 131:21 143:5 151:3 whoever (2) 41:2 85:17 whole (14) 7:25 16:14 37:3 42:11.17 52:24 62:12 73:3 verbal (2) 93:25 112:14 85:13 100:20 128:2 144:25 176:7 184:8 wholly (2) 36:16 178:4 whose (8) 54:19 65:12 67:24 vermin (4) 19:22 20:7 78:25 101:15 149:13,18 157:15 vicinity (26) 98:5 105:22 wide (4) 24:15,21 68:10 108:12,16,25 109:23,23,23 76:25 widen (1) 2:1 110:1.5.11.16 140:19 141:20 166:4,18 171:9 wider (1) 32:24 widespread (2) 45:19 62:11 172:11 173:16,16,17 174:15.17.24 175:1 180:4 widows (2) 58:18 59:3 wilson (1) 146:5 wires (1) 78:10 wise (1) 184:10 wish (2) 24:20,22 wishes (3) 16:4,6 51:15 wishing (1) 162:21 witness (1) 131:17 won (1) 4:9 wonder (1) 36:7 wont (13) 2:11 9:4,9 46:5 62:23,25 64:9 108:5 110:21 138:18 180:23 182:8 184:24 wording (26) 18:3 48:16 53:25 65:11 75:12 87:19,21,22 95:13 114:13 116:15,16 126:20,21,23 127:7,14,16 132:16,24 169:15 170:13 175:2,3 wants (5) 8:14 10:17 60:18 179:23 183:14 wordings (13) 15:9 18:4 65:9 warehouse (2) 100:21.25 74:23 130:13 165:23 166:13 167:8.9 175:6.18 180:3 181:11 work (15) 15:1,25 57:10 66:4 vasnt (4) 67:14 69:11 70:1 74:21 77:22 101:18 102:11 107:15 120:16 148:21 151:20 152:13 156:11,13 worked (2) 72:25 117:10 working (10) 6:14 17:23 68:5 14:6,13 37:9 40:16 42:5,19 49:12 59:10 61:23 62:5 90:3.11 117:13.14 122:10 135:22 139:22 65:7,21 74:14 75:18,24 works (1) 115:17 76:20 83:25 103:11 114:23 world (4) 3:17,24 14:7 172:2 126:19 142:4 148:6 158:20 worry (2) 117:14 128:12 worse (1) 19:16 ways (5) 6:19 12:21 15:25 worth (5) 5:16 7:7 42:8 102:17 104:5 wealthy (5) 54:18 57:23 wouldnt (8) 5:16 37:10 58:3,5 64:2 56:13 58:7 73:8 77:1 95:21 weasels (2) 109:8,9 148:19 weathervanes (1) 115:18 writing (3) 17:25 122:23 website (2) 102:24 157:21 183:23 wednesday (1) 185:20 written (7) 109:12 116:19,22 week (9) 16:8 48:3 60:6 130:13 141:21 165:10 61:14,16 62:9 72:2 152:2,5 182:17 weekly (1) 57:25 wrong (13) 9:17 26:22 76:19 weeks (1) 163:4 97:20.22 105:15 106:15 weight (1) 113:20 113:1 120:16 126:6 149:15 welcome (6) 61:9 89:15 150:21 178:19 91:10,11 92:3 95:1 wrongdoers (1) 11:21 welfare (2) 29:22 30:1 wrote (1) 55:3 went (2) 69:4 104:19 werent (1) 185:5

181:3 186:3 129:1 185:13.18.20 10000 (3) 69:21,22,25 102 (1) 109:17 1028 (2) 17:1,7 103 (1) 56:3 107 (1) 125:9 11 (6) 39:7 40:22 92:11 114:3 126:14 127:13 112 (1) 55:10 1120 (1) 46:23 113 (1) 66:25 **1130 (1)** 46:25 114 (1) 67:21 1186 (1) 27:22 12 (11) 17:21 27:22 39:7 40:22 114:3 123:1.7.9 170:17.25 171:2 12month (1) 138:18 13 (1) 114:3 130 (1) 186:5 131 (1) 103:14 **14 (3)** 4:22 15:9 151:18 144 (1) 99:14 145 (1) 99:14 146 (1) 42:9 148 (3) 42:7 44:8 121:16 **15 (1)** 175:13 1513 (1) 157:4 **153 (1)** 144:22 **159 (1)** 108:6 **16 (7)** 67:6,9,12 103:21 151:18 152:4.14 165 (1) 186:6 **17 (3)** 42:20 55:10 186:4 **177 (1)** 109:13 **1784 (1)** 28:4 18 (2) 39:2 66:25 **185 (1)** 109:13 19 (3) 12:1 30:6 124:20 1980s (1) 177:5 1984 (2) 31:15 32:9 1986 (1) 27:18

years (1) 138:20 yesterday (3) 59:11 101:24 114:8 yet (4) 51:14 83:14 130:9 182:9 youre (3) 9:2 46:13 58:20 yourself (3) 34:9,23 67:19 yourselves (1) 16:24

zero (2) 62:23 63:10 zurich (18) 81:5 165:22,23 166:6.11.15.25 167:2.8 173:5 175:2.18 177:15 179:8,13 181:5,10,11 zurich1 (3) 172:16 175:6,23 zurich12 (1) 39:14 zurich2 (4) 167:18 178:16,22 zurichs (1) 175:5

04 (1) 132:4

25 (15) 4:11 21:7,16 42:6 44:11 45:10 55:6 63:22 64:2,4,21 79:9 81:20 82:5 1 (38) 29:18 30:11 31:21 88:19 38:2,11,13 49:25 50:2 **25000 (1)** 164:17 78:16.23 90:2.5.18 91:3 **255278 (1)** 121:15 94:8,24 97:15,25 99:8,11 **257 (1)** 130:11 107:4 110:22 113:14 25mile (12) 25:1 42:22 117:19 131:25 132:3 45:1,2 79:21,22 80:3,5 134:20 135:9 140:18 87:25 95:23 96:2,14 145:24 151:11 153:6.9.24 26 (3) 151:12 153:14 154:23 162:21 167:19 168:17 **261 (3)** 126:19,20 128:19 **264 (1)** 127:20 10 (6) 55:15 58:22,24 72:2 27 (1) 151:12 172:10 185:17 276 (1) 122:23 100 (5) 63:3,5 97:10 128:24 2761 (2) 12:25 13:1 278 (1) 122:24 1000 (12) 1:2 60:6 61:13,17 28 (3) 1:1 167:24 170:18 62:9 182:13 184:17.18.25 287 (2) 81:8,9

> 3 (29) 12:17 18:20 19:17 22:4 24:7,15 30:18 33:19 41:4 43:12 44:6 50:6 97:17 114:1 132:1 140:24 147:11.19.24 155-12 14 16 17 156:15,16,17 157:1,1,3 30 (4) 51:13,16,17 168:15 **31 (1)** 102:16 320 (1) 144:1 3253 (1) 81:16 **33 (4)** 104:3 138:11 151:18 178:23 330 (3) 1:10 143:24 144:3 332 (1) 1:10 336 (2) 102:19,20 34 (2) 169:19,21 35 (1) 171:11 364 (1) 4:22 **37 (1)** 96:20 **38 (2)** 18:2 158:2 385 (1) 81:16 397 (1) 15:15 3a (1) 39:19

29 (2) 103:5 185:21

4 (6) 1:15 67:21 95:2 114:2 157:8,14 40 (1) 15:10 **403 (1)** 165:17 41 (1) 176:2 42 (2) 18:5 95:6 **421 (1)** 16:21 43 (1) 178:24 430 (3) 184:6,11,16 436 (1) 185:19 439 (1) 16:22 44 (3) 38:25 154:23 175:13 **445 (4)** 38:21,24 39:4 40:17

163:3,10,23 164:9

168:21,23,24 169:6

turns (5) 59:14 83:6 114:1

turnovers (1) 175:25

160:13 161:17

```
45 (2) 22:4 150:6
45c (2) 31:15,20
46 (5) 20:8 103:24 113:21,24
  151:11
47 (3) 21:3 112:14,20
5 (12) 30:19 33:4 131:24
  147:11,19,25 155:13
  157:24 158:1 175:9,11,20
51 (1) 155:20
53 (2) 29:4 151:11
531 (1) 23:20
5353 (2) 26:18,22
54 (1) 151:11
55 (3) 27:23 28:15 33:6
564 (1) 26:15
58 (1) 79:14
59 (4) 29:3 91:23,24 92:4
6 (54) 11:7 21:13 22:10
  23:13 24:8,9,25 25:1,12
  33:17 35:10,11,14,23
  37:5,12,20,23 38:1,4,10,15
  40:19,25 41:22 42:25
  43:11,14,24 44:12,24,25
  55:10 57:2 78:16,24
  79:2,4,20 87:20 92:24
  93:3.20 94:8 111:17
  112:13.19 114:2 132:9
  142:2 147:17 149:2 157:19
  158:7
60 (1) 80:18
61 (2) 53:1 181:6
62f (3) 102:10 105:4 156:9
63 (4) 23:4 54:18 117:22
  181:6
64 (1) 66:13
65 (4) 23:5 78:18,19 93:1
66 (4) 78:17,19,19 177:3
67 (1) 98:21
674 (1) 32:10
68 (1) 117:22
69 (1) 29:4
7 (12) 42:9 98:21 99:3,8
  114:2 126:13 132:10
  141:13 158:8,9 160:15
  161:9
70 (1) 155:15
71 (2) 48:22 49:2
72 (1) 49:4
75 (2) 49:10 117:22
77 (2) 50:12 56:2
779 (1) 82:24
79 (1) 51:7
8 (11) 44:8 55:15 82:11
  113:11 114:4,14,23
  141:16.17 162:21 171:10
80 (12) 48:23 51:16.17.17
  62:22,22 63:3,5,9,12
  117:22 128:24
82 (1) 51:25
823 (1) 52:2
824 (1) 52:9
832 (1) 52:20
833 (1) 53:1
833c (1) 53:5
84 (2) 53:23 175:10
85 (2) 96:21,23
850 (1) 182:17
86 (2) 54:17,21
861 (1) 54:21
87 (3) 66:13,14 82:13
893 (1) 81:8
899 (1) 82:24
9 (1) 57:2
90 (3) 2:6 59:2 96:23
906 (2) 111:21,22
95 (1) 125:9
953 (1) 32:15
```