



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

Day 7

July 29, 2020

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1 it is concerned with the use of welding and other heat
 2 generating equipment, and the need to keep the immediate
 3 vicinity of any work using such equipment clear of all
 4 loose combustible material. The immediate vicinity of
 5 such work will necessarily be a smaller area than the
 6 building or premises where the work is being carried
 7 out, and so clearly the same meaning is not to be --
 8 MR JUSTICE BUTCHER: You are saying that means the worktop,
 9 effectively .
 10 MR ORR: Effectively, my Lord. Indeed. It is a very
 11 different context and it doesn't assist .
 12 The FCA further argues that " vicinity " in the
 13 context of the extension is an open-ended term that
 14 applies not only to the local area around the insured 's
 15 premises, but extends to any such area as might affect
 16 the insured 's business in relation to a particular
 17 danger or disturbance. And the FCA went so far as to
 18 say that the vicinity could extend to the entire
 19 country; that is {Day3/109:1}. That, in our submission,
 20 is absurd. The FCA's interpretation renders the term
 21 " vicinity " otiose and disregards the important
 22 limitation placed on insurer 's risk by that word. We
 23 echo Mr Kealey's submissions to the same effect .
 24 Finally on " vicinity ", the FCA is also wrong to
 25 argue on an alternative basis that the term will always

1 encompass at least the same city, town or village in
 2 which a danger or disturbance occurs. That, we submit,
 3 is simply incorrect. There is no basis for ascribing
 4 such a fixed meaning to the term.
 5 I turn then to "following". It is common ground, as
 6 your Lordships know, that this term imports both
 7 a temporal and causative requirement. Zurich submits
 8 that the term "following" requires that the relevant
 9 civil authority action (a) must come later in time to
 10 a danger or disturbance in the vicinity of the premises,
 11 and (b) must have resulted from that danger or
 12 disturbance. In other words, the action must be in
 13 response to the danger or the disturbance. That aptly
 14 encapsulates what is meant by "following" in the
 15 extension .
 16 Our interpretation accords with the --
 17 LORD JUSTICE FLAUX: Can you please repeat that point,
 18 Mr Orr? I didn't quite pick it up. After you said
 19 "must have resulted from", what was the ...
 20 MR ORR: In other words, my Lords, the action must be in
 21 response to the danger or disturbance .
 22 LORD JUSTICE FLAUX: Thank you.
 23 MR ORR: And we submit that "in response to" aptly
 24 encapsulates what is meant by "following" in the
 25 extension .

1 LORD JUSTICE FLAUX: Once it is common ground that
 2 " following " has a causative element to it , in one sense
 3 it doesn't matter, does it? Because what it undoubtedly
 4 connotes is there must be some connection. Not only
 5 must the action be later than the danger in terms of
 6 time, but there must be something that connects them.
 7 So the action must in some way be connected to the
 8 danger. So, if there were a danger in the locality , and
 9 the local authority then shut down everybody's premises
 10 for a completely different reason, then this clause
 11 wouldn't operate. But quite how close the connection is
 12 and whether, for example, it is a "but for" or proximate
 13 or whatever, I don't think matters, really . Because
 14 once you accept there has to be a connection -- I mean,
 15 it may be you are right in saying that "in response to"
 16 is as good as it gets.
 17 MR ORR: Yes, my Lord. We do not disagree with anything
 18 that your Lordship has said. We take the analysis in
 19 three stages. We are simply trying to elucidate as
 20 a matter of language the meaning. But I entirely accept
 21 that the real questions here are the strength of causal
 22 connection required and, whatever the strength is ,
 23 whether that test is satisfied on the facts, on the
 24 agreed facts . Because it is the FCA's case that they
 25 make good a factual case on that causal connection on

1 the agreed facts .
 2 Can I turn to those two points, and it is our case
 3 that whatever the strength of the causal connection
 4 required , it 's not satisfied on the agreed facts , and
 5 that is absolutely fundamental. So I entirely agree
 6 with your Lordship. But in our submission it is useful ,
 7 and probably helpful , to spend a little time considering
 8 what might be the required degree of strength of
 9 a causal connection. That is why the parties have
 10 adopted by analogy concepts of proximate causation .
 11 Perhaps if I can put it this way. Our primary case
 12 on the strength of the connection is that it is
 13 something akin to proximate causation , and we say that
 14 that is the standard default causation test in indemnity
 15 insurance. Though we absolutely take the point that
 16 that test ordinarily applies in relation to the causal
 17 connection between the insured peril and the loss , and
 18 not an intra-insuring clause causal connection as we are
 19 dealing with here .
 20 And to that extent we adopt Mr Kealey's submissions
 21 on proximate causation , but we also make this point on
 22 proximate causation: that ordinarily the causal nexus
 23 between the relevant civil authority action and the
 24 occurrence of a danger or a disturbance in the vicinity
 25 of the premises will be clear and direct . And that is

1 why we say it is akin to proximate causation .
 2 Indeed --
 3 LORD JUSTICE FLAUX: When your example is the fire, I mean
 4 that is the obvious example.
 5 MR ORR: Yes, my Lord, yes.
 6 LORD JUSTICE FLAUX: There is a fire and the fire brigade or
 7 whoever it is, the relevant civil authority, evacuates
 8 all the premises within three streets or whatever.
 9 MR ORR: Yes, my Lord.
 10 LORD JUSTICE FLAUX: That would satisfy the clause and you
 11 wouldn't even be asking the question, because it is
 12 perfectly clear that's the reason why they've done it .
 13 So whatever "following" means, it must be satisfied .
 14 MR ORR: Yes. When one is asking, perhaps on a slightly
 15 philosophical basis, what is the strength of the test
 16 required, that is why we say it is something akin to
 17 proximate cause. But one can draw on other analogies .
 18 MR JUSTICE BUTCHER: Perhaps your formulation "in response
 19 to" is the better one, because one doesn't need to get
 20 into the question of proximate causation. What you are
 21 saying is that if the local authority or the police
 22 react to a particular situation, it is going to be
 23 obvious that that is "following", and you don't get into
 24 questions of whether it is the dominant cause or the
 25 "but for" cause or anything like that.

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1 MR ORR: Quite so, my Lord. Quite so.
 2 My Lords, I will take --
 3 LORD JUSTICE FLAUX: Only to the extent that if it isn't
 4 there, then you don't have cover. I mean, in that sense
 5 it is a "but for" element, if you like, of the insured
 6 peril, and if all you have got is action of the local
 7 authority closing down the streets without a danger,
 8 then there is no cover. That was a point that Mr Kealey
 9 made yesterday.
 10 MR ORR: Exactly so, my Lord.
 11 In a sense this point only arises because we are
 12 dealing with, as we have put it, the FCA trying to
 13 hammer a square peg into a round hole, because they are
 14 struggling to find a basis for saying that there is
 15 a causal connection between government measures taken on
 16 a national basis and any danger or disturbance that
 17 might be said to have occurred or been present in an
 18 insured's vicinity .
 19 My Lords, in the light of your Lordships' comments
 20 I will take our other points on the strength of the
 21 causal connection very shortly, but one could draw on
 22 other analogies; for example, the causal test that
 23 applies in ordinary breach of contract cases, which is
 24 whether or not the breach of contract was a sufficiently
 25 substantial cause of the loss. That is obviously

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1 a reference to Galoo, which is in the authorities bundle
 2 at {K/80.1/1}, or your Lordships could look at Mr Peter
 3 MacDonald Eggers' decision in Crowden v QBE Insurance to
 4 which reference has been made already, which is in
 5 {J/135/1}, I won't take your Lordships to it. There he
 6 considered causal connections in terms of whether
 7 a matter was specifically accountable as a cause,
 8 whether it was significant as a cause. So these are
 9 just phrases that courts have used to elucidate what the
 10 causal connection might be or how you can describe it .
 11 But we do absolutely agree with what your Lordships
 12 have both put to me, and ultimately the minimum
 13 requirement must be a "but for" causal requirement.
 14 There is no indication in the extension or elsewhere
 15 in the Zurich policies that the parties can be said to
 16 have intended cover to be triggered under the AOCA
 17 extension even though the danger or the disturbance in
 18 the vicinity of the premises was not even a factual
 19 cause in the "but for" sense of the relevant civil
 20 authority action, or even though the civil authority
 21 action would have been imposed regardless of any such
 22 danger or disturbance as might have occurred in the
 23 vicinity of the premises.
 24 If you were to construe the causal requirement
 25 as anything less than that, you would not be giving

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1 proper meaning and effect to the requirement in the
 2 extension, that it must be a danger in the vicinity that
 3 leads to the relevant action.
 4 My Lords, can I, though, then turn to the factual
 5 point, which actually is possibly the more important
 6 point in this case.
 7 The factual question is whether the FCA has made
 8 good the necessary causal connection on the agreed
 9 facts. And that, as is obvious, is a question of fact .
 10 The burden of proof on that lies on the FCA standing in
 11 the shoes of policyholders. It is for them to establish
 12 that the causal connection is satisfied .
 13 In our submission, the FCA has not discharged that
 14 burden. On the agreed facts, the FCA has not
 15 demonstrated, and is unable to demonstrate, any
 16 meaningful causal connection between the measures taken
 17 by the national UK Government, on a national basis, in
 18 response to the COVID-19 pandemic and the occurrence of
 19 any such danger as might be said to have been present in
 20 the vicinity of any particular insured's premises.
 21 On this issue, the starting point is the FCA's
 22 admission that it does not allege that the advice given
 23 and restrictions imposed by the UK Government were
 24 caused by any particular local occurrence of COVID-19.
 25 That is the FCA's reply, paragraph 52 {A/14/27}, and it

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1 may be useful if we could have that up on the screen.
2 Paragraph 52:

3 "It is not alleged that the advice given and/or
4 restrictions imposed by the UK Government were caused by
5 any particular local occurrence of COVID-19."

6 Then they go on to make the jigsaw argument.

7 Now, it is implicit in that admission that the FCA
8 also does not allege that the government advice and
9 restrictions were caused by the danger of COVID-19 in
10 any particular locality. So the only way the FCA makes
11 good their point on "following" is on the basis of their
12 jigsaw argument, so I turn to that.

13 Now, the FCA has sought to portray the government as
14 having adopted from as early as the beginning of March
15 what they described as an "indivisible and interlinked
16 strategy that was not piecemeal". That is {Day1/53:11}
17 to 12.

18 My Lords, we all lived through this and we know that
19 is simply not correct. This mythical indivisible
20 strategy is not established by the agreed facts. It is
21 a creation of the FCA's to force the national government
22 measures responding to the pandemic into the AOCA
23 extension.

24 In Zurich's submission, the agreed facts as set out
25 in the chronology at {C/1/1} and the supporting

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1 documents at C2 establish the following seven points.

2 First, that the government was responding to a new
3 and emerging infectious disease about which it knew very
4 little in terms of, among other things, the disease's
5 precise mode of transmission, its symptoms and its
6 fatality risk.

7 Second, in the early stages of the epidemic the
8 government was responding to international and not
9 national developments.

10 Third, during February and March only limited
11 information was available to the government about the
12 number and geographical spread of cases of COVID-19 in
13 the UK.

14 Fourth, there was no coherent co-ordinated strategy,
15 the government and its advisers reacted in a piecemeal
16 manner to developing information about the incidence of
17 the disease and estimates of its likely growth.

18 Fifth, between 16 March and 26 March the government
19 was driven to take increasingly severe measures,
20 primarily out of a concern to avoid the NHS being
21 overwhelmed.

22 Sixth, there is no evidence that the government had
23 any considered assessment, let alone reliable
24 information, showing the incidence or risk of infection
25 in each and every area of the country at the time it

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1 took action in March.

2 At that time, and this is the seventh point, the
3 government acted on a national basis in order to protect
4 the national health system, and not because it took
5 account of and aggregated the incidence or risk of
6 infection in each and every area of the country.

7 Now in the time available, I would like to take your
8 Lordships to three documents to illustrate those points.

9 LORD JUSTICE FLAUX: In a sense, Mr Orr, that point you just
10 made is made good by the contrast between what happened
11 in March and what has been happening in the last couple
12 of weeks, in terms of the lockdown in Leicester and we
13 now learn a lockdown in Oldham and potential lockdowns
14 elsewhere, all of which are a reaction or action, or
15 however you describe it, to specific instances.

16 Whether it would satisfy your policy wording is
17 a different question. One can see the argument that in
18 those cases there is a danger in the vicinity of
19 somebody's insured premises, to which the government is
20 reacting or the action is in response to it.

21 But non constat when what was going on, as you
22 rightly say, was a national response to what was
23 effectively a miasma. I mean, nobody knew how bad it
24 was. Certainly when I left London there were concerns
25 people were going to be dropping dead in the street,

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1 because nobody knew what was going to happen.

2 MR ORR: Indeed so, my Lord, and what your Lordship has just
3 said is entirely borne out by the SAGE minutes, and
4 I was going to take the court to three of those minutes.

5 MR JUSTICE BUTCHER: I would be obliged if you did that,
6 because I haven't looked at those.

7 MR ORR: Let's do that. These are in bundle C2. I was
8 going to start with {C/2/125}. This is the SAGE minute
9 of 16 March.

10 The points I draw your Lordships' attention to -- we
11 seem to have ... (Pause)

12 The points I would draw your Lordships' attention to
13 are in particular points 6, 10 and 11 on that minute.
14 So, first of all the reference to:

15 "London having the greatest proportion of the UK
16 outbreak."

17 Point 10, and this is the key point on motivation:

18 "The objective is to avoid critical cases exceeding
19 NHS intensive care and other respiratory support bed
20 capacity. The figures for capacity are now clear but
21 intensive care bed capacity will increase by 20% or
22 more."

23 And 11:

24 "It is vital to understand numbers of cases
25 regionally relative to NHS capacity, to know where local

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1 more stringent interventions might need to be
2 introduced."

3 But as you read these minutes through, there is
4 continuing reference to the lack of up-to-date or
5 reliable information and clearly the government didn't
6 have it at that stage.

7 That is not a criticism, it is just a reflection of
8 the novel and unprecedented and emerging situation that
9 the authorities were having to deal with.

10 The second SAGE minute that I draw to your attention
11 is at page 205 of this bundle {C/2/205}. That is the
12 SAGE minute of 18 March.

13 The four critical points here are points 1, 4, 9,
14 and 13. Point 1:
15 "Based on limited available evidence, SAGE considers
16 that the UK is 2 to 4 weeks behind Italy ..."

17 But it is the reference there to "limited available
18 evidence".

19 Point 4:
20 "Reliable data on the health impacts of existing
21 interventions will only be available in 2 to 3 weeks.
22 This would not be in time to inform judgment on
23 additional interventions to limit NHS pressures, which
24 are likely to be significant within 2 to 3 weeks. It
25 may be possible to collect intermediate data, and this

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1 should be a priority."

2 Again, did your Lordships see there the concerns
3 about the lack of and the limited availability of
4 important data?

5 Point 9 there is a reference to 1,950 cases in the
6 UK and the number of intensive care cases.

7 Point 13, and this again is the key point:
8 "Modelling suggests that without mitigation, London
9 could reach COVID-19-related intensive care capacity by
10 early April."

11 But then if we go to the third document, which is in
12 the same bundle at page 279, the SAGE minutes of
13 23 March. There are a number of points here.

14 First of all point 7, the data suggests that London
15 is one to two weeks ahead of the --

16 LORD JUSTICE FLAUX: It is the wrong page, Mr Orr. Page 279
17 seems to be halfway through the document.

18 MR ORR: I am sorry, I am on the previous page, my Lord,
19 {C/2/278}. Thank you, my Lord, so {C/2/278}, point 7:
20 "The data suggest that London is 1 to 2 weeks ahead
21 of the rest of the UK on the epidemic curve. Case
22 numbers in London could exceed NHS capacity within the
23 next 10 days on the current trajectory."

24 Point 11:
25 "PHE are seeking to understand environment dispersal

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1 of the virus in hospitals."

2 So again we see they're still trying to understand
3 the rate of infection.

4 Point 18:
5 "There is significant uncertainty concerning the
6 impact of interventions brought in thus far ..."

7 And of some relevance to the debates that we have
8 already had, point 20:
9 "SAGE noted that social distancing behaviours have
10 been adopted by many but there is uncertainty whether
11 they are being observed at the level required to bring
12 the epidemic within NHS capacity."

13 This, of course, is after 21 March but before the
14 26 March regulations, so one sees the motivation for
15 those regulations.

16 Then finally, on page {C/2/281} it's the same
17 minutes, towards the top of the page, "List of actions":
18 "PHE [and among others] to review how the true
19 infection rate in the community can be ascertained as a
20 basis to measure the effects of interventions ..."

21 So again, they didn't even at that stage know the
22 true rate of infection.

23 Our point is that, in these circumstances, the FCA's
24 portrayal of the reasons for the introduction of the
25 government's nationwide measures is inaccurate and

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1 unrealistic. In particular, contrary to what the FCA
2 submitted, there was no national picture of all local
3 outbreaks to which the government was responding.

4 Second, the FCA is wrong to say that if all areas
5 have not been affected to a greater or lesser extent,
6 there would not have been a national lockdown. As
7 I have said already, the government imposed a national
8 lockdown to save the national health system from being
9 overwhelmed, and not because it had a comprehensive
10 picture of the incidence of the disease in each and
11 every area of the country.

12 In his submissions Mr Edelman referred repeatedly to
13 the notion of the government having a spreadsheet on
14 which the incidence or danger of COVID-19 in each policy
15 area appeared as a line entry. He referred to that for
16 example on {Day2/130:1}, page 134, page 147 and on
17 {Day3/140:1}. But the obvious point my Lords, and for
18 the avoidance of doubt, is that there is no evidence
19 that the government had a spreadsheet or anything
20 resembling a spreadsheet. Mr Edelman's spreadsheet is
21 purely fictional; it was lifted out of a hypothetical
22 example used by Amlin in its skeleton argument.

23 MR JUSTICE BUTCHER: You say it was an entirely notional
24 spreadsheet.

25 MR ORR: An entirely notional spreadsheet, my Lord. There

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1 is no evidence of any real spreadsheet.
 2 Bringing that altogether, we submit in conclusion,
 3 on this point, that there was no meaningful causal
 4 connection between any danger in the vicinity of an
 5 individual insured's premises and the national and
 6 nationwide government action on which the FCA relies.
 7 The UK Government would have acted in precisely the
 8 same way and implemented the same national measures, at
 9 the time it did, irrespective of any such incidents or
 10 danger of COVID-19 as might have existed in the vicinity
 11 of any insured's premises. So it follows that none of
 12 the possible causal tests that might be mooted, whether
 13 proximate causation, substantial or significant cause,
 14 "but for", or even something less are satisfied. There
 15 is just no evidence before the court that the government
 16 was responding to the incidence or danger of disease in
 17 individual insureds' localities.
 18 LORD JUSTICE FLAUX: That point is made good by the Scilly
 19 Isles point, isn't it?
 20 MR ORR: It is, my Lord. That is --
 21 LORD JUSTICE FLAUX: The Scilly Isles is an example of
 22 somewhere where it has remained COVID-19 free but it was
 23 subject to exactly the same restrictions.
 24 MR ORR: Exactly so.
 25 LORD JUSTICE FLAUX: Yes.

21

1 MR ORR: My Lords, I was then going to turn to prevention of
 2 access to premises.
 3 On this point two issues arise. First, what does
 4 prevention of access to premises mean in the context of
 5 the extension? Second, did the government measures upon
 6 which the FCA relies prevent access to premises within
 7 the meaning of the extension?
 8 Your Lordship will recall the very similar wording
 9 to the Zurich wording of Amlin's MSA1 wording, which
 10 Mr Kealey dealt with yesterday. That is also
 11 a prevention of access clause, not a hindrance or
 12 prevention of use clause.
 13 Zurich, like Amlin, has a customer base that is
 14 predominantly made up of category 5 businesses that were
 15 not required to close. And we do adopt what Mr Kealey
 16 said about the meaning and effect of the phrase
 17 "prevention of access". The reference to his
 18 submissions is {Day6/97:1} to page 107.
 19 We address the detail of this point in our skeleton
 20 at paragraphs 95 to 126. In the time available
 21 I propose only to make the following brief points.
 22 First, as to the meaning of prevention of access, we
 23 submit that the relevant words of the extension are
 24 straightforward and narrow. The clause requires access
 25 to the premises to be prevented; there are no

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1 qualifications or glosses. "Access" means something
 2 different to "use", and "prevention" means something
 3 different to "hindrance or restrictions".
 4 It is common ground that "access to premises" means
 5 the approach or entry to premises, and access is
 6 therefore a physical concept. What must be prevented is
 7 the physical means of approaching or entering the
 8 premises. That, of course, accords with the paradigm
 9 case contemplated by the clause that your Lordships have
 10 well in mind. So the classic vanilla situation is that
 11 the police cordon off the approach or entry to the
 12 premises and they prevent everyone, except of course for
 13 the emergency services, from entering the premises.
 14 As Mr Turner explained on {Day4/148:1} the
 15 imposition of the cordon by the police represents both
 16 a physical and legal barrier to entry. The FCA is wrong
 17 to suggest the contrary.
 18 In addition to the police's common law powers and
 19 powers under the Terrorism Act, to which Mr Turner
 20 referred, one should also note section 89(2) of the
 21 Police Act 1996, which is in the authorities bundle at
 22 {K/10.1/1}. We don't necessarily need to look at it,
 23 but for your Lordship's note it makes it an offence to
 24 resist or wilfully obstruct a constable in the execution
 25 of his duty or to wilfully obstruct a person assisting

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1 a constable in the execution of his duty.
 2 Zurich's case, in short, is the same as Amlin's,
 3 namely that prevention of access to the premises
 4 requires that such access is physically obstructed or
 5 otherwise rendered impossible. Like Amlin, we say that
 6 the action must be mandatory and have the force of law
 7 for the reasons given by Mr Kealey on {Day6/102:1} to
 8 page 104.
 9 So far as authority is concerned, there does not
 10 appear to be any English authority on the meaning of the
 11 phrase "prevention of access" in the context of a clause
 12 of this kind. However, Zurich's construction is
 13 supported by two relevant lines of authority.
 14 First, the line of authority concerning the meaning
 15 of "prevention" and "hindrance" in the context of force
 16 majeure. Your Lordships have already been referred to
 17 that line of authority. We submit that those cases are
 18 relevant and of assistance. They affirm that
 19 "prevention" and "hindrance" have different distinct
 20 meanings, and they represent judicial determination,
 21 albeit in a different context, that "prevention" means
 22 rendering something impossible rather than merely
 23 difficult.
 24 The second line of authority that Zurich relies on
 25 is the US case law concerning denial or prohibition of

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1 access clauses in business interruption policies . Now,
2 the effect of those authorities is summarised in our
3 skeleton at paragraphs 103 to 105, which is bundle
4 {1/19/47}.

5 We have there summarised the effect of these
6 authorities . They are dealing with denial or
7 prohibition of access clauses . Those clauses typically
8 provide cover where access to an insured's premises is
9 denied or prevented by action of a civil or other
10 authority . They are therefore similar clauses to the
11 kind of extensions that we have been looking at and --

12 MR JUSTICE BUTCHER: It's a quirk, is it, that the American
13 policies use the words "prohibited" and "denied" whereas
14 ours use "prevented" or "hindered", as it were?

15 MR ORR: Exactly so, my Lord. It is a quirk of language,
16 but the substance is the same.

17 What these cases show, they are all very short, but
18 they are clear and straightforward in their approach,
19 and what they all say consistently is that these clauses
20 apply only where access to the insured's premises is
21 totally and completely prevented, ie made impossible.
22 There is no suggestion in any of these decisions that
23 denial of access or prohibition of access means
24 a partial denial or prohibition, or denial or
25 prohibition for some people but not others, or denial or

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1 prohibition for certain purposes but not others. The
2 words simply mean what they say, without any further
3 gloss.

4 So, my Lords, we do invite your Lordships' attention
5 to that line of authority, which we say does assist.

6 The FCA's case, by contrast, fails to give proper
7 meaning and effect to the requirement for access to be
8 prevented, as opposed to access being merely hindered,
9 or use rather than access of premises being restricted
10 or hindered.

11 The next question is whether the government measures
12 relied upon by the FCA amounted to prevention of access.
13 If Zurich is correct in its interpretation, none of the
14 government measures prevented access to any particular
15 premises and therefore cover has not been triggered.

16 Before looking further at the categories of
17 business, two headline points though can be made.

18 First, the focus here must clearly be on the 21 and
19 26 March regulations. Although the FCA relies on
20 government guidance as action triggering the clause from
21 16 March, in Zurich's submission only the regulations
22 are capable of so doing.

23 Second, the aim of the regulations was not to
24 prevent access to particular premises, and that is
25 important when one is considering whether they did

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1 actually prevent access. At most, they restricted the
2 use of premises.

3 Now, I intend to focus on category 5 which, as your
4 Lordships know, represents the vast majority of holders
5 of the Zurich1 and Zurich2 policies. We have addressed
6 all categories in our skeleton argument.

7 So far as category 5 is concerned, that includes
8 manufacturers and service businesses, such as
9 accountancy and law firms. The regulations didn't
10 impose any particular requirements on this category of
11 business, nor was any of the advice or guidance issued
12 after 16 March directed at this category of business.

13 The FCA's case in relation to category 5 is premised
14 entirely on regulation 6(1) of the 26 March regulations
15 and the government guidance on social distancing.

16 Taking those in turn. The restrictions in
17 regulation 6(1) did not prevent access to category 5
18 businesses. That ground has been traversed by
19 Mr Gaisman on behalf of Hiscox, and Mr Kealey on behalf
20 of Amlin. Mr Gaisman's submissions were at {Day5/134:1}
21 to 142 and Mr Kealey dealt with this yesterday,
22 {Day6/101:1}. We adopt their submissions.

23 As to government guidance on social distancing
24 measures, the FCA asserts that even in respect of
25 businesses which were permitted to remain open, or

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1 partially open, such guidance in the light of employers'
2 duties or occupiers' duties made it impracticable for
3 some businesses to function.

4 Now, as to that, we say that at most such guidance
5 might, in combination with the business' pre-existing
6 duties, amount to a restriction on use of the premises;
7 for example, if a law firm had to put certain distances
8 between desks in a particular room, or whether
9 a manufacturer had to position employees a certain
10 distance away from each other on a manufacturing line.
11 But that did not prevent access to the premises.

12 To the extent that category 5 businesses chose to
13 close their doors, that was their choice. They were not
14 prevented by government action from accessing the
15 premises from which they functioned. And even when they
16 were closed, no employees were prevented from accessing
17 their premises for the purposes of work, where it was
18 not reasonably possible for those employees to work from
19 home.

20 There are very few Zurich policyholders which fall
21 within the other categories. Zurich's case on those is
22 set out in our skeleton at paragraphs 120 to 125.

23 In the time available to me, can I then turn briefly
24 to causation of loss and trends clauses.

25 In relation to this, in general terms Zurich adopts

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1 the joint submissions made by Mr Kealey on causation of
2 loss and trends clauses, being the submissions that he
3 made collectively on behalf of all insurers.

4 It follows from those submissions that Zurich
5 invites the court to reject the FCA's pleaded case on
6 causation and trends clause as set out in its
7 particulars of claim.

8 My Lords, I don't think anyone has taken your
9 Lordships to the particulars of claim or the
10 declarations that the FCA actually seeks in relation to
11 causation of loss and trends clauses. Can I ask your
12 Lordships to look at that briefly. We can start in
13 bundle {A/2/45}.

14 The reason I do this is because of the discussion
15 that has arisen about exactly what the court can do in
16 relation to causation of loss and trends clauses.

17 My Lords, in our respectful submission, what the
18 court should be doing is seeking to elucidate so far as
19 possible general principle, but also, importantly from
20 our perspective, rejecting the declarations that the FCA
21 seeks. I will explain why.

22 If we look at the FCA's pleaded case, it is
23 contained essentially in paragraphs 76 to 78 of the
24 particulars of claim, which begins on {A/2/45} of that
25 bundle.

1 Your Lordships will see in paragraph 76 the argument
2 that the trends clauses only contemplate something
3 extraneous which can fairly be described as an ordinary
4 vicissitude of commercial life.

5 Then in paragraph 77 they set out their pleaded case
6 as to the proper counterfactual, which involves taking
7 out or reversing out the entire COVID-19 pandemic.

8 Then in paragraph 78, on page {A/2/46}, they say
9 that the valuation of loss does not fall to be reduced
10 on the basis that but for the business closure or
11 particular government measures all or the majority of
12 the losses would have been suffered anyway as a result
13 of the outbreak of COVID-19 in the UK, the lockdown,
14 self-isolation, social distancing and so on.

15 So that is the absolutist nature of the case that we
16 are meeting, and that absolutist case is then reflected
17 in the declarations that the FCA seeks, which are set
18 out in paragraphs 15, 16 and 18 of the prayer, which
19 begin at page 53 of this bundle. {A/2/53}

20 Declaration 15 is the FCA's case as to proximate
21 cause.

22 Declaration 16, it's not entirely clear, but we
23 understand that to be essentially seeking a declaration
24 as to the counterfactual that the FCA advances. In
25 other words, the counterfactual that one must assess

1 loss on the basis that there would have been no COVID-19
2 pandemic.

3 Then over the page, page {A/2/54} of the bundle,
4 declaration 18, they seek a declaration that:

5 "Losses do not fall to be reduced under the trends
6 clauses or otherwise by reason that but for the business
7 closure or particular government measures all or the
8 majority of the losses would have been suffered anyway
9 as a result of the broader COVID-19 pandemic, the
10 lockdown, self-isolation, social distancing ..." and so
11 on.

12 So what these declarations are seeking is to shut
13 insurers out from arguments that are and should be
14 available to them on the facts of individual cases. In
15 our respectful submission, that is not appropriate and
16 so we invite the court not to make those declarations.

17 LORD JUSTICE FLAUX: On the FCA's case, if the FCA is right
18 about what is the counterfactual, then it would also be
19 right, wouldn't it, that that would apply as it were
20 across the board? Because you would simply take out
21 COVID and all the restrictions and all the public -- or
22 rather you wouldn't take out any of the government
23 restrictions, you would take out COVID and the public
24 response to COVID, et cetera, et cetera. But if the FCA
25 is wrong about that, or at least wrong about it in

1 relation to particular wordings, then it would not be
2 appropriate to make a blanket declaration of that kind.
3 They're issues of causation, which will depend upon
4 particular facts, as you rightly say.

5 MR ORR: Exactly so, my Lord. That is the essence of our
6 point, that the court is not in a position to make such
7 a declaration on the basis of the agreed facts.

8 My Lords, there are two specific points that arise
9 on the FCA's arguments on causation of loss and trends
10 clauses against Zurich. If I can deal very briefly with
11 those. First of all, an issue concerning the wording of
12 the quantification machinery in the Zurich policies and,
13 secondly, the appropriateness of the counterfactuals
14 advanced by Zurich.

15 So far as the wording of the quantification
16 machinery is concerned, this is a slightly pedantic
17 point but I need to cover it because it has been raised
18 by the FCA. What it comes to is that the FCA is seeking
19 to exploit a minor difference in the wording between the
20 Zurich1 and Zurich2 policies.

21 If I can do this by taking first the Zurich2 policy,
22 which is at {B/22/34}. On page 34, towards the top of
23 the page, your Lordship will see there under the heading
24 "Additional cover extensions applicable to section B"
25 the stem wording for the business interruption

1 extensions:
 2 "Any loss as insured under this section resulting
 3 from interruption of or interference with the business
 4 in consequence of:
 5 "(a) damage at any situation or to any property
 6 shown below; or
 7 "(b) any of the undernoted contingencies."
 8 It is the words in (b) that matter. Any of the
 9 undernoted contingencies:
 10 "will be deemed to be an incident."
 11 Obviously what that wording is doing is engaging the
 12 contingency in each extension as an incident for the
 13 purposes of the quantification machinery. That, indeed,
 14 is what the FCA accepted in paragraph 634 of its
 15 skeleton argument. I don't ask your Lordships to see
 16 it, let's just focus on the wording.
 17 Can I then turn, though, to the Zurich1 wording, and
 18 that you will see in {B/21/50}. Your Lordship sees
 19 there, halfway down, again the stem wording for the
 20 business interruption extensions in the Zurich1 policy,
 21 and that says:
 22 "Any loss as insured by this section resulting from
 23 interruption of or interference with the business in
 24 consequence of accidental loss destruction or damage at
 25 the under-noted situations or to property as under-noted

1 shall be deemed to be an incident ..."
 2 What those introductory words omit are the words "or
 3 any of the under-noted contingencies".
 4 In our submission, it is clear that the intended
 5 meaning of the provision is the same, namely that it is
 6 the contingency identified in each extension which is
 7 deemed to be an incident. We submit that the omission
 8 of the words "or any of the under-noted contingencies"
 9 is an obvious drafting error which falls to be corrected
 10 on a proper interpretation of the provision. One can
 11 properly get there anyway on the express words of the
 12 provision.
 13 It is nonsensical to suggest that that slight
 14 difference in wording was intended to have a difference,
 15 intended to create a difference between that wording and
 16 the equivalent wording in Zurich2.
 17 However, in its skeleton argument at
 18 paragraphs 700-702, the FCA do seek to take advantage of
 19 this obvious drafting infelicity. If I can just show
 20 your Lordships that briefly, that is at {1/1/233}.
 21 In paragraph 700, about halfway down, having quoted
 22 the words from the Zurich1 policy, they say:
 23 "That definition is rather circular ... and drafted
 24 at least in part with property damage in mind ..."
 25 Then they go on in 701 to say:

1 "The 'incident' according to this definition is the
 2 loss or else the interruption or interference."
 3 Our short point is that that is wrong. The incident
 4 is the contingency in the AOCA extension. That is the
 5 clear intent of the wording. It is the same as the
 6 wording in Zurich2. That, in any event, is the insured
 7 peril. It follows, therefore, that the quantification
 8 machinery in both policies operates in precisely the
 9 same way.
 10 My Lords, my final point is just to touch upon the
 11 counterfactual advanced by Zurich.
 12 On this there has been debate about the
 13 applicability of the "but for" test, but in our
 14 submission that debate is irrelevant to the Zurich
 15 policies. In the trends clauses in the Zurich policies
 16 the parties have agreed that the sum payable shall
 17 represent as nearly as may be reasonably practicable the
 18 results which but for the incident would have been
 19 obtained.
 20 Zurich submits that this would require the court to
 21 reverse such government measures as the court might find
 22 prevented access to the insured's premises. But
 23 everything else must be assumed to remain the same. The
 24 court is therefore not required also to reverse the
 25 danger or incidence of COVID, whether within or outside

1 the vicinity of the insured's premises.
 2 We adopt on this point the arguments of Amlin on
 3 MSA1, as well as the arguments to the same effect made
 4 by Hiscox on its public authority clause.
 5 So on our analysis, if the court were to find that
 6 the government measure, for example preventing access,
 7 was regulation 4 of the 26 March regulations, that
 8 regulation would fall to be reversed out for the
 9 purposes of the counterfactual.
 10 Now, the FCA suggests that by reversing out the
 11 particular regulation by which access was prevented
 12 Zurich is accepting that a narrow insured peril approach
 13 does not apply and is therefore being inconsistent,
 14 because what we are doing is reversing out the entirety
 15 of the regulation on a national basis and not just
 16 something that was in the vicinity.
 17 In our submission, there is nothing inconsistent or
 18 illogical in our approach. Our position follows from
 19 the fact that this is a case where the relevant civil
 20 authority action that might be found to have prevented
 21 access was a regulation imposed on a national basis. In
 22 such a case, it is that particular regulation that falls
 23 to be reversed.
 24 The position would obviously be different if civil
 25 authority action was taken, which was limited to the

1 insured's premises or limited to the vicinity of the
 2 insured's premises. Zurich's approach does not involve
 3 acceptance of anything more than that.
 4 MR JUSTICE BUTCHER: I may have misunderstood. This is
 5 essentially an alternative case so far as you are
 6 concerned, isn't it? You have lost here, at this point,
 7 haven't you, on your basic point as to what is
 8 a relevant action of ...
 9 MR ORR: Yes. Yes, my Lord, we are assuming at this stage
 10 of the argument that the court has found that there has
 11 been prevention of access, so contrary to all of our
 12 arguments on prevention of access and ...
 13 MR JUSTICE BUTCHER: So, as it were, a national response has
 14 been found to trigger your clause.
 15 MR ORR: Indeed so, my Lord, yes. Apologies, I should have
 16 made that clear. But that is always the case when we
 17 talk about causation of loss, we are assuming against
 18 ourselves that the court has found, contrary to our
 19 case, that cover has been triggered under the extension.
 20 My Lord, I hope that clarifies the position.
 21 If we are right about that, the short point is that
 22 we say it would follow that policyholders would or are
 23 likely to have suffered the same or substantially the
 24 same loss, given the wider ramifications of the COVID-19
 25 pandemic, all of which would still be assumed to remain.

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1 That, though, of course, is a question of fact that can
 2 only be determined on the facts of an individual case.
 3 My Lords, that was all I was going to say, unless
 4 your Lordships have any further questions for me.
 5 LORD JUSTICE FLAUX: I don't. Thank you very much.
 6 MR ORR: Thank you, my Lords.
 7 LORD JUSTICE FLAUX: Thank you very much, Mr Orr.
 8 Who is next, Mr Salzedo?
 9 MR HOWARD: No, it is me, my Lord, for QBE.
 10 LORD JUSTICE FLAUX: I was misled by the fact that I had
 11 Mr Salzedo pinned to my gallery.
 12 MR HOWARD: Well, I'm sorry that I am interrupting what you
 13 were expecting but it was meant to be me.
 14 LORD JUSTICE FLAUX: It's a pleasure to see you Mr Howard.
 15 (11.03 am)
 16 Submissions by MR HOWARD
 17 MR HOWARD: I'm grateful for that.
 18 My Lords, as your Lordships know, QBE is sued, and
 19 only sued, in respect of cover provided pursuant to the
 20 so-called disease clauses. The real issue so far as
 21 concerns QBE, as your Lordships have remarked, is one of
 22 construction, and that is so for the following reasons.
 23 Firstly, the test case is concerned with whether the
 24 QBE wordings, amongst others, respond to the events of
 25 COVID-19 and the UK Government action responding to the

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1 disease in the first half of this year; see, we don't
 2 need to turn it up, the particulars of claim at
 3 paragraph 3 {A/2/3}.
 4 Now, my Lords, the occurrence of a notifiable
 5 disease, wherever it occurs, can potentially interfere
 6 with an insured's business in numerous different ways.
 7 For instance, staff or customers may fall ill or are in
 8 contact with the disease and so unable to work or to
 9 visit the insured, whether as a result of being ill or
 10 quarantined.
 11 Secondly, suppliers, wherever they may be, may be
 12 affected in a number of ways and unable to supply.
 13 Thirdly, there could be public perception of risk or
 14 fear of the disease causing some downturn in trade.
 15 Fourthly, there can be local or national or foreign
 16 government action responding to the disease. Such
 17 action can be measures anything from hygiene advice, to
 18 travel restrictions, or lockdown, with different
 19 propensities to have an effect on an insured's business.
 20 And it is important, I would respectfully suggest,
 21 not to lose sight of the fact that the occurrence of
 22 a notifiable disease, wherever it may occur, can
 23 potentially affect insured's businesses in a myriad
 24 number of ways.
 25 Now, of course, in this case the FCA's arguments are

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1 focused, because of what has happened, on the specifics
 2 of recent events. But when considering construction of
 3 these policies, one has to adopt a construction which is
 4 suited to all the different circumstances that may
 5 arise, and not simply to the particular circumstance
 6 that has arisen, particularly where it is acknowledged,
 7 as it must be, that the disease clauses were not, even
 8 on the FCA's case, specifically for the purposes of
 9 a pandemic. Essentially what is said by the FCA is that
 10 the clauses are wide enough to cover a disease of
 11 pandemic proportion and so cover the effects of such
 12 a pandemic, even if that is not what they were primarily
 13 directed at.
 14 But taking the FCA's case as it is, being concerned
 15 with the UK Government's response to COVID-19, they say
 16 that the government response to what they call the
 17 events of COVID-19 was a single body of public authority
 18 intervention which interrupted or interfered with
 19 activities at insureds' business premises. That is the
 20 particulars of claim, paragraph 4.1 {A/2/3}. It might
 21 be worth just putting that up on the screen.
 22 Do your Lordships see paragraph 4.1:
 23 "The government response, in the form of advice,
 24 instructions and legislation, was a single body of
 25 public authority intervention which did prevent and

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1 hinder access to and use of business premises ..." and
 2 so on.
 3 Here we are talking about a single body of public
 4 authority intervention across the whole of the UK, and
 5 certainly for present purposes England and Wales. The
 6 test case, therefore, is concerned with whether that
 7 single body of public authority action across the whole
 8 of the UK which interrupted or interfered with
 9 activities at QBE's various insureds' business premises
 10 was an insured peril under the QBE disease wordings.
 11 My Lords, there are a number of points that could be
 12 made about the FCA's formulation in paragraph 4.1 of the
 13 particulars, but for present purposes it is sufficient
 14 to note and emphasise the word "single". It is not said
 15 that the government response was a response to the
 16 disease occurring anywhere in particular.
 17 Indeed, that becomes clear from two further
 18 paragraphs of the particulars of claim. If we could go
 19 to {A/2/28} and paragraph 42, your Lordships see there
 20 that:
 21 "All of the advice and actions referred to above in
 22 paragraph 18 were imposed upon all locations in
 23 England and Wales at the same time because of the
 24 anticipation and occurrence of a nationwide pandemic.
 25 They were not limited to particular areas where COVID-19

1 was present or feared [and they refer to an alternative
 2 approach] because all of the UK was considered to be at
 3 risk."
 4 Then in the next paragraph they explain that:
 5 "The pandemic was a nationwide emergency arising out
 6 of a highly contagious disease with an actual and
 7 believed substantial risk of fatality ..."
 8 So it is clear that the government action was not in
 9 response to the presence of disease on any particular
 10 insureds' premises or within 1 mile or 25 miles of those
 11 premises. Mr Orr also took you to the reply at
 12 paragraph 52, which we don't need to turn up.
 13 The final reference at this point to go to is
 14 {I/1/97}, the FCA's -- I was going to say skeleton,
 15 I think that would be a misuse of language, it is
 16 written argument, at paragraph 241. You will see there
 17 in the second sentence, this is introducing the jigsaw,
 18 but it is important to note what their case is:
 19 "The government responded to the [and one sees this
 20 portmanteau way of referring to things]
 21 "... fear / risk / danger / emergency / prevalence [so you
 22 can't distinguish any of them, on the FCA's case]
 23 of COVID-19 all around the country and the incidence
 24 of the disease. Had there been no such
 25 fear / risk / danger / emergency / prevalence anywhere, it would

1 not have acted. But had there been such fear etc in the
 2 entire country other than one 25-mile radius ... it
 3 probably still would have acted."
 4 So one sees there that they are recognising that any
 5 particular insured's premises, or they take the 25-mile
 6 radius but equally the 1 mile radius, does not actually
 7 affect what would have happened.
 8 Now, it is fair to point out that the caveat that is
 9 expressed at footnote 236, where it is said:
 10 "Although whether it would have acted nationally, or
 11 would have excluded the strangely immune from the
 12 government action on the basis that it was not needed
 13 there and it was better to keep that economy going, is
 14 a further question."
 15 I will come back to that separately, but that is
 16 a caveat which plainly only arises if the FCA is wrong
 17 on its construction arguments.
 18 What you see from both the paragraphs in the
 19 pleadings to which I have referred and paragraph 241 in
 20 the main text is that the drivers for the government's
 21 action were what are described as fear, risk, and so on.
 22 Of course, where that is the concern, as fear of spread
 23 of COVID-19 and so on, it's not surprising that it is
 24 conceded that the government's decision would have been
 25 precisely the same irrespective of the position in any

1 insured's 1 mile or 25-mile policy area. The presence
 2 or absence of the disease in such an area would not
 3 affect the fear and risk of contagion over the whole of
 4 the UK that was faced.
 5 So my Lords, the issue of construction, therefore,
 6 arises where, firstly, the FCA's case is that the cause
 7 of the interruption or interference to any particular
 8 insured was the nationwide UK response, such response
 9 being based on fear, risk, danger, emergency, prevalence
 10 generally, and not occurrence of the disease in any
 11 particular 1 mile or 25-mile radius area, and secondly,
 12 such response would have occurred in any event, whether
 13 or not there was an occurrence of COVID-19 in
 14 a particular insured's premises or within the insured's
 15 relevant policy area.
 16 Thus, the highest that the FCA can put its case is
 17 in this what I have described as portmanteau way, that
 18 there was fear, risk, et cetera, of COVID everywhere and
 19 not based upon the disease having occurred in any
 20 particular location, but on the fact that it may or may
 21 not have occurred in a number of places and fear that,
 22 if unchecked, it would spread widely.
 23 So the furthest that the FCA goes using its
 24 portmanteau approach is to contend that the fear or risk
 25 of occurrence of COVID in any one place, therefore

1 including, supposedly, one insured's premises or one
2 insured's relevant policy area, formed part of the
3 so-called jigsaw on which the FCA say the government
4 relied.

5 It is against this background that one understands
6 why the FCA is desperate to avoid a construction which
7 requires that the occurrence of the disease on the
8 insured's premises or in the insured's relevant policy
9 area should have a causative effect on the insured's
10 business interruption; in other words, that it should be
11 a "but for" cause.

12 My Lords, against that background, one asks what
13 actually is the FCA's case on construction, and I regret
14 to say that the submissions of the FCA are in fact
15 somewhat confused on this. The reason for that is that
16 they actually make two submissions on construction, and
17 one needs to disentangle those two submissions.

18 The first submission is what has been called orally
19 the "qualifying condition" point but which, insofar as
20 I can understand it, in the pleading was called the
21 "some sort of anchor" point. The latter terminology,
22 "some sort of anchor" has been quietly dropped without
23 fanfare or explanation. The reason why my learned
24 friend Mr Edelman has shied away from the "some sort of
25 anchor" terminology is perhaps too obvious to require me

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1 to dwell on.

2 But what is the argument? It comes down to this:

3 As I shall explain in a moment, the plain language
4 of QBE's clauses requires an insured to prove
5 a causative nexus, "but for", between the occurrence of
6 the disease in their relevant policy area and the
7 business interruption.

8 This argument of the FCA, whatever label, whether
9 qualifying condition or some sort of anchor that the FCA
10 from time to time chooses to employ, is an attempt to
11 subvert the wording of the policies and to avoid the
12 need to prove any causative effect by reason of the
13 occurrence of the disease on the insured's premises or
14 in the relevant policy area.

15 So, my Lords, it is important to be clear as to what
16 the purpose and consequences of the argument are. It is
17 to say that the BI cover is against the effects of
18 a notifiable disease wherever it occurs and however it
19 causes the insured's business interruption, provided
20 there is at least one occurrence of the disease in the
21 insured's relevant policy area, whether or not that
22 single occurrence has any impact or not.

23 As only a momentary perusal of the terms of the
24 disease clause reveals, this argument drives a coach and
25 horses through the wording, but it is, as I have already

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1 said, manifestly clear why the FCA is driven to run this
2 argument. The simple reason is that it recognises that
3 it, or rather the various insureds of QBE, even if they
4 could prove by the statistical analysis favoured by the
5 FCA that a case of COVID had actually occurred in their
6 relevant policy area, which of course is assumed for the
7 purposes of the test case, they can't prove the
8 necessary causative effect of such occurrence of a case
9 of COVID. However, it is fair to point out that the
10 suggestion that there is no need to show any causative
11 effect of the occurrence of the disease in the insured's
12 relevant policy area is astonishing both in terms of,
13 firstly, the breadth and nature of the cover that this
14 would confer and, secondly, the bizarre happenstance
15 nature of such cover, the lottery effect.

16 As became clear in submissions, the qualifying
17 condition or some sort of anchor is really the FCA's
18 main construction argument. Once it is recognised to be
19 wrong, I suggest realistically that is the end of the
20 matter.

21 My Lords, an interesting observation to make at this
22 point: although they make this qualifying condition
23 argument, the FCA can never quite bring themselves to
24 state that the consequence of their argument is that
25 there is no need to prove any causative element

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1 whatsoever attributable to the occurrence of the disease
2 in the relevant policy area. Whilst that is the clear
3 effect of the argument, the FCA refrains from explicitly
4 making the point because it is clear, frankly, that
5 it is ridiculous. So they use sleight of hand to blend
6 the point into their second argument, which is concerned
7 with causation, but causation as a matter of
8 construction.

9 My Lords, in order to understand the second
10 argument, one needs to bear in mind what the FCA
11 correctly accepts as to the law in relation to causation
12 generally.

13 They accept that in order to recover, an insured
14 must normally prove, as indeed is plain law, that but
15 for the operation of the insured peril he would have
16 suffered loss. Accordingly, the FCA argues that you
17 must take away the entire insured peril as part of the
18 "but for" causation analysis. But, as your Lordships
19 will remember, it is at this point that the FCA finds
20 itself riding horses going into different directions.

21 For the purposes of the disease clause case, it
22 realises that this concession or acceptance of the
23 correct legal position would fatally undermine it if the
24 insured peril is the occurrence of the disease in the
25 insured's relevant policy area, and you take that away

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1 for the "but for" analysis . That is the end of the
2 case. Because, as the FCA acknowledges, reversing the
3 assumed presence of COVID in the insured's relevant
4 policy area would not have made a jot of difference to
5 the government nationwide response based upon the fear
6 and risk that COVID might spread and so on. The
7 nationwide response, which the FCA relies upon as the
8 relevant interference to business, would have happened
9 anyway. Hence Shop B, in our example, is in no
10 different position to Shop A.

11 But it is in this context that you come to consider
12 the FCA's second construction argument.

13 The FCA, acknowledging as it does that the assumed
14 presence or indeed absence of COVID in the insured's
15 relevant policy area would not make a difference to the
16 UK Government's response, then say there is a special
17 rule of causation in respect of the disease clause.
18 This is how Mr Edelman sought to wipe the smile off the
19 face of the proverbial Kealey-esque Cheshire Cat. It is
20 a rather convoluted argument that appeared in different
21 places, but which Mr Edelman summarised on {Day1/148:1},
22 if we could get that transcript up, please.

23 You see --

24 LORD JUSTICE FLAUX: I notice that it is just after 20 past
25 11. I wonder, because this is obviously going to take

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1 you a little while to develop --

2 MR HOWARD: Yes, I am perfectly happy --

3 LORD JUSTICE FLAUX: -- it might be sensible to break now
4 before you go too far into it. Then we can look at the
5 way in which this second argument is put.

6 MR HOWARD: I'm grateful, my Lord.

7 LORD JUSTICE FLAUX: This is obviously an important part of
8 your case and, speaking for myself, I would welcome
9 a short break. My clock says 11.22, so we'll say just
10 after 11.30.

11 MR HOWARD: Perfect. Thank you.

12 (11.22 am)

(Short break)

14 (11.32 am)

15 LORD JUSTICE FLAUX: Whenever you are ready, Mr Howard.

16 MR JUSTICE BUTCHER: That seemed to have the reverse of the
17 intended effect.

18 LORD JUSTICE FLAUX: It did. Mr Howard, you have
19 disappeared.

20 We can see you but you are still muted.

21 MR HOWARD: Is that better?

22 LORD JUSTICE FLAUX: Yes, that is better. We can hear you.

23 The quality was very good before the break, so I am sure
24 you will be alright.

25 MR HOWARD: As I was explaining before the break, my Lords,

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1 there are two arguments on construction; the first is
2 the qualifying condition point, and the second is an
3 argument as to causation and as to what the parties
4 intended by way of causation. This was explained at
5 {Day1/148:6} which we have here, so Mr Edelman says:

6 "So we see the answer to this case is to be found in
7 the way one approaches causation. For a composite
8 clause one excludes from the counterfactual the
9 contemplated element."

10 Just stopping there, there is obviously a debate as
11 to what is in the composite clause, the insured peril,
12 but his case is you exclude the insured peril. But then
13 he says:

14 "For a disease clause you proceed on the premise
15 that the parties contemplated a disease outbreak which
16 might be part of a larger outbreak, hence the fact that
17 it was related to notifiable diseases, but it was not
18 the intention of the parties for causation to operate by
19 treating the outbreak as a whole as part of
20 a counterfactual. And the rationalisation in causation
21 terms is that the outbreak would be a single and
22 divisible cause or a current interdependent series of
23 causes, all contributing to the same picture."

24 What is important to bear in mind is that this is
25 being put forward as an argument as to what the parties

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1 intended by the contract, in other words, as an argument
2 on construction.

3 Now, my Lords, one might ask precisely which words
4 are said to have this effect or indeed what reading of
5 the disease clause achieves this effect. We would
6 suggest that was never made clear. The most that can be
7 discerned is that this arises from the fact that
8 a disease, to be relevant, must be notifiable, and that
9 as such a notifiable disease is contagious and may
10 spread and may be the subject of government response or
11 actions that affect a business.

12 Now, one is sorely tempted to respond to this by
13 saying: so what?

14 Properly understood, this argument is actually
15 really another way of stating the qualifying condition
16 or some sort of anchor argument; that is to say, denying
17 that the occurrence of the disease in the insured's
18 relevant area has to cause the business interruption.

19 But if that argument, the qualifying condition
20 argument, is wrong and the insured peril is the
21 occurrence of the disease in the relevant policy area,
22 which must cause the business interruption, it is
23 difficult to see how it can sensibly be suggested that
24 the parties have nevertheless agreed sub silentio at the
25 causation stage that the requirement of causation should

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1 either be discarded or relegated in the convoluted way
 2 suggested. Indeed, to ascribe such an intention to the
 3 parties would mean that the insured peril was
 4 dramatically enlarged, contrary to the limiting words
 5 actually used in the policy itself .
 6 No doubt such arguments might find merit in the
 7 topsy-turvy world beyond the looking glass, remembering
 8 the famous exchange between Humpty Dumpty and Alice, but
 9 we would suggest they do not in the real world.
 10 My Lords, with that introduction, I am going to
 11 consider more fully the construction arguments. I will
 12 then deal with causation, although in fact little, if
 13 anything, is left once one disposes of the construction
 14 arguments.
 15 My Lords, before considering the FCA's qualifying
 16 condition argument, I want to say something about the
 17 approach. In our submission, it is clear that the FCA,
 18 in approaching the construction argument, starts with
 19 what it wants to achieve, which is the broadest possible
 20 cover for the largest number of policyholders, that is
 21 to say cover in respect of the effects of the UK
 22 government response to COVID-19, including steps taken
 23 in fear of a pandemic or the risk of spread of COVID.
 24 The FCA works backwards, putting whatever spin on
 25 contractual words and applying whatever novel form of

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1 causation test it thinks allows it to achieve the
 2 objective. So it essentially justifies the process by
 3 starting from what it seeks to prove.
 4 So its starting premise is that the wordings cover
 5 a disease of pandemic proportions. Any other view, they
 6 say, is absurd. So they seek to make the words fit what
 7 they seek to achieve. As we have said in our pleading,
 8 at paragraph 54 {A/11/15}, we don't need to turn it up,
 9 the case is back to front. It is a classic case of
 10 reverse engineering to achieve the amount of cover that
 11 the FCA seeks to get for policyholders .
 12 The qualifying condition that is put forward, and
 13 I will come back to that, does not reflect the wordings
 14 themselves, the presumed intention of the parties, or
 15 indeed commercial common sense. The same is true of the
 16 secondary argument to causation, and the approach by
 17 reference to jigsaws, underlying causes, inextricable
 18 links, all of which are said to be relevant by means of
 19 some presumed intention of the parties or some novel
 20 third category of multiple cause cases, supposedly
 21 established by The Silver Cloud case in the Court of
 22 Appeal.
 23 The FCA's objective here is plain; it seeks to
 24 persuade you to make findings which water down the
 25 construction of the policy and the effect of the radius

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1 provisions in particular, and which either wholly
 2 disapply the need for a causative effect of the
 3 occurrence of the disease in the relevant policy area or
 4 apply a novel causal test, effectively a non-causal
 5 test, since the causal requirement is reduced almost to
 6 vanishing point, and, as I say, in order to achieve the
 7 maximum amount of coverage, delivering pandemic coverage
 8 by the back door.
 9 We suggest that the argument doesn't begin to
 10 withstand any proper legal analysis .
 11 My Lord, let's turn more fully to the qualifying
 12 condition point. It is worth seeing how Mr Edelman put
 13 his case on {Day3/48:1}. We want to go to line 25. We
 14 need to show a bit more of the page, please .
 15 MR JUSTICE BUTCHER: Or perhaps the next page.
 16 MR HOWARD: Yes, yes. If one goes to, yes, line 25:
 17 "What these clauses are all contemplating, as
 18 Mr Howard seems to accept in paragraph 24, is that the
 19 authorities will be doing something about it."
 20 Stopping there for a moment. That is one way, of
 21 course, you get business interruption but, as I have
 22 already said, that is not the only way. But that
 23 doesn't matter for present purposes. He goes on to say:
 24 "That is the critical point, because any
 25 interruption or interference will be caused by virtue of

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1 the response of the authorities to the outbreak, not by
 2 the outbreak itself ."
 3 As I have said, that is not necessarily right. Then
 4 he goes on to say:
 5 "One can analyse this, and one then asks oneself: is
 6 one is talking about these clauses contemplating that
 7 actually what will cause the interruption or
 8 interference is the reaction of the authorities to the
 9 disease, what is the function of the 25-mile or 1 mile
 10 restriction? Is it imposing a locality limit or is it
 11 merely imposing a qualifying condition, saying that if
 12 there is authority reaction to an outbreak of a disease,
 13 and that authority action impacts on you, you only have
 14 cover if that disease, whether it is elsewhere or not,
 15 is present within the defined radius from your
 16 premises?"
 17 So Mr Edelman's answer to the question he poses is
 18 that the radius provision is actually what he calls
 19 a qualifying condition. It's a tick box exercise. Do
 20 you have one example of a notifiable disease occurrence
 21 in your relevant policy area? If so then you tick the
 22 box and you have full cover for the effects of
 23 a notifiable disease as it occurs, or may occur,
 24 anywhere and everywhere, and presumably at any time.
 25 We will come to the wordings in a moment, but such

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1 construction is not supported by the wordings, and we
 2 would suggest is contrary to them, and indeed leads to
 3 patently absurd conclusions and can't be what the
 4 parties intended.
 5 Your Lordships will remember, we don't need to turn
 6 it up, but we posited the examples of shops A to D in
 7 our written opening, and those examples plainly caused
 8 some discomfort to the FCA. You will remember
 9 Mr Edelman's attempts to deal with them, and I would
 10 suggest he had no sensible answer.
 11 You will recall that insured Shop A, which has no
 12 occurrence of disease within its relevant policy area --
 13 and it matters not whether we are talking about a 1 mile
 14 or a 25-mile radius -- it's common ground that it has no
 15 cover for the business interruption caused by the
 16 government response to the disease.
 17 Shop B, the happenstance of one case of COVID in its
 18 area, Mr Edelman focused on the reference to a care
 19 home. It doesn't really matter what facts you are
 20 assuming. Mr Edelman sought to distract attention by
 21 going off at a tangent and saying: how did the case get
 22 there? It entirely misses the point and was
 23 a distraction. It is the FCA's case that a single case
 24 of COVID-19 occurring in the area is enough.
 25 The point of the example is that a single case, in

1 that example, has had no causative effect. But the
 2 oddity on the FCA's case is that Shop B is covered for
 3 the business interruption caused by the government
 4 measures, while Shop A, 100 yards or so away, is not;
 5 and that is by the pure happenstance of a single case in
 6 Shop B's policy area, and despite the fact that the case
 7 in Shop B's policy area is wholly and utterly irrelevant
 8 in fact to Shop B's business.
 9 My Lord, I would respectfully suggest that this
 10 makes no sense, and no doubt explains Mr Edelman and the
 11 FCA's evident discomfort in addressing these examples.
 12 My Lord, let me give you another example, away from
 13 the UK response to COVID, just to illustrate how
 14 surprising and, to use the FCA's much loved word, absurd
 15 the FCA's case is. Let's call it the case of the
 16 Chinese supplier.
 17 Assume an English insured manufactures goods. It
 18 obtains vital parts for those goods from a factory in
 19 China. Due to the outbreak of a notifiable disease in
 20 the supplier's town in China, and let's take SARS, to
 21 move away from the current crisis, the Chinese
 22 government orders a lockdown in that town. As a result,
 23 the English insured is unable to obtain his supplies and
 24 is therefore facing an interruption or interference to
 25 its business.

1 Now, we ask, does the English insured have cover for
 2 the interruption or interference?
 3 QBE says plainly no. But what is the position of
 4 the FCA? Now, undoubtedly on the plain facts that
 5 I have just outlined it would also have to say no. Its
 6 position would be there is no cover in respect of
 7 interruption by this notifiable disease, SARS -- sorry,
 8 its position is that there is cover, sorry, in respect
 9 of a notifiable disease, SARS, and that has happened,
 10 but sorry, insured, you have no cover because the
 11 qualifying condition has not been met. But, the FCA
 12 would say to the insured, if you can prove that by
 13 complete chance a person with SARS happened to come
 14 within 1 mile or 25 miles of your business, depending on
 15 which clause they had, you will then have cover.
 16 No doubt this would provoke the insured to put
 17 adverts in the papers to find anyone who had visited
 18 China and who might, whether they knew it or not, be
 19 infected with SARS and who had infected their
 20 policyholder area, inviting them to come forward.
 21 Should such a person be found, suddenly cover would be
 22 triggered, and the insured would be able to recover all
 23 of the loss suffered by reason of events occurring on
 24 the other side of the world.
 25 My Lords, whilst, frankly, anyone reading the clause

1 can see this is plainly nonsense, what it reveals is the
 2 staggering effect of the FCA's argument in revealing
 3 both the breadth of the supposed cover it argues for,
 4 namely cover for the effects of the occurrence of
 5 a disease anywhere in the world, providing that the
 6 insured meets a non-causative qualifying condition, and
 7 the happenstance of when an insured is able to satisfy
 8 that non-causative qualifying condition and get cover
 9 against the effects of a disease occurring anywhere,
 10 which is what the FCA claims is the purpose of the
 11 insurance.
 12 My Lord, just to complete the bizarre effect, the
 13 picture of the bizarre effect of the FCA's argument,
 14 let's consider a case closer to home, and indeed one
 15 that my Lord, Lord Justice Flaux adverted to this
 16 morning, namely the Scilly Isles.
 17 The Scilly Isles are, of course, located more than
 18 25 miles from the English mainland. It is an agreed
 19 fact that there is no disease on those islands. As
 20 such, on the FCA's case, no policyholder on those
 21 islands will currently have cover, whether they have
 22 a 1 mile or 25-mile radius policy. In terms of the shop
 23 examples given in our written opening, they are all
 24 Shop A examples, but of course they will be suffering
 25 interference with their business as a result of the

1 nationwide COVID-19 pandemic and the UK Government's
2 guidance and restrictions put in place as a result .

3 But let's assume, taking the FCA's case, a Cornish
4 fishing boat sailed and crossed the 25-mile radius
5 threshold and approaches the island , and on board that
6 fishing boat, it turns out, there is one contagious but
7 asymptomatic and undiagnosed fisherman. What then
8 happens? Well, on the FCA's case, cover would suddenly
9 start being triggered from business to business as the
10 fishing boat approached, it would be a like a row of
11 lights coming on one by one. The boat need never enter
12 port in the islands , and may turn back for the mainland
13 after even a few moments, but those businesses would be,
14 on the FCA's case, converted into businesses with cover
15 and would, as if by magic, suddenly have the benefit of
16 full pandemic cover.

17 Of course, the unfortunate businesses located just
18 outside the 25-mile range from the point where the
19 trawler turned back will not get cover, however, and in
20 Mr Edelman's words that is just bad luck.

21 My Lords, no sensible person would consider that an
22 insurance contract should operate in such
23 a happenstance, and indeed I would suggest perverse and
24 capricious , manner.

25 The FCA's construction of the radius provision as

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1 a qualifying condition or some sort of threshold
2 requirement or proviso to cover makes no sense, and that
3 is true whether one looks at it from the insurer's
4 perspective or the insureds .

5 Taking the insurer's perspective , the FCA's approach
6 offers no meaningful limit on the scope of the insurer's
7 potential liability . Once cover is triggered , as it may
8 be at any time by the happenstance of someone with the
9 disease entering a relevant policy area, the extent of
10 the business interruption disease cover will effectively
11 be limitless , including in geographical and temporal
12 terms.

13 Construing the radius provisions as the FCA proposes
14 also makes no sense from the insured's perspective . If ,
15 as the FCA contends, the disease clause is intended to
16 protect the insured against the business interruption by
17 notifiable disease occurring anywhere and everywhere,
18 then why is it in the insured's interests to have to
19 wait until someone with the disease just happens to be
20 nearby to trigger cover, and to have no cover if
21 happenstance does not occur?

22 In my example of the Chinese supplier , the English
23 insured business cares not a jot that a person who by
24 chance visited China and caught SARS, and who by chance
25 entered the relevant radius, whether it is 1 mile or

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1 25 miles, they are not interested in that at all . What
2 they would want, if the FCA's argument as to the
3 purposes of the insurance were correct , is cover for the
4 interruption to their business caused by the disruption
5 to the supplier in China by the SARS epidemic. How is
6 the qualifying condition of any assistance or relevance
7 to that policyholder ?

8 Of course, my Lords, the true position is far more
9 prosaic . The insured has not purchased insurance
10 against business interruption caused by a notifiable
11 disease anywhere and everywhere. They have purchased
12 insurance against the business interruption caused by
13 the occurrence of a notifiable disease on their premises
14 or in their relevant policy area.

15 As I have made clear, these examples reveal the true
16 nature of the FCA's case on construction , which is that
17 BI cover here is for the effects of a notifiable
18 disease , wherever it occurs, but where your entitlement
19 to an indemnity depends on happenstance. And on the
20 FCA's analysis , the 1 mile or the 25-mile radius
21 provision is effectively a lottery ticket for the
22 insured . If someone with the relevant disease enters
23 the radius, the policyholder wins the lottery and has
24 full cover for all effects of that disease arising
25 anywhere and everywhere, but not otherwise . And the

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1 only difference between the 1 mile and the 25-mile
2 radius is that in one case the insured is effectively
3 has effectively bought one lottery ticket and in the
4 latter 25 tickets .

5 The postcode lottery is the inevitable outcome of
6 the FCA's attempt to rewrite the cover so as to be one
7 for the business interruption effects of disease
8 anywhere in the world, treating the radius provisions as
9 qualifying conditions , threshold requirements or
10 provisos , rather than a key component part of the
11 insured peril , which is what they really are .

12 Indeed, Mr Edey expressly accepted this on behalf of
13 the HIGA interveners on {Day3/167:1}. If we could get
14 that up, please . If your Lordships go to line 25 and
15 then we will need to go to the next page:

16 "My Lords, the second point is the question which
17 seemed to be troubling your Lordships a little on
18 Monday, which was the purpose of the area requirement.
19 We say the answer to that is simple: it precludes cover
20 if you don't have cases of the relevant notifiable
21 disease in the relevant area . And that is an important
22 purpose, albeit one which necessarily gives rise to the
23 postcode lottery to which QBE refer on their case as
24 much as ours."

25 If one is having to accept, as Mr Edey correctly

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1 does, that the FCA's construction necessarily leads to
2 cover on the basis of a postcode lottery, that strongly
3 suggests that the proposed construction is not the
4 correct one. Moreover, there is no respect in which the
5 correct construction advanced by QBE involves any sort
6 of lottery, as I shall explain in a moment.

7 But, my Lord, just to complete this point, put
8 simply, insurance is not a game of lotto. An argument
9 that, on its true construction, the liability of the
10 insurer and the entitlement of the insureds depends on
11 such chance is, to put it at its lowest, surprising. It
12 is even more surprising, frankly, to find such an
13 argument being articulated by the FCA, which normally
14 wears a hat as the regulator of insurers, but perhaps,
15 my Lords, the less said about that the better.

16 I now turn to look at the correct approach to
17 construction. My Lord, in contrast to the FCA's back to
18 front methodology, QBE take the conventional approach of
19 starting with the words of the insuring clauses, and
20 asking how they should be construed objectively and in
21 the light of established legal principles.

22 My Lords, you can call me old-fashioned if you like,
23 and I have got broad shoulders, I can live with that,
24 the simple point is that the only way of ascertaining
25 the parties' intentions to a contract is by considering

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1 the words used.

2 My Lords, you probably have the references to the
3 relevant policy wordings already, but for convenience
4 the lead wording, one of four for QBE1, is at {B/13/1};
5 the lead wording, one of 2 for QBE2, is at {B/14/1}; and
6 the one and only wording for QBE3 is at {B/15/1}.

7 My Lords, let's look, if we may, at the wording in
8 QBE1. I take that rather than QBE3 because Mr Edelman
9 seems to be averse at looking at the policy with the
10 1 mile clause.

11 If we look at QBE1 {B/13/31}, you have clause 7.3.9,
12 and if one goes back to page {B/13/29}, to the
13 introduction to clause 7.3, and I am sure your Lordships
14 are very familiar with this now, 7.3 makes it clear that
15 this is an extension:

16 "This section is extended to include the following
17 additional coverages ..."

18 Just beneath that:

19 "We will indemnify you for ..."

20 Then if we go back to 7.3.9 on {B/13/31} where we
21 have the disease clause, it is very important not to
22 lose sight of this extension, to see it in its entirety,
23 because of course we are focusing on one part of it.
24 But what one actually finds is that it is covering
25 business interruption, interruption of or interference

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1 with the business arising from, one can see, and leave
2 aside the first one for a moment, you have got:

3 "(b) actual or suspected murder, suicide or sexual
4 assault at the premises;

5 "(c) injury or illness sustained by any person
6 arising from or traceable to foreign or injurious matter
7 in food or drink provided in the premises;

8 "(d) vermin or pests in the premises;

9 "(e) the closing of the whole or part of the
10 premises by order of a competent public authority ..."

11 So what you see is that (b) to (d) are very narrow
12 covers based upon things that happen at or are related
13 to the premises. If we go back to (a):

14 "any human infectious or human contagious
15 disease ... an outbreak of which the local authority has
16 stipulated shall be notified ... manifested by any
17 person whilst in the premises or within a 25-mile radius
18 of it."

19 One of the things is one mustn't lose sight of the
20 fact that what it first looks at is an occurrence of the
21 disease, or manifestation of the disease in this one,
22 whilst somebody is in the premises or within a 25-mile
23 radius of it.

24 Now, my Lord, just looking at this clause in the
25 context of the policy as a whole, we would suggest it is

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1 somewhat surprising to say that this clause was intended
2 to provide all-singing all-dancing pandemic cover or
3 cover for the effects of notifiable disease wherever it
4 occurs, that one is having to say, that is, from
5 somewhat buried away within clause (a), all of which
6 seems unlikely.

7 Now, my Lord.

8 Now, my Lord, the structure of the extension and its
9 place within the context of the other extensions does
10 not suggest that what was intended here was very broad
11 cover.

12 My Lord, are matters made any more promising for the
13 FCA when one looks at the wording of the radius
14 provision itself? We would suggest the answer is
15 clearly no. There is no language there to suggest that
16 the need for the disease to be in the premises or within
17 a 25-mile radius is some qualifying condition or
18 proviso. The clause isn't saying that the insured is
19 covered in respect of the effects of a notifiable
20 disease anywhere and everywhere, provided that at least
21 one person with the disease is present on the premises
22 or within 25 miles of the premises. For the FCA to so
23 contend is to rewrite the clause.

24 My Lord, we would suggest that the meaning of the
25 words here is clear. The interruption or interference

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1 must arise from, and the other QBE wordings are "caused
2 by" or "in consequence of", notifiable disease
3 occurring, on this one, "in the premises or within
4 25 miles". The words are clear and unambiguous.

5 My Lord, much is made by the FCA of the fact that
6 the 25-mile radius gives rise to a 2,000 square mile
7 area or something of that sort. Now, my Lord, that is
8 true. It is also true that where you have the 25-mile
9 radius, in a very large number of cases that area may
10 extend into the sea. My Lords, it is also true that
11 where you have a 1 mile radius that gives rise to
12 a smaller area, of approximately 3 square miles. It is
13 also true that where you have looking at the premises,
14 that gives rise to a smaller area still, depending on
15 the size of the premises.

16 My Lord, all of those facts are true, but entirely
17 unilluminating. The point is that the parties have
18 chosen an area either of insured's premises or within
19 a radius of 1 mile or 25 miles thereof going in any
20 direction, which they regard, as it were, as an impact
21 zone; in other words, a zone in which there is both
22 a risk that the occurrence of a notifiable disease might
23 impact the business of the insured, and in respect of
24 which risk the insurer is prepared to provide cover.

25 Now, my Lords, obviously --

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1 LORD JUSTICE FLAUX: Mr Howard, in a sense it doesn't matter
2 as a matter of construction, but it is striking that
3 I think all the insurers with whom we are concerned
4 either adopt a 1 mile limit or a 25-mile limit, and that
5 is presumably -- I mean, these policies have been around
6 for a long time, as Mr Gaisman I think it was told us.
7 Presumably this 25-mile limit has some history to it
8 which, I mean, one would suspect it is related to some
9 outbreaks of disease 30 or 40 or 50 years ago, I don't
10 know. Is there anything that assists on that or not?

11 MR HOWARD: There is nothing that I can point to that
12 assists on that, other than really -- I don't think
13 there is any magic in it, is really what it comes down
14 to. You choose an area, and all that you are saying is:
15 I am prepared -- if you look at it from each party's
16 point of view, the insured is saying, "Well, things that
17 happen in this area may affect me", and you can choose,
18 you could choose, for instance, there is nothing to stop
19 you saying it should be 100 miles. A lot depends on the
20 nature of your business. 1 mile, you have just said,
21 well, I think an outbreak of measles, if we take that,
22 I think your Lordship referred to that as the bread and
23 butter case, measles for some businesses, you might say,
24 "I can see if there is an outbreak of that within a mile
25 of my business that might cause me a problem". There

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1 might be other businesses where you say? "Actually, an
2 outbreak of measles within 25 miles might cause me
3 a problem".

4 I was going to come to it later, but you will
5 remember Mr Edelman, one of his examples that he gave
6 was Maidenhead and London. Now, I think he was working
7 on the premise that Maidenhead is 25 miles away from
8 London. I am not sure geographically if that is right
9 or not, but it doesn't really matter, let's assume it
10 is.

11 LORD JUSTICE FLAUX: I think 25 miles from the Royal Courts
12 of Justice.

13 MR HOWARD: Right. Your Lordship's geography is stronger
14 than mine.

15 LORD JUSTICE FLAUX: No, I just remember that the radius was
16 from the RCJ, I think, so we were familiar with what we
17 were talking about.

18 MR HOWARD: Let's assume that is right and let us assume
19 that an insured is a restaurant which is very close to
20 the RCJ. An outbreak of measles in Maidenhead, that may
21 or may not have an effect on their business, it just
22 rather depends. If you were a business which had staff
23 who worked in Maidenhead, for instance, let's say your
24 key waiting staff or your chef all lived in Maidenhead
25 and there was a quarantine imposed on them because they

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1 had been in contact with measles or some other disease
2 that could have a severe impact on you.

3 Equally, there may be something about your
4 restaurant which particularly attracts people from
5 Maidenhead. That is not a sort of idle point. It could
6 be you are a wedding venue, for instance, and it may be
7 you have got a booking for a wedding and the wedding
8 party all come from Maidenhead and the immediate area
9 around it, so at the last minute they are unable to
10 fulfil the wedding, and cancel.

11 There are all sorts of ways in which you can impact,
12 and all that one can say is that the parties choose
13 a zone of impact because that is what they are choosing
14 to insure. It doesn't mean that you couldn't be
15 impacted by things occurring more broadly; it is simply
16 that you have not sought insurance for something
17 happening more broadly, and the insurers have not agreed
18 to provide you with cover in respect of that.

19 The very simple way of looking at this, the risk of
20 business interruption caused by occurrence of
21 a notifiable disease elsewhere other than in your
22 relevant policy area is a different risk and not an
23 insured risk.

24 What is Mr Edelman's response to that? He says, and
25 I referred to this briefly in passing already, he says

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1 this is cover for notifiable diseases. You recognise,
2 Mr Insurer, that a disease can spread both within and
3 outside the relevant policy area, and you recognise it
4 can become of epidemic or even pandemic proportions.
5 Because, per Mr Edelman, you know just how nasty
6 a disease can be. So, he says, you would know that
7 being contagious with this ability to spread can give
8 rise to an epidemic or pandemic.

9 Therefore, he says, because a disease could spread
10 and be both within and without the insured's relevant
11 policy area, he says you must have insured the risks of
12 business interruption caused by the disease both being
13 within and without the relevant policy area.

14 Now, my Lords, the leap of logic here is truly
15 breathtaking. Two particular points can be made in
16 response to this.

17 The first, and they are all obvious but the first is
18 simply this. The insurance is in respect of the
19 occurrence of disease within the defined area, whether
20 that is the premises or within 1 mile or 25 miles of the
21 insured's premises. What is clear is that it is the
22 effect of the disease within the defined area which is
23 insured, and there is no basis to say that something
24 else, that is to say the occurrence of the disease
25 elsewhere, is insured.

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1 My Lord, just imagine this. Assume one didn't use
2 a radius, as was used in these policies, but you used
3 a specified, defined geographical location. So let's
4 say you took out a policy against business interruption
5 caused by the occurrence of a notifiable disease in
6 Canada. It would be difficult to say with a straight
7 face, because Canada shares an extensive border with the
8 United States, and it would be obvious that a contagious
9 disease could spread across the border to the United
10 States. That meant that the insurer had agreed to
11 provide cover against risk of the disease occurring in
12 the United States or the effects of the disease
13 occurring in the United States.

14 The second point I would make leads from the first.
15 The fact that these diseases are contagious is no doubt
16 one of the reasons why the insurer would wish to limit
17 the cover provided for them. Their ability to cause
18 widespread damage, in Mr Edelman's very nasty cases,
19 explains or is one of the reasons that explains the
20 existence of the limit in the first place.

21 Where Mr Edelman goes wrong here, of course, is in
22 suggesting that because insurers agree to cover risks of
23 the effects of a disease occurring in one place, the
24 insurers are covering an epidemic or, more importantly,
25 that they are covering the effects of an epidemic.

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1 They may indeed be covering a new, unexpected
2 notifiable disease but, as with any notifiable disease,
3 they are only covering it if and insofar as the business
4 interruption loss is caused by the occurrence of that
5 new disease at the premises or within a certain limited
6 radius, 1 mile or 25. The radius is plainly, on its
7 face, a limit on the cover and not a proviso or
8 threshold requirement.

9 My Lord, it is also --

10 LORD JUSTICE FLAUX: If you are right about that, I mean
11 that in a sense gives the clue, doesn't it, as to -- I
12 mean, you said earlier on the causation argument is
13 really answered by the construction argument, and I see
14 the force of that. But the point here is that what
15 insurers -- this is a limit to cover, you say, a limit
16 to cover which means that the insurers will cover you
17 for the effects of infectious disease, the effects being
18 the interruption or interference with your business,
19 infectious disease occurring within the 25-mile radius
20 limit. So far as disease outside the 25-mile radius
21 limit is concerned, the effects of that are not covered.
22 That is one of the reasons why, when you look at
23 causation, if your business has been affected by
24 occurrence of the disease outside the 25-mile radius you
25 haven't got insurance.

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1 MR HOWARD: Yes, my Lord, it is really as simple as that.

2 LORD JUSTICE FLAUX: It is like the hurricane in the
3 Orient-Express case.

4 MR HOWARD: Yes.

5 LORD JUSTICE FLAUX: There wasn't cover under the insurance
6 for what the hurricane did to the rest of New Orleans.

7 MR HOWARD: Yes, that is right. It really is simple.

8 Of course Mr Edelman, as my learned friend Mr Kealey
9 pointed out, elided the nature of the insurance in
10 Orient-Express and overlooked the critical point, which
11 of course was the basis of the decision both of the
12 learned arbitrators and Mr Justice Hamblen, that the
13 insured peril was damage to the hotel. Of course the
14 damaged to be caused by a fortuity, but it is damage to
15 the hotel which was the basis of the business
16 interruption cover.

17 The other point I was going to make, which is really
18 one by way of background, it's not even the case
19 actually that diseases on the notifiable diseases list
20 would normally or necessarily or even regularly be
21 expected to have epidemic, still less pandemic,
22 consequences. I think Mr Edelman himself accepted that;
23 we don't need to turn it up but {Day1/102:1}.

24 It might just be worth reminding your Lordship of
25 the list of notifiable diseases that we are concerned

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1 with. If we go to {J/9/79}. This is the pre-COVID
 2 list. Of course COVID got added, but you can see the
 3 sort of thing that we are dealing with, anthrax,
 4 Legionnaires', which is I think under the notifiable
 5 organisms, malaria which is also under those, measles,
 6 meningitis, mumps, plague, rabies, tuberculosis. Many
 7 of these diseases are not likely to break out into
 8 epidemics, and it is certainly not inherent in the type
 9 of diseases being covered they will do so. Many of
 10 them, if not most of them, are likely to have a fairly
 11 local occurrence and effect, particularly given the
 12 state of modern medical science. Where they go beyond
 13 that, however, as they might rarely do, the insurance
 14 applies a radius limit to protect the insurer against
 15 what would otherwise be virtually limitless liability.
 16 My Lord, can I just give you, because your Lordships
 17 have been presented with an argument --
 18 MR JUSTICE BUTCHER: I am just conscious that we mustn't
 19 trespass, Mr Howard, over a red line which we ourselves
 20 created in one of the CMCs, about the exclusion of
 21 evidence in relation to these diseases.
 22 MR HOWARD: My Lord, all I was saying is that here is a list
 23 of diseases, and you can see what type of diseases are
 24 being looked at. But I am not seeking to, as it were,
 25 give evidence about the nature of the diseases, I am

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1 just trying to give some examples about what sort of
 2 situation the cover is intended to respond to.
 3 The point I particularly wanted to make is that your
 4 Lordships remember the FCA boldly asserts that if their
 5 argument is not right, that means that the cover is
 6 illusory. I just want to explain to you why that is
 7 just obvious nonsense by reference to some simple
 8 examples.
 9 MR JUSTICE BUTCHER: Looking at this list, I would have said
 10 they were a mixed bag.
 11 MR HOWARD: Yes, they are a mixed bag. Exactly. There are
 12 some things which are more serious and some are less
 13 serious. One sees there is tetanus, then one has
 14 smallpox. I mean, in fact in the modern world prior to
 15 COVID, one can see the things that actually a lot of
 16 people might be concerned about are measles, mumps and
 17 rubella, because of the problems we have had with
 18 anti-vaxxers, or whatever they call themselves, that
 19 philosophy having taken hold and a lot of children not
 20 getting vaccinated and so on.
 21 But let's think of what is quite a typical example,
 22 and that is an outbreak of meningitis on a university
 23 campus. Again, something which we are all familiar with
 24 having happened in recent times. One can see that that
 25 could cause interference with businesses in a number of

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1 ways. You could get student bars in and immediately
 2 around the campus getting affected, but you could also
 3 get a music venue which might be 20 miles away,
 4 somewhere that students go to gigs, effectively loses
 5 its business because the outbreak of meningitis means
 6 that the students are worried about going out or not
 7 allowed to go out. That is the sort of situation that
 8 you can see the policy can respond to.
 9 Similarly, the example of the local opera house
 10 being shut down due to the outbreak of Legionnaires'
 11 disease. Another example where Lady Flaux would miss
 12 her opera, but nearby restaurants would suffer a loss
 13 because of pre-theatre dinner guests, but ...
 14 LORD JUSTICE FLAUX: You have frozen.
 15 MR HOWARD: That specialises in weekend opera packages.
 16 LORD JUSTICE FLAUX: Mr Howard, you were frozen, I am
 17 afraid. You froze then for a while.
 18 MR HOWARD: Am I unfrozen now? Can your Lordship hear me
 19 now or not?
 20 LORD JUSTICE FLAUX: I can.
 21 MR HOWARD: I can't hear your Lordship.
 22 LORD JUSTICE FLAUX: I was muted because you froze. So yes,
 23 I can hear you. Yes.
 24 MR HOWARD: Did you lose audio as well?
 25 MR JUSTICE BUTCHER: Yes. We missed a couple of sentences

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1 of yours, Mr Howard.
 2 LORD JUSTICE FLAUX: You were talking about the local opera
 3 house and then the quip about my wife missing her opera,
 4 and then about the local restaurants closing, so I think
 5 we have got the point.
 6 MR HOWARD: The point I wanted to add there was the hotel
 7 which does weekend opera packages. It might be 10 or 15
 8 or even 20 miles away, within the radius limit, but it
 9 is showing the zone of influence or the zone of impact,
 10 if you like, that you don't necessarily have to be next
 11 door to the opera house, you can be some distance away
 12 but your business can be affected by what happens at the
 13 opera house.
 14 MR JUSTICE BUTCHER: For example, Glyndebourne.
 15 MR HOWARD: Exactly. That is what essentially I was
 16 adverting to.
 17 At the end of the day, one could posit example
 18 after example, and I won't detain you by doing so. The
 19 critical point is there is nothing illusory about the
 20 cover operating in the way that QBE contends. My Lords,
 21 it is in fact real and valuable cover, but it is
 22 limited. If insureds wanted unlimited insurance against
 23 business interruption caused by notifiable disease
 24 occurring anywhere, no doubt they would have sought to
 25 purchase it. The simple answer is they did not. And

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1 these are insureds, in QBE's case, who operate through
 2 brokers. If they were seeking effectively this disease
 3 cover against disease occurring anywhere, no doubt they
 4 would ask for it. I am not saying insurers would be
 5 prepared to provide it. It is just a very different
 6 type of insurance to what was actually provided by means
 7 of extension to property cover.

8 There has been some discussion about Salisbury in
 9 this case, because of the well-known events there, where
 10 people have been taking the facts of Salisbury but
 11 treating Novichok as if it were a notifiable disease.
 12 Mr Edelman referred to paragraph 24 of our skeleton,
 13 which perhaps we could get up, which is {1/17/14}. If
 14 we could go to page 14, please. You will see there we
 15 said:

16 "In terms of the sort of circumstances that might be
 17 covered by the relevant policy area, the range of
 18 potential cases are myriad."

19 Then we gave the example of a localised outbreak of
 20 a notifiable disease, including COVID-19, might lead to
 21 a particular street or square mile being locked down
 22 although the rest of the country remains open.

23 I think my Lord, Lord Justice Flaux at that point
 24 said: that can't be right in relation to the 25-mile
 25 provision. And it is obviously correct that the

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1 intention of the 25-mile radius clause is not only to
 2 deal with the street immediately outside being closed or
 3 the area around the premises being locked down. But,
 4 my Lord, the point is a much more general one. To be
 5 covered, the business insurance loss has to be caused by
 6 the local occurrence, and we are using "local" there to
 7 describe the radius limit, whether 1 mile or 25 miles.
 8 "Local" is simply shorthand to refer to the relevant
 9 radius limit. That is very much the point we make in
 10 paragraphs 25 and 26, which follow.

11 Staying with the Salisbury example, which Mr Edelman
 12 raised following my Lord's intervention, let's assume
 13 that instead of Novichok it was anthrax that the Russian
 14 agents had used. Stonehenge is about 9 or 10 miles away
 15 from the centre of Salisbury. Consider that you have
 16 got at Stonehenge two businesses, one a burger van or
 17 something similar with a 1 mile radius policy, and
 18 secondly a stall selling tourist guides with a 25-mile
 19 radius policy. Assuming both lose business as a result
 20 of the Salisbury poisoning some 10 miles away, assuming
 21 that it was a notifiable disease, cover would attach
 22 under the 25-mile policy but not under the 1 mile
 23 policy. That is just because you have got different
 24 radiuses, different zones of impact.

25 Now, my Lord, all of these outcomes that I have been

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1 describing make complete commercial sense. By contrast,
 2 as I have already submitted, on the FCA's case, where
 3 all that is required for cover to attach is a person
 4 with the disease being inside the relevant policy area,
 5 whether diagnosed or undiagnosed, symptomatic or
 6 asymptomatic, and whether or not having any impact at
 7 all on the insured, that, in our submission, makes no
 8 commercial sense and indeed is not what the clause is
 9 saying.

10 My Lord, unless your Lordships have any further
 11 questions for me, that deals with the FCA's primary
 12 case, the so-called qualifying condition or some other
 13 anchor point, which we say is manifestly misconceived.

14 I am then going to turn to their secondary argument.
 15 As I say, once you dispose of the primary argument, that
 16 is really the end of it. But their secondary argument,
 17 as I made clear earlier today, arises once it is
 18 accepted that the FCA is wrong to treat the need for the
 19 occurrence of the disease in the relevant policy area as
 20 a mere qualifying condition. In other words, for this
 21 purpose, the FCA accepts, firstly, that the insured
 22 peril for the BI cover is the occurrence of the disease
 23 in the relevant policy area, and secondly, that means
 24 that the insured must prove that the occurrence of the
 25 disease in that area caused him business interruption,

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1 and thirdly, that for the purposes of establishing loss
 2 and the application of the "but for" test, the insured
 3 peril must be taken away.

4 So it is at this point that you have to consider the
 5 FCA's case that a special rule of causation is required
 6 as a matter of the parties' intentions.

7 What they then are saying is you don't take away the
 8 insured peril; what you take away is the disease
 9 wherever it occurs. I have already shown you what
 10 Mr Edelman said on {Day1/148:6} to line 19.

11 This argument suffers from the same defects in
 12 analysis as the qualifying condition "some sort of
 13 anchor" argument. In fact, if that were possible, it is
 14 even worse.

15 Having recognised that its qualifying condition
 16 argument is wrong, and so the occurrence of the disease
 17 in the relevant policy area does have to have causative
 18 effect, the FCA then seeks to argue that somehow the
 19 parties' intended to reverse that when it comes to
 20 causation. In other words, what they seem to be arguing
 21 is that somehow the parties have intended that when one
 22 gets to the causation stage the cover is transformed
 23 from one providing limited cover in respect of the
 24 effects of a disease, namely the effects of its
 25 occurrence in the relevant policy area, to unlimited

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1 cover in respect of the effects of the disease occurring
 2 anywhere.
 3 My Lords, this only has to be stated to see that
 4 it is frankly patent nonsense.
 5 At this stage, I would respectfully suggest it is
 6 important to be clear as to what the supposed
 7 construction of the policy is, and it is helpful to get
 8 up on the screen QBE2 at {B/14/29} by way of example.
 9 Here we have the "Infectious disease, murder or
 10 suicide, food or drink or poisoning" clause. So the
 11 relevant part of it, if one reads this as a whole,
 12 I mean the preamble says, which you have to read in "We
 13 will indemnify you for", that appears earlier. So we
 14 will indemnify you for:
 15 "Loss resulting from interruption of or interference
 16 with the business in consequence of any of the following
 17 events:
 18 And here it is:
 19 "(c) any occurrence of a notifiable disease within
 20 [a 25-mile radius] of the premises."
 21 What is the FCA's case at this stage? What they are
 22 saying is you then have to read into this clause, only
 23 into 3.2.4(c), the following -- this is what you would
 24 have to read in at the end of it -- "providing that if
 25 the said occurrence is related to or forms part of an

1 occurrence elsewhere than within the defined radius, we
 2 will treat loss resulting from interruption or
 3 interference with the business in consequence of such
 4 occurrence of the notifiable disease elsewhere, as loss
 5 resulting from interruption or interference with the
 6 business in consequence of the occurrence of the
 7 notifiable disease within the radius of 25 miles of the
 8 premises".
 9 That is what the argument on construction amounts
 10 to.
 11 My Lords, you have to spell this out to see how
 12 hopeless the argument is, and that no doubt explains why
 13 Mr Edelman refrained from spelling it out.
 14 As I asked earlier today, if one asks how do you get
 15 there, it is all built on the word "notifiable". My
 16 Lords I have already covered that and won't repeat the
 17 point.
 18 But perhaps the most simple answer to this is that
 19 it seeks to ascribe an intention to the parties which is
 20 the precise opposite of what the words used reveal. As
 21 I hope I have made clear, the cover is provided for the
 22 effect of a notifiable disease within the relevant
 23 policy area; it is not provided for the effects of the
 24 notifiable disease elsewhere; and still less, I would
 25 add, for the effects of fear of a contagious or

1 notifiable disease.
 2 Now, my Lord, the FCA's argument on this is not only
 3 hopeless when viewed in the context of the language of
 4 the disease clauses, it is also contradicted by the
 5 terms of the trends clauses.
 6 Now I need to explain where we have got to, your
 7 Lordships may recall this but I ought to remind you, on
 8 the debate about the trends clauses.
 9 Originally, and until service of the written
 10 opening, the FCA denied that the trends clauses applied
 11 to the non-damage extensions. It did so because the
 12 trends clauses refer to "damage". And, of course, the
 13 non-damage extensions are predicated on something which
 14 is not damage. The clue lies in the name, non-damage.
 15 The simple and obvious answer to that is that the
 16 quantification machinery provided by the trends clause
 17 is intended to operate across the board and so the word
 18 "damage" in context has to be read in a non-damage case
 19 as referring to the insured peril.
 20 My Lords, there is no commercial reason why the
 21 trends clauses should apply only to damage-based cover
 22 or even to certain non-damage extensions and not others.
 23 In any event, the same analysis will be undertaken as
 24 a matter of common law, as the trends clause provides,
 25 save that the trends clause provides a machinery for

1 quantification.
 2 But the important point to note is the FCA has now
 3 come a long way towards accepting our position. For
 4 instance, it accepts that the trends clause in QBE3
 5 applies. If we could have a look at {B/15/1} for
 6 a moment. The relevant clauses, first the notifiable
 7 disease, murder or suicide clause is at page {B/15/22},
 8 so you will see familiar type of clause, and this is the
 9 1 mile one, you can see (c) is the occurrence of
 10 a notifiable disease within a radius of 1 mile, and the
 11 trends clause is on page {B/15/177}. So you see there
 12 it is 25.180, "Trend adjusted":
 13 "Adjustments made to figures as may be necessary to
 14 provide for the trend of the business and for variation
 15 in or circumstances affecting the business either before
 16 or after the damage or which would have affected the
 17 business had the damage not occurred, so that the
 18 figures thus adjusted will represent as nearly as may be
 19 reasonably practicable the results which but for the
 20 damage would have been obtained during the relevant
 21 period after the damage."
 22 Now, the FCA sensibly accepts that this particular
 23 clause does apply to the non-damage interruption, and
 24 that one has to read "damage" here as referring to the
 25 insured peril.

1 Somewhat surprisingly, having made that concession,
2 the FCA seeks to argue that that is not so in all cases,
3 and they do that by reason of a textual argument by
4 reference to each policy.

5 My Lords, all of this has been considered in writing
6 and I am not going to detain you with the arguments now,
7 save to say this. The FCA's point is manifestly wrong,
8 because in all the policies it is clear that it would
9 make no sense whatsoever for the trends clauses not to
10 apply or, to put it another way, for them to apply to
11 physical damage but not to non-physical damage business
12 interruption.

13 Leaving aside that, the fact that the result of the
14 FCA's -- or the FCA's concessions is anomalous, what you
15 see for present purposes is that the trends clause on
16 any view actually stipulates for a "but for" approach to
17 causation. They actually use the words "but for".

18 I would respectfully suggest, against that
19 background, my Lords, it is impossible to see that
20 nevertheless, in respect of the disease clauses only,
21 the parties are to be taken to have agreed some wholly
22 different approach to causation.

23 So my Lords, in our submission, the second way in
24 which the FCA puts its case on construction is hopeless.

25 That is significant when you come to consider the

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1 arguments on causation, which are in fact premised on
2 their argument on construction being correct. I will
3 address, as it were, some freestanding point which they
4 seek to extract from The Silver Cloud, although that has
5 largely been covered by my learned friend Mr Kealey, but
6 essentially, as I understand the argument that
7 Mr Edelman made and Ms Mulcahy made, you only get to
8 their Silver Cloud argument if they were right on their
9 approach to construction of the policy. Since they are
10 plainly wrong, all of that, in my submission, is
11 academic.

12 Before I go to the question of causation I should
13 say something about HIGA's arguments of construction.
14 Your Lordships will recall that we heard from Mr Edey
15 something about that.

16 Now, much of what, if not all of what Mr Edey had to
17 say was both wrong and misses the point. His
18 submissions are on Day 3, we don't need to turn it up at
19 the moment, but what he said was -- perhaps we can turn
20 it up at {Day3/170:1}.

21 At line 17, he said:

22 "The starting point is not proximate cause ..."

23 If we then go on to {Day3/174:25}:

24 "The legal question is what is the test required by
25 the relevant causal link within the insured peril. In

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1 QBE1 that is 'arising from' and in QBE2 'in consequence
2 of'.

3 "We say they do not require satisfaction of the
4 proximate cause test, but something looser than that,
5 akin if you will to what the FCA says 'following'
6 means."

7 Now, as I understand it, what Mr Edey is trying to
8 say is that QBE has identified the wrong insured peril,
9 because in defining the peril it omitted the
10 interruption or interference part of the extension.

11 MR JUSTICE BUTCHER: Sorry, I just don't understand that
12 formulation, Mr Howard. Could you explain what you mean
13 by that?

14 MR HOWARD: It is probably best if one has -- it is
15 a semantic and arid issue, but if we go back to
16 {B/15/1} -- actually, which one did we look at? If we
17 take {B/13/1} --

18 No, sorry, {B/15/22}, the one we were looking at
19 a moment ago, at page 22. The insured peril, QBE says,
20 rightly, that we are concerned with here, is an
21 occurrence of a notifiable disease at the premises.

22 I'm sorry, (c), an occurrence of a notifiable
23 disease within a radius of 1 mile.

24 Mr Edey says: no, no, no, you have got that wrong,
25 that is not the insured peril, the insured peril is loss

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1 resulting from interruption or interference with the
2 business in consequence of an occurrence of a notifiable
3 disease within a radius of 1 mile.

4 So as I understand it, what he is saying is you have
5 to look at everything, including the loss as part of the
6 insured peril.

7 It is quite difficult to deal with an argument that
8 is so plainly wrong, in that the interruption or
9 interference is just part of the description of the
10 relevant loss. That is the first thing. But in any
11 event, none of this would make any difference; it
12 doesn't matter whether you say the insured peril is
13 the --

14 MR JUSTICE BUTCHER: I can well see the interruption or the
15 interference might be in a different category from loss,
16 in relation to defining the insured peril.

17 MR HOWARD: Yes.

18 MR JUSTICE BUTCHER: I'm not sure what difference that
19 actually makes if you say that the interruption or
20 interference, in consequence of the following events, is
21 the insured peril.

22 MR HOWARD: It doesn't, and that is really the point.

23 I think what it was all designed to do, this argument of
24 Mr Edey's, is to say that because the insured peril,
25 I think he says, is interruption or interference with

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1 the business in consequence of an occurrence, his
2 argument is the proximate cause test only arises at the
3 link between the loss and the interruption, and it
4 doesn't arise -- sorry I think somebody has a microphone
5 on -- it doesn't arise at the stage where you are
6 looking at "in consequence of an occurrence of
7 a notifiable disease". He says no, that is not
8 proximate cause, that is something looser.

9 The answer to that is, firstly, it plainly is
10 proximate cause, because those are the standard words of
11 proximate cause. But the second answer is that it
12 doesn't actually matter, as your Lordships have been
13 saying to various different counsel. What we are
14 concerned with here is actually not debates about
15 proximate cause, we are concerned with the "but for"
16 stage. The question is whether the occurrence, on this
17 one of a notifiable disease within a radius of 1 mile of
18 the premises, was a cause of the interruption. The
19 point is it wasn't a cause, and therefore it can't be
20 a "but for" cause.

21 LORD JUSTICE FLAUX: It doesn't matter, does it? You might
22 say, I think my Lord was putting to you, the insured
23 peril is the interruption of or interference with the
24 business in consequence of the occurrence of
25 a notifiable disease within a radius of 1 mile.

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1 But, two things. Firstly, whatever "in consequence
2 of" means, there has to be a causative link between the
3 interruption and the occurrence. Secondly, even if that
4 is the, as it were, composite insured peril, "loss
5 resulting from" are clearly words which are focusing on
6 what is the proximate cause of loss you have suffered.

7 MR HOWARD: Yes.

8 LORD JUSTICE FLAUX: If your business has been interrupted
9 by the occurrence of a notifiable disease within
10 a radius of 1 mile, you still have to show that you have
11 suffered loss, and you have also got to show, whatever
12 the causative link is, that the interruption or
13 interference you have suffered is in consequence of the
14 occurrence of the disease in the 1 mile limit.

15 MR HOWARD: Exactly.

16 LORD JUSTICE FLAUX: Unless you abandon all causative links
17 in the argument, as it were, as you said a moment ago it
18 is an arid dispute, isn't it?

19 MR HOWARD: I was going to say it is certainly arid and
20 semantic, and I was going to say it is interesting but
21 irrelevant, but it's not interesting, it's just
22 irrelevant.

23 As I say, with all respect to Mr Edey, he appears to
24 have contributed two things, or three things which I am
25 going to have to deal with: one is this point, another

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1 is a point by reference to London, and then a curiosity,
2 which is the reference to the Dalmine case, which
3 I won't be able to resist saying something about,
4 because the reason it is being referred to is because
5 Mr Edey was on the losing side in that case and I was on
6 the other side. It is a curiosity, the case being
7 referred to.

8 Those are the arguments on construction, my Lords,
9 and I hope your Lordships will forgive me for saying
10 that the reality is that when you look at what is the
11 FCA's case as to what caused the business interruption
12 and one looks at the QBE clauses and construes them in
13 according to their plain and natural meaning, the answer
14 to the case is, I would suggest, fairly obvious.

15 I come on to the question of causation. Now, I can
16 take this relatively briefly, because we have all had
17 the benefit of Mr Kealey's master class last Thursday.
18 I entirely endorse his submissions and adopt them. But,
19 my Lords, we submit that the causation issue is both
20 simple and entirely orthodox.

21 One starts by properly construing the insured peril.
22 And, as I have already explained, and perhaps beginning
23 to bore you, here it is, the occurrence or manifestation
24 of COVID-19 in the relevant policy area.

25 One then asks whether the occurrence of that insured

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1 peril caused loss in the form of interruption or
2 interference to the insured's business. That, in fact,
3 requires, on orthodox and conventional
4 principles, applying both a factual causation test, the
5 "but for" test, and a legal causation test, which is the
6 proximate cause test, but this case is actually all
7 concerned, at least at this stage for the purposes of
8 the argument, with the factual causation question.

9 Now, my Lords, it is fair to point out that the mere
10 presence of someone with COVID-19 within the relevant
11 policy area will not usually, and certainly not
12 necessarily, cause any loss to an insured as a matter of
13 fact. Whether it does is demonstrated by
14 straightforward application of the "but for" test. You
15 ask: but for the insured peril, that is to say the
16 presence of that person with COVID in the relevant
17 policy area, would the insured have suffered its loss
18 anyway? Or its business interruption loss, I should
19 say. In our case it would have, in almost all cases,
20 whether as a result of the national apprehension or the
21 fear or the government guidance or indeed the national
22 lockdown.

23 My Lords, if the insured cannot pass, as it can't
24 and indeed is I think effectively admitted, the "but
25 for" test, then that is the end of it; you never get on

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1 to legal causation.
 2 Forensically one might legitimately question why it
 3 was that the FCA, through my learned friend Ms Mulcahy,
 4 chose to start with the second stage of causation
 5 analysis, namely proximate cause, rather than the first.
 6 But be that as it may, the conventional and orthodox
 7 approach, the first question is the "but for" causation,
 8 then you would consider proximate cause, and the final
 9 stage is to consider quantification of any indemnity
 10 which might be due to the insured. And this is
 11 something where you apply the trends clause, although if
 12 there isn't a trends clause you get to the same position
 13 as a matter of common law, although you don't have the
 14 benefit of the calculation machinery which is provided
 15 by the trends clause.
 16 My Lords, in his submissions, turning more fully to
 17 the "but for" causation, Mr Edelman made it clear that
 18 the FCA was not asking you to disapply, rule on or
 19 modify the rules of proximate cause or "but for"
 20 causation as they apply. What he said is you were being
 21 asked to rule on their application within the confines
 22 of specific policies. That was on {Day1/92:1}.
 23 Again, let's just stand back for a moment. If
 24 Mr Edelman is correct in treating the occurrence of the
 25 disease, the notifiable disease, in the relevant policy

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1 area as a mere qualifying condition, his argument would
 2 be correct. But that is because, on his argument, the
 3 cover is against the effects of a disease anywhere,
 4 subject to this mere qualifying condition. But as
 5 I have explained, that is plainly misconceived.
 6 Equally, his argument would be correct if, on the true
 7 construction of the QBE clauses, they contain, as the
 8 FCA says, a special rule as to proof of loss; which is
 9 really dressing up the qualifying condition point in
 10 different clothing. Because both are designed to say
 11 that the cover is intended to be cover for the effects
 12 of a disease wherever it occurs and notwithstanding that
 13 those effects are not attributable to the occurrence of
 14 the disease in the relevant policy area.
 15 So if the FCA is correct on either of these points
 16 of construction, and they are not, but if they were, the
 17 issues of causation do not arise. But if they are not
 18 correct, what is odd is that they do still appear to try
 19 to say that they are not defeated by orthodox rules of
 20 causation.
 21 Now, despite his protestations to the contrary,
 22 Mr Edelman's approach does therefore, when you get to
 23 this stage of the analysis, require the disapplication
 24 of the "but for" test. Because on a straightforward
 25 application of the "but for" test, and on the assumed

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1 facts, there can surely be no doubt that but for the
 2 insured peril in the so-called disease clauses, that is
 3 to say occurrence or manifestation of COVID at the
 4 premises or within 1 mile or 25 miles, the
 5 policyholder's business would have suffered exactly the
 6 same BI loss. And in the Cheshire Cat reference which
 7 I gave you, Mr Edelman appeared to recognise that. That
 8 is why he was so keen to wipe the smile off Mr Kealey's
 9 face.
 10 The same point follows from paragraph 241 of the
 11 skeleton which I showed you, or written argument.
 12 Now, before we look at this any further, can I just
 13 make a couple of further submissions to amplify what has
 14 already been said.
 15 MR JUSTICE BUTCHER: Your basic point is that if Mr Edelman
 16 is right about the insured peril, causation doesn't
 17 arise; and if you are right about the insured peril,
 18 causation doesn't arise, really.
 19 MR HOWARD: Exactly so. But I have to address it because
 20 the FCA, frankly their submissions have muddled up
 21 different concepts, so one has to infer that the FCA is
 22 running what I call The Silver Cloud point as some
 23 freestanding point of law.
 24 But having said that, both Ms Mulcahy and Mr Edelman
 25 on Day 1, when they were talking about this, were very

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1 keen to say it is all a matter of intention. So if they
 2 are wrong that you can't deduce this intention, the
 3 secondary argument, from the contract, then I would
 4 respectfully say their arguments on causation don't
 5 arise. But for the sake of completeness, as it were,
 6 one ought to just knock them on the head. That is
 7 obviously what I am here to do in any event.
 8 LORD JUSTICE FLAUX: Your argument on construction is if you
 9 are right that the insured peril is the occurrence of
 10 a notifiable disease within the relevant area, and that
 11 is what has to have caused the interruption to the
 12 business and the loss which is suffered, then on one
 13 view you don't even get to issues about counterfactuals
 14 and so forth, because you just pose the question on the
 15 agreed facts would the insured have suffered the same
 16 loss anyway.
 17 MR HOWARD: Yes.
 18 LORD JUSTICE FLAUX: To which the answer is yes.
 19 So you don't start stripping things out; you just
 20 ask the question.
 21 MR HOWARD: My Lord, I don't shrink from saying that is the
 22 simplicity of this case. But is we have got to --
 23 LORD JUSTICE FLAUX: The trends clause just makes the point
 24 even clearer. But that would be the position you would
 25 say at common law anyway.

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1 MR HOWARD: Yes.
 2 You will remember in Orient Express the trends
 3 clause was in similar terms. It had the "but for"
 4 point. The only difference between the arbitrators and
 5 Mr Justice Hamblen, I think the arbitrators said the
 6 trends clause was actually conclusive in showing that
 7 you had to apply the "but for" test; whereas I think
 8 Mr Justice Hamblen said it wasn't necessarily conclusive
 9 but it was strong evidence, or something like that.
 10 I can't remember quite the way he put it. It is
 11 actually pretty difficult to distinguish the two. The
 12 point is if somebody is saying in this contract the
 13 parties have specifically agreed to disapply the "but
 14 for" test, when you see them actually referring to the
 15 "but for" test it is, I would say, a pretty difficult
 16 argument to make with a straight face.
 17 But having said that, Mr Edelman did keep a straight
 18 face and I think Mr Schaff managed to do the same in
 19 Orient-Express. I think it was Mr Schaff.
 20 My Lord, can I just make one or two other
 21 observations on "but for", and its application.
 22 Now as Mr Kealey said we essentially submit that
 23 this is really what I think I once heard Lord Steyn
 24 refer to as hornbook law, which I think may have been
 25 a sort of South African reference to what is basic law.

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1 But the application of the "but for" test is in our
 2 submission of that ilk.
 3 There is one other authority that I would like to
 4 show you which basically also makes that point. It is
 5 a case called The Kamilla which is at {K/128/1}. It is
 6 a judgment of Mr Justice Morison's.
 7 This case wasn't an insurance case but it was a case
 8 concerned with a contract for indemnity. So effectively
 9 the same thing. It concerned an appeal against an
 10 arbitral award determining that damage to a cargo of
 11 lentils was caused for the purposes of the indemnity
 12 clause by unseaworthiness of the vessel. The owners had
 13 argued that concepts of foreseeability should be read
 14 into the clause, while the charterers relied on a more
 15 straightforward "but for" causation test.
 16 The details don't matter, but if we could go to
 17 page 5, paragraph 15 {K/128/5}. At paragraph 15 you see
 18 in the second sentence:
 19 "The test for causation is whether the act or
 20 default complained of is a proximate cause of the
 21 alleged damage. The "but for" test is appropriate to
 22 establish whether there is a causal link between the act
 23 or default and the alleged damage. It is a necessary
 24 but not sufficient test."
 25 Your Lordships can read on the rest of the passage,

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1 but it is simply another illustration of a commercial
 2 judge recognising that the "but for" test is
 3 a prerequisite there in a contract of indemnity. As
 4 I say, I would respectfully suggest that it is hornbook
 5 law.
 6 I think my Lord Mr Justice Butcher was asking are
 7 there cases where the point is made. I refer to this
 8 because it is a point where --
 9 MR JUSTICE BUTCHER: It is curious, isn't, Mr Howard, the
 10 Marine Insurance Act talks about proximate cause. There
 11 doesn't seem to be any insurance cases until recently
 12 where whether something is a proximate cause has been
 13 tested by whether it is a "but for" cause.
 14 It may well be that that is partly because no one
 15 would seek to suggest, at least in the ordinary
 16 circumstances, that something which wasn't a "but for"
 17 cause was the dominant cause of the loss.
 18 MR HOWARD: Yes. The simple answer is that you don't get to
 19 the proximate cause analysis until you have crossed over
 20 the hurdle of "but for".
 21 MR JUSTICE BUTCHER: That has never been done, certainly
 22 until recently. People have gone straight to the issue
 23 of whether it is the proximate cause of the loss.
 24 MR HOWARD: Yes. But in most cases it will be obvious that
 25 something is a "but for" cause which is a lower

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1 threshold than proximate cause. In other words, the
 2 "but for" eliminates things that are not causes at all.
 3 But then you have to come on to decide, once you have
 4 got things that are causes, are they proximate causes.
 5 But, as it were, within any proximate cause
 6 analysis, except for the Fairchild Enclave, and all the
 7 difficulties that has given rise to, a necessary as it
 8 were predicate is what you are talking about is a "but
 9 for" cause; if it is not a "but for" cause it can never
 10 be a proximate cause.
 11 MR JUSTICE BUTCHER: I am not absolutely sure of that. For
 12 example, if a ship was taken by pirates, which is let's
 13 say an insured peril, but the insurers could show that
 14 she would in fact have been torpedoed by enemy action,
 15 which is not an insured peril, I am not sure, speaking
 16 for myself, that you actually do do that investigation
 17 at that point, but the taking by pirates would be the
 18 proximate cause.
 19 MR HOWARD: In your Lordship's example the pirates have
 20 seized the vessel, and that is the insured peril. One
 21 is talking about a different concept there, where what
 22 the insured is then saying, well, or the insurer then
 23 would be saying: although the insured peril has actually
 24 operated the vessel was seized by the pirates. As it
 25 happens there was a submarine, an enemy submarine,

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1 nearby which was just about to shoot a torpedo. It did
 2 in fact shoot the torpedo but it missed because the
 3 pirates had caused the vessel to alter course. It was
 4 heading into whatever the port was but they decided to
 5 take it off to wherever their lair was, so you miss the
 6 course. So in that argument what you are then saying is
 7 in fact if this insured peril had not happened something
 8 else would have happened which would have caused the
 9 damage. That is not our type of situation .
 10 MR JUSTICE BUTCHER: My example may not be very important
 11 for the purposes of this case. But I just say that
 12 I still have some residual reservations as to why
 13 proximate cause is always tested by "but for".
 14 MR HOWARD: I would say --
 15 LORD JUSTICE FLAUX: I think my Lord gave the example in
 16 relation to Mr Kealey's argument of the train , the
 17 landslip case, where it turns out there is also
 18 a signalling problem further up the line .
 19 MR HOWARD: Yes.
 20 LORD JUSTICE FLAUX: Whether there is cover or not in that
 21 case.
 22 MR HOWARD: In my submission, that case, there is a danger
 23 in confusing what appears to be the position with what
 24 is actually the position . So in my Lord's example of
 25 the landslip the train , as everybody understood it at

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1 the time, could not leave the station because they
 2 understood there was a landslip which had blocked the
 3 line . But if in fact it turned out that it could never
 4 leave the station anyway then the landslip has not
 5 actually been the cause of the loss at all . It appeared
 6 to be, but it wasn't.
 7 So similarly , going back to your example about the
 8 pirates , that is slightly different because the pirates
 9 have actually seized the ship . But if the situation was
 10 that the torpedo was heading for the ship and it is just
 11 because the pirates got on it at that moment that they
 12 changed course, the same sort of point might arise where
 13 you say: actually the ship was going to founder anyway
 14 for some other reason .
 15 But the landslip example is actually clearer ,
 16 I would suggest, in that as a matter of fact actually
 17 the landslip wasn't what caused the loss . It is what
 18 people believed was the cause of the loss . But actually
 19 further investigation shows it wasn't, because actually
 20 the traffic signals were all not operational and it
 21 couldn't go anyway .
 22 Take an example, take a sort of more graphic
 23 example. Let's assume that the locomotive engine is
 24 actually completely defunct but nobody knows that, and
 25 if it had tried to leave it wouldn't have been able to

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1 because the engine wouldn't have worked. That is the
 2 same as your Lordship's example; it is just easier to
 3 comprehend. One would say the landslide was interesting
 4 but actually it didn't cause this train not to leave
 5 because the locomotive was shot and there was no
 6 replacement for it .
 7 My Lord, I see the time.
 8 LORD JUSTICE FLAUX: Yes, is that a convenient moment?
 9 MR HOWARD: Yes, my Lord.
 10 LORD JUSTICE FLAUX: We will say 2 o'clock then.
 11 (1.05 pm)
 12 (The short adjournment)
 13 (2.00 pm)
 14 LORD JUSTICE FLAUX: When you're ready, Mr Howard.
 15 MR HOWARD: My Lord, I think Mr Orr wanted to just say
 16 something, to correct something that he had said this
 17 morning, a reference , I think .
 18 MR ORR: My Lords, could I just correct some references that
 19 I gave your Lordships . You will recall that I referred
 20 to Mr Edelman's notional spreadsheet showing incidence
 21 or danger of COVID-19 in each policy area , and
 22 I referred your Lordships to references in Days 2 and 3
 23 of the transcript . I should have referred you to Days 1
 24 and 2. So the references I gave you should be
 25 {Day1/130:1}, page 134 and 147 and {Day2/140:1}.

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1 Apologies for that, my Lords.
 2 LORD JUSTICE FLAUX: No need to apologise. Thank you very
 3 much.
 4 Mr Howard.
 5 MR HOWARD: Yes. Thank you, my Lord.
 6 Just reverting to the discussion we were having
 7 before the adjournment, I would respectfully say we need
 8 to be careful not to confuse different things .
 9 If we take, firstly , the landslip example. The
 10 landslip appears to be what prevents the train from
 11 leaving , but in fact it wasn't as a matter of fact what
 12 prevented the train from leaving , because the signals
 13 were down or the locomotive was dead. So there is
 14 a danger there that what one is confusing is what may
 15 have appeared to be the position but wasn't in fact the
 16 correct position .
 17 As Mr Kealey explained on {Day4/42:1} to page 44
 18 when this was discussed , on my Lord's example the
 19 landslip did not in fact cause, and here we are looking
 20 at business interruption , it didn't cause the business
 21 interruption , because the business interruption was
 22 already, as it were, in train , it is just that people
 23 hadn't realised it .
 24 Of course, one of the things that is also important
 25 when discussing these things is to remember here that we

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1 are talking about in this case business interruption , so
2 what you are looking at is interruption over an extended
3 period. So you need to consider what would have
4 happened over the period over which the business
5 interruption is claimed but for the peril .

6 Now, on our case one has to remember, on the facts
7 it is actually clear and I think it is not really in
8 dispute, that the occurrence of the disease in the
9 insured's relevant policy area has not in fact made any
10 difference , because what has caused the interruption is
11 the government's response and that would have happened
12 anyway.

13 Just turning to my Lord's example of loss of
14 a vessel . That, you have got to remember, and this is
15 why one has to be careful not to confuse different
16 concepts, there you are talking about physical loss of
17 the ship. So the ship is insured against loss through
18 piracy , and piracy takes place, the pirates , off the
19 coast of Somalia or wherever it is , seize your vessel .
20 So the insured peril has in fact operated, and the
21 insured prima facie has a right to an indemnity because
22 he has lost his vessel through the operation of the
23 insured peril .

24 I think what your Lordship was then contemplating,
25 whether it is open to the insurers in that situation to

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1 say: ah well , although you lost the vessel through the
2 operation of the insured peril , something else would
3 have happened which would have deprived you of the
4 vessel .

5 Now, that obviously , whether that is an argument
6 that is open on a marine insurance contract against loss
7 of a vessel , will actually depend upon the terms of the
8 policy and obviously the terms on which the indemnity
9 arises . Because if the indemnity arises , for instance ,
10 at the moment that you have lost your vessel , it is no
11 good for the insurers to say, "Well, you might have lost
12 it a week later or two weeks later ", because their
13 contract is to pay up in respect of the loss of the
14 vessel there and then.

15 But if what is being said is the moment that the
16 pirates seized the vessel actually she was doomed and
17 you were going to lose her then, a similar analysis
18 arises . It is probably actually going to be as
19 a proximate cause level , because you wouldn't be able to
20 say, in all probability , that the insured event hadn't
21 operated at all to cause the loss , because
22 self - evidently the pirates had seized the vessel .

23 There is a danger in , as it were, trying to try
24 different cases on a different insurance contract , which
25 obviously one has then to speculate as to its terms.

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1 MR JUSTICE BUTCHER: It is merely because you are asserting
2 that proximate cause always means at least "but for"
3 cause, Mr Howard. But I don't necessarily want to take
4 up too much more time on this. You would say, I think,
5 in this case, that on any view it wasn't the dominant
6 cause. Just stick to that.

7 MR HOWARD: My Lord, I would say on our facts you don't ever
8 actually get to "but for" at all .

9 MR JUSTICE BUTCHER: No, of course, and you made all of
10 those submissions this morning.

11 MR HOWARD: On your Lordship's example, the piracy example,
12 what I was saying is that you -- I don't think there is
13 anything in that which actually undermines what I am
14 saying , because your Lordship's example is one where you
15 are saying , well you can establish a "but for" . There
16 still would be a question as to whether that actually is
17 the proximate cause of the loss . But we do say -- I
18 mean, at the end of the day there is a danger we are
19 then having an academic discussion , which is interesting
20 but divorced from the facts of this case. I find it
21 difficult to see in fact how you can ever get to
22 proximate cause if you haven't got over the "but for"
23 argument.

24 But there it is . As your Lordship says, I don't
25 think it actually really arises in this case.

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1 The other point I wanted to make about "but for" is
2 this . In a way it arises out of the question that you
3 posed to my learned friend Ms Mulcahy, which is that you
4 asked her whether there were any cases in which
5 something that is said to be the proximate cause when it
6 wasn't the "but for" cause, and her answer was by
7 reference to and only by reference to Silver Cloud.

8 As you know, insurers say that the case doesn't
9 stand for that principle at all . The thing that is
10 slightly odd about the FCA's submissions is there is
11 a line of authority , of course, where the courts have
12 not applied the "but for" test , and in insurance, and it
13 is of course the cases in the Fairchild Enclave.

14 Without going into it, because I think everybody is
15 familiar with it , one has started off with Fairchild ,
16 where the courts , for policy reasons in mesothelioma
17 claims, adopted an approach to "but for" causation or to
18 disapply "but for" causation where you have an employee
19 employed by a number of employers and you couldn't say
20 at what stage the disease was contracted. That was
21 obviously a view of trying to reach justice .

22 It then followed in the insurance cases that had to
23 apply that , that a similar , as it were more generous
24 approach had to be applied to the employers' insurance
25 coverage otherwise they would be left high and dry, the

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1 courts having made this policy decision .
 2 That quite clearly comes out of the cases . But
 3 I remind you, I don't think we need to turn it up, that
 4 in the Sienkiewicz case, which is at {K/144/66} at
 5 paragraph 186, Lord Brown made the salutary point,
 6 having reflected on the problems that Fairchild had
 7 given rise to, that the law tampers with the "but for"
 8 test of causation at its peril . I would suggest that
 9 those are salutary words, that it really does require
 10 a very exceptional circumstance like the Fairchild type
 11 of situation . And I will come on to explain why we are
 12 nowhere near the Fairchild situation in a moment.

13 Can I then move on to the FCA's case, just analysing
 14 that and how it stands . The FCA's case in its pleading,
 15 at the particulars of claim, paragraph 53.1 -- if we
 16 could get that up, it is {A/2/35}. Your Lordships by
 17 now will be very familiar with this . At paragraph 53.1
 18 their case is that there is only one proximate
 19 effective , operative or dominant cause of the losses ,
 20 namely the COVID-19 disease, including its local
 21 presence or manifestation and the restriction due to
 22 emergency, danger or threat of life , et cetera, caused
 23 by the disease .

24 Now, that being the FCA's case, once you have set
 25 aside their argument on construction and the so-called

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1 qualifying condition argument, this way of putting the
 2 case seems to run into obvious difficulties , in that the
 3 formulation of the sole proximate cause bears absolutely
 4 no resemblance to the insured peril in the QBE disease
 5 clauses .

6 So when one looks at that and you compare it with
 7 the disease clauses , the case doesn't look very
 8 promising .

9 You then have to look at their alternative case,
 10 which is then set out at paragraph 57 in the pleading ,
 11 which is on {A/2/39}, and what you see here is that they
 12 essentially hedged their bets:

13 "If and insofar as there is more than one concurrent
 14 cause, they are interdependent causes or alternatively
 15 are inextricably linked , alternatively a set of causes,
 16 none of the elements of which are sufficient on their
 17 own and which should be considered together .

18 Alternatively , even if there are independent causes,
 19 they do not prevent cover."

20 So one sees there that they run the whole gamut .
 21 Although as the matter was developed in argument through
 22 Mr Edelman on {Day3/50:12} of the transcripts -- sorry ,
 23 I think I must have given the wrong reference . Sorry ,
 24 I have given you the wrong reference . Could your
 25 Lordships just excuse me for a moment . (Pause)

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1 Yes, it is page 52, I apologise . {Day3/52:1},
 2 I apologise . So we see Mr Edelman says:

3 "We say, as we have said before and I say this in
 4 a sentence ..."

5 So that is the case that the FCA is running:

6 "... the government was responding to one
 7 indivisible occurrence or multiple occurrences which are
 8 aggregated as part of a national occurrence to become
 9 one combined cause. In reality , if all areas had not
 10 been affected to a greater or lesser extent, one can
 11 imagine there wouldn't have been a national lockdown.
 12 It was the national pictures of all these local
 13 outbreaks which caused the lockdown. And when the court
 14 considers what caused the application of the
 15 government's lockdown measures in any particular
 16 locality , the causal effect of local prevalence of the
 17 disease is part of that overall indivisible cause or
 18 viewed individually by virtue of its contribution to the
 19 overall picture , and is an effective cause of the
 20 government action."

21 So what one sees there is again this is
 22 a recognition that the individual area doesn't actually
 23 of itself make any difference , and it is simply saying ,
 24 well , it is part of an overall jigsaw .

25 Now, when considering this , as I have made clear,

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1 one needs to clear out of the way the argument on
 2 construction . At this stage of the analysis the FCA has
 3 lost on the meaning of the policy in both ways argued .
 4 So we have got conventional insurance , conventional
 5 peril and conventional application , we would say, of the
 6 "but for" test .

7 Now, before one tests this , what one needs to just
 8 reflect on are the submissions that were made on
 9 multiple interdependent causes and independent causes,
 10 none of which I think , as the cases developed, are
 11 actually relied on by the FCA. So they were I think
 12 being shown to your Lordships, as it were, as part of
 13 the background in order to get to their Silver Cloud
 14 submission .

15 So the multiple interdependent causes, by reference
 16 to cases such as The Miss Jay Jay, it was submitted, and
 17 it is right , that where you are looking at multiple
 18 interdependent causes, they need to be equal or nearly
 19 equal in efficiency . And that is what was said in The
 20 Miss Jay Jay .

21 Now, on our facts , a particular local occurrence of
 22 the disease , and here we are talking about potentially
 23 a single person in the relevant policy area having
 24 COVID-19, is a very long way from being of equal or near
 25 equal efficiency with all the facts which went to cause

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1 the government to order the nationwide lockdown.
 2 As I understand it, that is effectively conceded.
 3 It is not seriously suggested by the FCA that this is
 4 a case of multiple interdependent causes.
 5 You then have got the next point they took you to,
 6 which were the multiple independent causes. It was
 7 somewhat obscure in reality why those are being referred
 8 to. As Mr Kealey made clear, the difficulty faced by
 9 the FCA here is that the examples they refer to, the two
 10 hunters, or the decision of Mr Justice Coulson in the
 11 Greenwich Millennium Village case, are all cases of true
 12 multiple wrongdoing situations, where the "but for" test
 13 is disapplied, so that one wrongdoer cannot use another
 14 wrongdoer's actions or indeed its own wrongdoing to
 15 escape liability, leaving the victim uncompensated.
 16 So all of the cases relied upon by the FCA in this
 17 area are cases where the "but for" test was disapplied
 18 because they involved multiple wrongdoers or, in the
 19 insurance context, multiple insurers or sections of
 20 insurance policies potentially covering the same loss.
 21 Now the critical, albeit obvious, distinction
 22 between those cases and the present case is that this is
 23 not a multiple wrongdoer or insurer situation. The
 24 FCA's both written and oral submissions continuously try
 25 to suggest otherwise. So the FCA has set up the case as

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1 if it is brought against multiple insurers, all of whom
 2 rely on events happening in another insurer's policy
 3 area to avoid cover.
 4 That is not the true situation at all. It is just
 5 convenience and happenstance that these policies are
 6 being tested, or the claims of different insureds are
 7 being tested in one test action. In reality -- and one
 8 mustn't lose sight of this -- each case here that
 9 underlies this involves one policyholder and one
 10 insurer, and it is simply a question of what risks that
 11 insurer agreed to insure, assume on behalf of that
 12 policyholder.
 13 So once you bear that in mind, the answer is in fact
 14 simple. Here, QBE agreed to accept the risk of business
 15 interruption loss caused by the occurrence of
 16 a notifiable disease at the particular insured's
 17 premises or within the radius 1 mile or 25 miles of
 18 those premises.
 19 The fact that QBE may be entitled to deny liability
 20 to an insured in the South East and an insured in the
 21 North East is, frankly, nothing to the point. The
 22 coverage dispute is between QBE and each of the parties
 23 to each of their relevant contracts.
 24 Indeed, you have to test the argument that the FCA
 25 is making here by assuming that there was only one

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1 insured suing on one policy, and there are no other
 2 insurers who have issued policies, or QBE had issued no
 3 policies to anybody else. That doesn't make any
 4 difference, but that simply illustrates that one is
 5 simply concerned with the position between the two
 6 parties.
 7 My Lords, that leads me to the third category, which
 8 is really where the FCA's argument rests, which is the
 9 inextricably linked causes. Now, this argument, one has
 10 to recognise, arises because the FCA, at this stage of
 11 the analysis, accepts it cannot establish that the
 12 occurrence of the disease within the insured's relevant
 13 policy area was a "but for" cause of the business
 14 interruption. And it also arises on the basis that they
 15 have lost on their arguments of construction.
 16 As I showed you earlier today in the extract from
 17 Mr Edelman's oral submissions, this inextricably linked
 18 point was all -- the foundation for it, is an argument
 19 of construction or, as he put it, contractual intention
 20 or construction. As I said earlier, if the FCA are
 21 wrong about that, as they are, one wonders whether they
 22 say there is this third novel type of causation.
 23 In any event, assuming that they do, we have now
 24 seen that all the other ways of causation put forward
 25 don't work, and so you then have to consider whether The

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1 Silver Cloud is in fact authority for this new way of
 2 putting the case.
 3 Now, as I say, Mr Kealey addressed that decision.
 4 We would suggest it is not authority for the sort of
 5 novel causal analysis attempted by the FCA. If it were,
 6 it would be surprising, to say the least, that it has
 7 been so overlooked. The reality is that it involved
 8 a factual finding that certain matters were rolled up
 9 into one proximate cause, and a legal finding that the
 10 policy insured against the consequences of that
 11 proximate cause. The FCA is a very long way from that
 12 sort of orthodox position.
 13 But the bizarre thing is this, my Lords. The
 14 principle sought to be extracted from Silver Cloud
 15 actually turns the insurance on its head. We have
 16 already seen that the FCA seeks by way of construction
 17 to contend that the policies do provide cover for
 18 pandemics. Having lost that argument, it then seeks to
 19 use a decision in The Silver Cloud to invoke a principle
 20 of construction whose effect is somehow to create cover
 21 wider in scope than that provided by the express terms
 22 of the policy. As I say, that only has to be stated to
 23 see its obvious flaw.
 24 It is important to be clear about precisely what the
 25 FCA requires by way of its so-called local piece of the

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1 jigsaw.

2 On the FCA's case, all that is required is the
3 presence of one occurrence of COVID within the relevant
4 policy area. It can be brought into the area by
5 a single person who has no symptoms and is never
6 diagnosed. But on their case that is sufficient, on
7 this inextricably linked argument, to trigger cover for
8 all losses in connection with the disease, whether from
9 the nationwide lockdown or general public apprehension
10 or otherwise.

11 Using the shop examples that we set out at the start
12 of our written argument, so beloved or perhaps detested
13 by Mr Edelman and Mr Edey, all that is required to turn
14 Shop A into Shop B is the one undiagnosed case.

15 So ultimately The Silver Cloud apparently is giving
16 rise to essentially the same result as the qualifying
17 condition or some sort of anchor point, or the special
18 rule of causation by agreement, but which is now said to
19 be arising through some undeclared and novel rule of law
20 to be extracted from The Silver Cloud case. One really
21 wonders what this rule of law is.

22 On our case, according to the FCA, as long as there
23 is an anchor person, whether diagnosed or undiagnosed,
24 symptomatic or asymptomatic, in the policy area, the
25 insured effectively has, as a result of this supposed

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1 rule of law, full cover for the effects of the disease
2 wherever it occurs, and that is notwithstanding that the
3 insurance is in respect of the effect of the occurrence
4 of the disease in the relevant policy area.

5 So the Silver Cloud decision apparently supports
6 what actually ultimately is this game of lotto. In my
7 submission, it is no authority for anything of the sort.

8 So, my Lords, we say and submit to your Lordships
9 that operating the policies in this case is in fact
10 a simple exercise. As I said, you start with the proper
11 construction, and I don't think I need to repeat that.
12 One then asks whether the loss in question was caused by
13 the peril. If the answer is yes, you may have to ask
14 the proximate cause question and then you move on to the
15 quantification and the application of the trends clause.

16 Now, your Lordships have probably had more than
17 enough of looking at different examples, but I think
18 I ought to deal with Mr Edelman's reference to the Isle
19 of Wight, because he referred to that, as it were, as
20 demonstrating that my submissions must be wrong.

21 You will remember with great fanfare on {Day1/144:1}
22 he referred to it, and he referred to it because he
23 said, well, the Isle of Wight is only 20 miles long and
24 it goes into lockdown, and how do our arguments work.
25 Your Lordships will look at the reference, but he sought

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1 to say somehow this demonstrates that we can't be right.

2 Now, when one actually properly looks at the Isle of
3 Wight, there is nothing actually at all surprising in
4 the result when you apply our argument.

5 So assume the Isle of Wight and assume you have two
6 businesses, two hotels in Cowes, one has a 1 mile radius
7 clause and the other has a 25-mile radius clause.

8 The reason it is important to bear in mind the two
9 differences, the 25-mile radius clause would stretch
10 across the Solent to Southampton, whereas the 1 mile
11 clause would not.

12 Now, let's assume a situation where the island is
13 disease-free. When the general public apprehension,
14 government guidance and ultimately the lockdown
15 occurred, it causes trade to slow in the island just as
16 much as in the mainland UK.

17 Now, on both the FCA's case and QBE's case, the
18 1 mile policyholder has no claim, because it is a Shop A
19 in our example.

20 But on the FCA's case, provided there had been at
21 least one case in Southampton, the 25-mile policyholder
22 gets cover, possibly following a retrospective
23 statistical analysis showing there must have been a case
24 of COVID in the 25-mile area. So by good fortune, on
25 the FCA's case, and by happenstance, the 25-mile clause

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1 responds.

2 Now, on our case, perfectly orthodox, both the
3 25-mile policyholder and the 1 mile policyholder are in
4 the same position. They have both suffered BI loss for
5 the same reason and are unaffected by the actual or
6 potential case of COVID in Southampton.

7 Now, if you change the assumed facts scenario to
8 assume that the Isle of Wight is the only place hit by
9 a notifiable disease and a form of island-wide lockdown
10 is imposed, so no one in or out of the island and all
11 shops to close and so on. Our two hotels are then
12 suffering loss which they wouldn't have suffered but for
13 the local lockdown. So are they covered?

14 Well, the 25-mile policyholder, who has paid for the
15 larger radius, plainly is. Because the cases in the
16 Isle of Wight within his 25-mile radius led to the
17 lockdown.

18 Now, the 1 mile policyholder, the answer may or may
19 not be the same, it depends upon where he is and where
20 the cases are. If the position is that the cases within
21 his 1 mile radius have not made any difference at all,
22 and that the island was going to go into lockdown
23 because of the cases outside his area, then the argument
24 or the position is exactly the same as the one we are
25 considering, which is the occurrence in his area hasn't

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1 made any difference .

2 Now, there are all sorts of other examples you can
3 give. I think that is probably sufficient . But the
4 simple answer is the one that I made previously: the
5 purpose and effect of the 1 mile or 25-mile radius
6 provision, properly construed, is to limit the insurer 's
7 scope of cover, and it is not this threshold or proviso
8 or lottery ticket as the FCA would say.

9 The next point I want to deal with is London. The
10 reason I need to deal with that is because of the
11 submissions of Mr Edey on {Day3/179:1}, where
12 essentially what Mr Edey sought to say is, well, it is
13 obvious that London was the proximate cause of the
14 national lockdown, and therefore somehow that has to
15 feed into the equation.

16 Now, my Lords, the first thing I would say about
17 this is that the premise of -- the first thing to note
18 is that the premise of Mr Edey's assertions at this
19 point is that we are correct on our argument as to the
20 construction of the policies and the approach to
21 causation .

22 But there are then two important points to make in
23 response to these submissions, which appear to be an
24 attempt to obtain, in this test case, a factual finding
25 from the court that London was in fact a "but for" cause

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1 of the national lockdown. The two points are these.

2 First, we would suggest it is simply not open to the
3 HIGA, if that is what one is to call them, interveners
4 to advance such an argument. This is not a pleading
5 point, my Lords, but a point of substance. It is
6 contrary to the FCA's pleaded case, which I have shown
7 you. Their pleaded case is that there is no 25-mile
8 radius area which would make any difference. That would
9 apply equally to London as it would anywhere else.
10 It is also contrary to what I showed you in their
11 skeleton argument, the FCA's skeleton argument at
12 paragraph 241. In other words, the whole premise of
13 this test case is that it is not possible to take any
14 25-mile radius area, and say that without that area the
15 outcome would have been different. Now, it is true that
16 the FCA, at footnote 241, which I showed you, caveated
17 the position, but it recognised, rightly, that it is not
18 possible in the test case to investigate such facts.

19 Secondly, in any event, it is plainly wrong as
20 a matter of fact that London was the "but for" cause of
21 the nationwide lockdown or similar. The government
22 based its --

23 MR JUSTICE BUTCHER: Are you inviting, us, Mr Howard, to not
24 get into this, or to get into it and decide it in your
25 favour? It matters to this extent, that if we accept

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1 your first point, then it would presumably still be open
2 for people to say London was indeed the cause.

3 MR HOWARD: Well, the way in which the matter has come
4 before you on the basis of the FCA's -- I mean both the
5 assumed facts and the agreed facts, and then one has got
6 the FCA's assertions. The FCA has not sought to say in
7 respect of any particular relevant policy area: well,
8 the disease in that area is actually the driver, as it
9 were, for the government's action; and the government's
10 action, if we assume no disease in that area, would
11 either have still been the same or they would have not
12 imposed any restrictions in that area.

13 So the danger in a case like this is in trying to
14 decide facts when really the purpose of the test case is
15 to decide questions of principle. So I am only really
16 responding to this and setting out at least why, on the
17 facts that are before your Lordships, the position is
18 actually that London couldn't be the driver. No factual
19 determination. I mean, if your Lordships accept that,
20 that is not going to actually preclude an insured
21 saying: well, I am not bound by that, because all I am
22 bound by are questions of legal principle that are
23 determined in the FCA test case. So it has been left
24 open for all true questions of fact ultimately to be
25 determined between an insured and the relevant insurer.

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1 LORD JUSTICE FLAUX: Does this point go back to those
2 passages in the SAGE minutes we were being shown this
3 morning?

4 MR HOWARD: No.

5 LORD JUSTICE FLAUX: Because, I mean, they would suggest
6 that at least at the time when the lockdown was put in
7 place, the reasons or the motivations for doing it were
8 not because of London.

9 MR HOWARD: Well, my Lord, yes, those are relevant to what
10 I am saying. I thought your Lordship was asking me
11 a slightly different question.

12 LORD JUSTICE FLAUX: What my Lord is putting to you, we are
13 at risk of straying into areas of factual investigation
14 which (a) we shouldn't be doing it and (b) we really
15 haven't got the evidence to be doing it.

16 MR HOWARD: No, I entirely endorse that. I am not seeking
17 to invite your Lordships to trespass into territory you
18 shouldn't go into.

19 I think what your Lordships can properly do, though,
20 is to recite what the case is before you that the FCA is
21 making. The point I was really just going to make is
22 that the FCA's case, the material they have put before
23 you, shows that London is not, as it were, in some
24 special category, because their case is that the
25 government exercised a nationwide lockdown, and

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1 essentially what it comes down to, and this comes out of
2 those minutes that Mr Orr was showing you amongst other
3 things, but essentially, if you ask yourself really what
4 was happening, is the government took the measures it
5 took in the middle and towards the end of March because
6 of the increasing concern that fed through to them from
7 SAGE as a result of the views that were being taken of
8 COVID as a result of what had happened in Italy and
9 elsewhere, that the so-called R rate, we all remember
10 that, was something like 3, which meant that the rate of
11 growth of the disease is that it doubled or something
12 like that every couple of days, and that is why there
13 was this massive concern about the NHS being overrun.

14 So saying, well, what about London, actually no
15 particular place makes any difference; it is that the
16 government was concerned that you had a disease which
17 was in danger of spreading, which caused severe illness,
18 and which they thought was going to overrun the NHS in
19 terms of its capacity to put people on ventilators and
20 things like that. That is why they built things like
21 the Nightingale Hospitals extremely quickly.

22 As it happens, hindsight is a wonderful thing, we
23 now know the Nightingale Hospitals weren't really
24 required and have hardly been used, but the perception
25 at the time was that the NHS was going to be overrun and

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1 that is what they were concerned about.

2 But all I am saying for present purposes is it is
3 the FCA's case that the lockdown was a country-wide
4 approach, not a reaction to cases in any particular
5 locality, and it is their case it was because the shape
6 of the curve of infection rates was similar across the
7 whole country.

8 So it was Mr Edey who has essentially tried to open
9 this up and to look for or to try and obtain different
10 factual findings, and we say the whole basis on which
11 the case is being fought is that what he is putting
12 forward isn't the case. If he and his clients want to
13 contend otherwise, that is something which would have to
14 be fought out in a separate piece of litigation, is what
15 it amounts to.

16 LORD JUSTICE FLAUX: That is all for another day.

17 MR HOWARD: Exactly.

18 I can then move on, seamlessly, I hope, to
19 a slightly different topic, and I will deal with it very
20 briefly, and that is the burden of proof point which
21 came in in the reply, and was a point addressed by
22 Mr Edey based upon the Dalmine case. It is fairly clear
23 that the point that was raised has, as I said earlier
24 come, from Mr Edey.

25 Now, the starting point is that the insured bears

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1 the burden of proving that loss was caused by an insured
2 peril, including on a "but for" basis. The Dalmine
3 case -- I have to say this is I think the first time
4 I have been aware of it being referred to. I might be
5 wrong, it may be referred to elsewhere, but I haven't
6 come across it. But I would suggest that it provides no
7 assistance to the policyholders in this case.

8 You will remember that that was a case where what
9 had happened was that Mr Edey's clients, Dalmine, had
10 fraudulently certified that some pipes that were going
11 to go into the construction of a pipeline in the
12 North Sea were on spec when they knew full well they
13 were not on spec.

14 The trial was a very, very hard fought affair, as
15 these things go, and what Dalmine, as luck would have it
16 for them, they thought, the people who had welded the
17 pipes together, according to Dalmine, had done so
18 negligently. So the question at the trial was what was
19 the cause of the cracking in the pipes; was it the fact
20 that the pipes were not of the correct certain
21 specification or was it the negligent welding?

22 Mr Justice Cresswell, after hearing some pretty
23 complicated scientific evidence, this was really
24 state-of-the-art stuff on metallurgy, held that the
25 incorporation of the non-compliant pipes had caused the

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1 pipeline to fail. In other words, he rejected Dalmine's
2 argument that the cause of the failure was the negligent
3 welding, and so the fraudsters were held liable.
4 Nothing wrong with that, you might think.

5 As I say, at trial the fraudsters had tried to prove
6 that the pipes failed, despite inclusion of the
7 fraudulently certified pipes, due to negligent welding.
8 Now, it was only in those circumstances that this
9 question of burden of proof arose. So the claimant had
10 discharged its burden of proof, and the burden of proof
11 that the claimant had discharged was that the
12 fraudulently certified pipes had failed, and they had
13 failed because they were not the right pipes.

14 The defendant then had sought to prove its own
15 averment, namely that even if compliant pipes had been
16 used, the pipeline would have failed anyway. Now, they
17 didn't actually prove that. So what they were then
18 saying: aha, even though I haven't proved what I set out
19 to prove, you the claimant have got to prove a negative,
20 you have got to prove that something else would not have
21 caused failure of the pipes.

22 So, for instance, taking the Dalmine case, they
23 could have just as easily have said: aha, BHP (who were
24 the owners of the pipeline) it is perfectly true that
25 I supplied fraudulently certified pipes, and it is

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1 perfectly true that those pipes failed because they were
2 the wrong spec, but you know what, a lot of submarines
3 go around in this part of the North Sea and, BHP, you
4 haven't proved that a submarine wouldn't have come along
5 at some point and collided with the pipeline. It is
6 that sort of level of argument, that you haven't proved
7 all sorts of things. It is almost like saying you
8 haven't proved that pigs can't fly.

9 But if you turn to the judgment, at {J/89/12}
10 paragraph 36, it really sums it all up:

11 "So in this case we think that causation is proved
12 once BHP has shown the reason why the pipeline failed
13 when it did was because of the failure of non-compliant
14 pipe which but for Dalmine's deceit would have been
15 rejected. BHP has shown that the pipeline failed only
16 where one or both of the pipes was non-compliant and at
17 no other welded joint. In such circumstances, if
18 Dalmine wishes to show that a hypothetical pipeline made
19 up only of compliant pipe, given more time and the
20 operation of the pipeline at the ultimate working
21 pressure of 128 bar, would have failed in any event,
22 then it bears the burden of proving that on the balance
23 of probabilities. For these purposes, the mere
24 possibility of such failure would not be enough.
25 However, Dalmine concedes that it cannot sustain that

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1 burden."

2 That is just saying something, in my submission,
3 which is obvious as a matter of ordinary application of
4 the burden of proof and, indeed, as a matter of common
5 sense. The argument that Dalmine was seeking to run in
6 the Court of Appeal, that somehow BHP fails because they
7 haven't demonstrated a negative, when they had in fact
8 demonstrated the pipeline failed because of the failure
9 of the non-compliant pipes, it seems to me, I would
10 suggest, it's just an utterly obvious finding. There is
11 nothing you can extract from this decision which assists
12 you here.

13 LORD JUSTICE FLAUX: It is like going back to the forms of
14 action, clanking their chains before the Common Law
15 Procedure Act 1854, isn't it?

16 MR HOWARD: Your Lordship there has the better of me, I'm
17 afraid.

18 LORD JUSTICE FLAUX: It's the forms of pleading, before the
19 amendments were made in Victorian England, required
20 a plaintiff to prove all sorts of negatives along the
21 way. That was all abandoned and the law was changed by
22 the 1854 Act.

23 I remember when I first looked at this point,
24 I thought that sounds to me like an attempt to revive
25 that concept, because in the modern law, he who alleges

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1 has to prove. So if Dalmine wanted to allege that the
2 real cause of the loss was something else, it was for
3 them to prove it.

4 MR HOWARD: Yes, exactly.

5 LORD JUSTICE FLAUX: It is not rocket science, is it?

6 MR HOWARD: It is not rocket science. The case is really
7 not of much interest to anybody, that is why I was
8 surprised to see it. And when I got a message from
9 Mr Kealey saying I ought to explain what the answer to
10 it was, my first reaction was, I have not been in this
11 case, why are you asking me? That may say something
12 about my memory.

13 But, more importantly, when I did refresh my memory
14 and you read the case, what you actually see happened is
15 that the case collapsed in the Court of Appeal, where
16 the Dalmine side -- what happened was Lord Justice Rix
17 said: well, we are about to have a -- I can't remember
18 how long the appeal was, and he said, "I don't really
19 understand your case on burden of proof, explain it to
20 me". It was then explained, I think I had to make some
21 brief submissions, and then Lord Justice Rix said,
22 "Well, I can't see any of this works", and that is when
23 Dalmine gave up. But they had come along seeking to
24 prove that actually a compliant pipe would have failed,
25 but they recognised that they couldn't do that.

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1 Anyway, as I say, it is a curiosity. Rather like
2 the arguments based on Silver Cloud, it is trying to
3 extract from a case some general proposition and I am
4 afraid it simply does not bear what is sought to be
5 extracted. Really, both are examples of improper use of
6 authorities.

7 Before leaving burden of proof, one final point to
8 make is that in the course of exchanges with the Bar at
9 different stages, your Lordships have expressed concern
10 about difficulties of the insured in different
11 circumstances proving their case.

12 Now, the first point is one that Mr Kealey made,
13 which is right and obvious. Difficulties of proof do
14 not, and cannot, affect the correct legal analysis. The
15 fact, for instance, that insureds to these policies may
16 in some cases be relatively small concerns who may not
17 have the wherewithal to embark on expensive litigation
18 cannot make any difference to what is the right view as
19 to what the policies mean and how they operate.

20 But it is actually the case, as again I think your
21 Lordships have been told and will know, that business
22 interruption insurance is in fact a notoriously
23 difficult area anyway to calculate and determine the
24 appropriate indemnity. That is one of the reasons that
25 one has the trends clauses. The trends clauses are

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1 intended to be a fairly rough and ready machinery which
2 operate to assist the parties in trying to determine
3 what is in fact the effect of the insured peril .

4 I don't think I need to address you in any detail on
5 that, but there is one point that I do want to say
6 something about, which was a submission that Mr Edelman
7 made, which I think it is important to address simply
8 because it is something of more general interest . You
9 may remember, it was a point that he made by reference
10 to the facts of Orient-Express, where the argument he
11 made was that assume you had a downturn in bookings as
12 the hurricane approached, and then the hurricane hits
13 the hotel , and let 's assume you don't have the
14 difficulties with the damage to New Orleans. As
15 I understood it, Mr Edelman was suggesting, well, what
16 you can't do when you come to do the quantification of
17 loss is to distinguish between the losses caused, for
18 the purposes of applying a trends clause, through the
19 apprehension of the hurricane and the losses caused by
20 the hurricane itself .

21 There are a number of things that are wrong with
22 that. The first is that the insured peril in the
23 Orient-Express is business insurance caused through
24 physical damage to the hotel. Business interruption
25 caused by fear of a hurricane is not an insured peril .

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1 But Mr Edelman sought to use this to suggest that the
2 emergence of COVID-19 is like an approaching hurricane .
3 He said that on {Day3/55:1}.

4 That simply repeats the fundamental error as to the
5 nature of the insurance and, just as in Orient-Express,
6 the insured peril was not fear of the hurricane, or even
7 the hurricane itself , but physical damage to the hotel .
8 So here, the worldwide, nationwide COVID-19 health
9 crisis , nor fear of the same, are not the insured
10 perils ; the insured peril is the occurrence within the
11 relevant policy area .

12 I think your Lordships asked what Riley had to say
13 on this, and Mr Edelman said he didn't think Riley dealt
14 with it. That is actually not right. Riley does deal
15 with the point by way of a commentary on the New World
16 Harbourview Hotel case, which you probably remember the
17 SARS outbreak in Hong Kong. The relevant extract from
18 Riley is at {J/154/88}. If we go to page 88, this is
19 part of a discussion about the New World Harbourview
20 case. You see that at the top of the page. If you look
21 at the top of the page where he refers to New World
22 Harbourview, he says:

23 "The business interruption was part of a composite
24 mercantile policy , written on a UK gross revenue
25 basis ..." and so on.

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1 At the end of the paragraph:

2 "... the court had to consider ... the application
3 of the other circumstances clause."

4 Then they set out the clause, and it is the next
5 part that is relevant :

6 "The court had determined that the trigger date for
7 the cover under the second part of the clause was
8 27 March, 2003, when the ... government made SARS
9 a notifiable disease . Following earlier reports in the
10 press, the insured had argued that the disease had
11 become notifiable either on 13 February 2003 when the
12 hospital authority requested hospitals to report cases
13 of severe community acquired pneumonia, or on
14 21 February 2003 when a mainland visitor , who
15 subsequently died and was confirmed as having SARS, was
16 admitted to hospital .

17 "When it came to the application of the other
18 circumstances clause, the insured argued that any impact
19 of the SARS outbreak should be ignored in calculating
20 standard revenue. The court rejected this argument.
21 The publicity surrounding the potential outbreak had
22 clearly affected the standard revenue of the business
23 prior to the trigger date ... and this was to be taken
24 into account even if the relevant circumstances
25 subsequently crystallised into an insured peril .

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1 "The New World Harbourview Hotel case confirms not
2 only that the other circumstances clause should be
3 applied in a case of wide area damage, it also
4 illustrates that the applicable trend may well be
5 capable of measurement, in this case by virtue of the
6 downturn trend that was already evident .

7 "Whilst the New World Harbourview Hotel was already
8 suffering a downturn before the trigger date, the
9 reverse could also occur. For example, a hotel might
10 suffer damage as a result of storms which cause its
11 closure. It is not difficult to envisage circumstances
12 why the accumulated effect of those storms is widespread
13 flooding, some days later which causes a downturn in
14 visitors to the region as a whole. Applying the
15 approach in New World Harbourview Hotel, the loss in the
16 first few days would not be subject to adjustment to
17 reflect the impact of wide area damage, but once the
18 flooding had occurred, an adjustment would be merited
19 and could be measured."

20 Now, that directly contradicts , I think,
21 Mr Edelman's submission, both as to how he was saying
22 the trends clause operates and also how in fact business
23 interruption operates in relation to our type of
24 situation . I thought that was worth showing to
25 your Lordships .

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1 My Lords, that essentially brings me to my
2 conclusion. My conclusion is, as your Lordships
3 probably are fully aware by this stage, that we submit
4 that in truth, from QBE's perspective, the case is quite
5 simple.

6 Firstly, the disease clauses provide insureds with
7 business interruption cover for business interruption
8 caused by the occurrence or manifestation of COVID in
9 their relevant policy area. That requires an insured to
10 prove, firstly, that there was such an occurrence or
11 manifestation in the relevant policy area, and secondly,
12 that such occurrence or manifestation caused them
13 business interruption, and absent proof of these points
14 there is no cover. So there will be no cover for
15 business interruption loss that would have been suffered
16 in any event.

17 And on the FCA's case, the government's actions in
18 response to COVID-19 were, as they say, a single body of
19 public authority intervention which would have occurred
20 in any event, and irrespective whether a case or cases
21 of COVID occurred on any particular insured's premises
22 or within 1 mile or 25 miles thereof. Accordingly, the
23 cover provided by QBE disease wordings does not respond
24 to any insured's business loss caused by the
25 government's actions. Nor do they provide an indemnity

1 in respect of any loss that would have been suffered in
2 any event by reason of what the FCA calls the COVID-19
3 events, rather than business loss attributable to the
4 occurrence of COVID-19 in their relevant policy area.

5 My Lords, those are my submissions, unless I can
6 assist you on anything further.

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

8 So now it is Mr Salzedo.
9 (2.59 pm)

10 Submissions by MR SALZEDO

11 MR SALZEDO: My Lord, yes, thank you.

12 May it please you, my Lords, we have reached the
13 graveyard slot. Despite that, I know your Lordships do
14 not need any reminder that the matter is just as
15 important to Argenta and to its policyholders who are
16 owners of holiday homes and guest houses, called
17 category 6 in this case, as it is to everybody else with
18 an interest in this case.

19 As Ms Mulcahy told your Lordships on {Day3/155:16}
20 to line 18, only one Argenta clause is in issue in these
21 proceedings and it is, quoting Ms Mulcahy, "a very
22 simple clause"; it is interruption as a result of
23 occurrence of a notifiable disease within 25 miles.

24 The main point in this case in which we have an
25 interest is the jigsaw point and how it works or does

1 not work in the case of a very simple clause, as
2 Ms Mulcahy called it, like Argenta's. I adopt what has
3 been said by Mr Kealey, Mr Howard, and the other
4 insurers about that.

5 I will try not to repeat, but I do want to say
6 a little more about proximate cause as it applies
7 specifically to Argenta's simple clause, followed by
8 some very short submissions on each of the exclusions
9 and counterfactuals, and then a brief submission on the
10 declaration we seek relating to pre-notifiability
11 losses, which Mr Edelman specifically attacked.

12 So, my Lords, my submissions on proximate cause.
13 Before I go to Argenta's clauses themselves I would like
14 to remind my Lords of six items of common ground as
15 between the FCA and Argenta.

16 The first is at {A/15/18}, which is the list of
17 issues that was agreed between the parties. At the top
18 of page 18 you see paragraph 39:

19 "It is common ground, as a matter of law, that the
20 policyholder must establish that its losses are
21 proximately caused by an insured peril."

22 The second piece of common ground is contained in
23 the FCA's skeleton argument at {1/1/300}, where at
24 paragraph 949 the FCA accepts that in Argenta1 a defined
25 insured peril is an occurrence of disease within

1 25 miles of the premises.

2 MR JUSTICE BUTCHER: Which paragraph?

3 MR SALZEDO: 949, the very last line of the page.

4 MR JUSTICE BUTCHER: I see, yes.

5 MR SALZEDO: The obvious consequence of those first two
6 points of common ground was also accepted, and this is
7 my third point of common ground, by Ms Mulcahy in her
8 oral submissions against Argenta at {Day3/163:23}
9 through to {Day3/164:1}, where she said:
10 "The FCA accepts that the interruption must be
11 directly caused by the occurrence within 25 miles
12 because the term resulting from it imports a proximate
13 cause test as Argenta also says in its skeleton."

14 My Lords, the fourth piece of common ground that
15 I wish to remind you of is at {A/2/3}. It is the
16 particulars of claim. It is paragraph 1, the very
17 simple point. There is a pandemic. That is paragraph 1
18 of the particulars of claim. And the losses with which
19 this action is concerned arise from the pandemic.

20 The fifth point of common ground is moving on to the
21 reply at {A/14/27}. At paragraph 52, as Mr Orr reminded
22 my Lords this morning, the FCA say that they do not
23 allege that the advice given or restrictions imposed by
24 the UK Government were caused by any particular local
25 occurrence of COVID-19.

1 Finally, my Lords, still in the reply, if we go to
 2 page 29, at paragraph 58.1, {A/1/29} at lines 5 to 7.
 3 This is one of the places where the jigsaw argument is
 4 set out. But at lines 5 to 7 my learned friends say:
 5 "This is especially true where one of the things,
 6 COVID-19, in the UK, is the underlying cause of the
 7 other, such as the presence of the disease within the
 8 relevant policy area", which is the FCA's term for each
 9 25-mile radius around the premises of an Argenta
 10 policyholder.
 11 So what is accepted and is common ground is that the
 12 chain of causation runs from the pandemic to the
 13 occurrences in each particular 25-mile radius area and
 14 does not run the other way, as we saw at paragraph 52.
 15 They are not saying it runs the other way as well. So
 16 it only runs one way.
 17 Now, my Lords, in any ordinary case your Lordships
 18 may think that the first three points of common ground
 19 combined with the second three points of common ground
 20 would be sufficient to demonstrate that any particular
 21 Argenta policyholder facing business interruption
 22 arising from the government advice or restrictions
 23 relating to COVID will not have cover under Argenta1,
 24 because those matters are not proximately caused by the
 25 occurrences in their particular 25-mile radius circle.

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1 The only basis for a different result appears to be
 2 the jigsaw argument.
 3 Now, my Lords, with that introduction your Lordships
 4 can return to the Argenta clauses at {B/3/57}. At
 5 page 57 your Lordships see the main business
 6 interruption insurance section. Similar to the position
 7 in the Orient-Express, as Mr Kealey explained last week,
 8 the peril here is big "D" Damage under the business or
 9 contents section, and the small "d" damage in this
 10 section is the business interruption as a result of the
 11 premises being made uninhabitable by that peril.
 12 If we then turn to page 58, {B/3/58} your Lordships
 13 can see the extensions in the business interruption
 14 section. This sets out a number of other perils which
 15 may cause business interruption. The box at the top
 16 left are the important words, because they are relevant
 17 on the next page as well:
 18 "The company will also indemnify the insured as
 19 provided in the insurance of this section for such
 20 interruption as a result of ..."
 21 If we then go to page 59 {B/3/59} your Lordships see
 22 that the fourth set of extensions are (a) to (e). Your
 23 Lordships see, if you look through those, that (a), (b),
 24 (c) and (e) are all perils that operate at the premises,
 25 or in (b) attributable to food and drink supplied from

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1 the premises. The only one here that goes beyond the
 2 premises is (d), the crucial one:
 3 "Any occurrence of a notifiable human disease within
 4 a radius of 25 miles of the premises."
 5 So that the insurance that is due for Argenta is
 6 simply such interruption as a result of any occurrence
 7 of human notifiable disease within a radius of 25 miles
 8 of the premises.
 9 Still on page 59, my Lords, your Lordships may want
 10 to note the next peril, number 5, pollution or oil
 11 spillage, because it is also a 25-mile radius one:
 12 "Pollution or oil spillage on a beach, river or
 13 waterway within a 25-mile radius of the premises."
 14 The FCA's Chesil Beach pollution example was
 15 dismantled by Mr Kealey. But let me suggest a different
 16 pollution example based on Argenta's clause. Imagine an
 17 insured with a guest house or holiday home in Dover and
 18 a single oil spill on the beaches of Northern France
 19 that closes the ferry ports in Calais and Boulogne.
 20 The beach at Calais I understand from the internet
 21 is about 21 miles from Dover, whereas Boulogne is over
 22 30 miles away.
 23 So ferries from Calais are cancelled because of the
 24 spill and that causes interruption to the business. The
 25 policy on the face of it responds. But if ferries from

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1 Boulogne are cancelled with the same result the policy
 2 does not respond. That is because proximate cause is
 3 a question of causation rather than jigsaws.
 4 It will not help the policyholder who wants to claim
 5 Boulogne ferry losses to say that the oil that affected
 6 ferries from Boulogne was inextricably linked with the
 7 oil that affected ferries from Calais, nor that the oil
 8 spill affecting both beaches is one indivisible fact.
 9 My Lords, if we turn to page 60 we have the basis of
 10 settlement clause which defines the indemnity in terms
 11 of the gross income falling short of the standard gross
 12 income.
 13 Your Lordships don't need, I don't think, to read
 14 that in detail. I am just tracing through where it
 15 works. You have the references. But then if we go back
 16 to page 56 in the bundle there are a number of important
 17 definitions, including in particular standard gross
 18 income, which is the trend clause in very similar form
 19 to that which your Lordships have seen in other policies
 20 and indeed in the authorities.
 21 My Lords, would this be a good time to take a short
 22 afternoon break, or would your Lordships prefer to go on
 23 a bit longer? I am very much in your Lordships' hands.
 24 LORD JUSTICE FLAUX: If you have reached a point -- because
 25 you have shown us the policy wording -- where you are

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1 now moving on to something else ...
 2 MR SALZEDO: Yes, I am moving on to more substantive
 3 submissions perhaps.
 4 LORD JUSTICE FLAUX: Let's break now in that case, and say
 5 20 past.
 6 MR SALZEDO: Thank you, my Lord.
 7 (3.10 pm)
 8 (Short break)
 9 (3.20 pm)
 10 LORD JUSTICE FLAUX: Okay, Mr Salzedo, when you are ready.
 11 MR SALZEDO: Thank you, my Lord.
 12 If we can bring back on to the screen the relevant
 13 clause at {B/3/59}, your Lordships may recall that as
 14 Mr Kealey pointed out Mr Edelman's argument appeared to
 15 involve amending the wording in a particular way and
 16 adapting the way Mr Kealey put it for the Argenta
 17 wording. I don't know whether there are more
 18 microphones on than need be but I am getting an echo at
 19 the moment, but adapting Mr Kealey's wording to Argenta
 20 his point was that Mr Edelman's argument would read the
 21 clause something like:
 22 "Such interruption as a result of a notifiable human
 23 disease provided that there has been an occurrence
 24 within a radius of 25 miles of the premises."
 25 Now that amendment to the clause is only really

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1 a first approximation to the clause which Mr Edelman's
 2 submissions seemed to be addressing, because on its face
 3 that amendment would cover a situation where the local
 4 occurrences were many years earlier, for example. They
 5 would still satisfy the trigger, using one of
 6 Mr Edelman's phrases.
 7 As I understood the FCA's case, it was accepted that
 8 to give any meaning at all to the 25-mile limit you did
 9 need to include some causal connection between the local
 10 occurrence and the interruption to the policyholder's
 11 business. In case references are needed to justify that
 12 understanding I refer to the description of the argument
 13 at the FCA's skeleton at paragraph 241, which is
 14 {I/1/97}, and to Mr Edelman's submissions on
 15 {Day1/98:17} to page {Day1/99:5} and {Day1/104:3} to
 16 line 8.
 17 The question then arises, what is the causal
 18 connection for which Mr Edelman contends as an add-on or
 19 as he would presumably say implicit in our clause at
 20 {B/3/59}. (Pause)
 21 (3.22 pm)
 22 MR SALZEDO: Thank you. The question that then arises is
 23 what exactly is the causal connection?
 24 MR JUSTICE BUTCHER: Mr Salzedo, I am not sure whether
 25 my Lord is there.

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1 Yes, he is.
 2 LORD JUSTICE FLAUX: That's entirely attributable to
 3 technical incompetence on my part.
 4 MR SALZEDO: I broke the whole system.
 5 LORD JUSTICE FLAUX: Mr Salzedo, we have lost slightly over
 6 five minutes, so we will sit five minutes longer.
 7 MR SALZEDO: Thank you.
 8 So the question that arises next is what is the
 9 causal section that Mr Edelman is contending for as, we
 10 would say an add-on to the clause, as he would
 11 presumably say implicitly written into our clause at
 12 {B/3/59}.
 13 Mr Howard pointed out that Mr Edelman had not
 14 answered that question, and he suggested an answer to
 15 this same question by reference to QBE2 in the course of
 16 his submissions just before lunch.
 17 Before hearing Mr Howard I drafted my own idea of
 18 what Mr Edelman's submissions appear to amount to in
 19 relation to Argenta1 and it is quite different, which
 20 perhaps confirms how unclear the FCA's argument is.
 21 Unless it just confirms that I have not been listening
 22 carefully enough.
 23 In the hopes of assisting the court to identify the
 24 argument, I will put mine forward in competition for
 25 consideration, in competition with Mr Howard. Doing the

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1 best I can on the basis of my understanding of what
 2 Mr Edelman has been saying, it seems to me he wants to
 3 adjust our clause so that it reads "such interruption as
 4 a result of a notifiable human disease, provided that
 5 there has been some occurrence within a radius of
 6 25 miles of the premises and provided that such
 7 occurrence is part of the same outbreak of such
 8 notifiable human disease as the outbreak which has
 9 caused the interruption".
 10 Now, that revised wording brings to the front and
 11 centre the concept of an outbreak which reflects the
 12 role of an outbreak throughout the FCA's written and
 13 oral argument on this topic, even though it doesn't have
 14 that role in the contract. I accept the point that
 15 my Lord Mr Justice Butcher made to one of my
 16 predecessors in this seat, that the word is used
 17 obliquely in the definition, but it is not front and
 18 centre in the way that it is in the causation argument
 19 of Mr Edelman.
 20 So my suggestion is that the words I have drafted
 21 provide for a causal link which seem to fit with the
 22 jigsaw argument and also with Ms Mulcahy's legal
 23 submissions about interdependent or inextricably linked
 24 causes.
 25 In the case of a brand new disease like COVID-19,

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1 which manifests itself by a worldwide pandemic or
 2 a nationwide epidemic, that causal link that I have
 3 suggested, being part of the same outbreak, is trivial
 4 to establish. We all happen to know that every case of
 5 COVID-19 is part of the current pandemic outbreak.
 6 That unspoken premise is one reason why Mr Edelman
 7 has been able to make this argument without identifying
 8 all its components. But in the other cases the FCA's
 9 clause would be much harder to apply. If there was,
 10 say, a national measles outbreak and it becomes serious
 11 in October and then consequences follow, but there had
 12 been cases in Dover the previous March, were those cases
 13 part of the same outbreak? As Mr Kealey submitted on
 14 Day 4, page 110, {Day4/110:1} the FCA has propounded no
 15 principle by which that question would be answered.
 16 And as others have submitted before me, the FCA's
 17 revision of the clause, whether it is the revision as
 18 understood by Mr Kealey or Mr Howard or myself or some
 19 version that Mr Edelman may produce in reply, whatever
 20 that revision is it demotes the 25-mile requirement into
 21 an ill-defined and arbitrary trigger or condition with
 22 results that would be capricious, especially in
 23 non-pandemic cases.
 24 Returning to what the parties actually agreed in
 25 Argenta1 on page B359, the words are "such interruption

1 as a result of any occurrence of a notifiable disease
 2 within a radius of 25 miles of the premises" and that
 3 specifies a causal link between the local occurrence and
 4 the business interruption, namely that the latter is the
 5 result of the former. Or, in legal terminology,
 6 proximate cause.
 7 That causal link is straightforward, well understood
 8 in insurance law and in contract law more generally. It
 9 also makes much better commercial sense as a way of
 10 delimiting what is and is not covered. Now, we have
 11 made clear in our skeleton argument, at {1/11/25} if
 12 this could be brought up, at paragraph 56, that Argenta
 13 accepts that this clause may respond to some COVID-19
 14 claims, and we have set out at paragraph 56 three types
 15 of claim which could give rise to indemnified loss,
 16 including the Leicester example, as my Lord
 17 Lord Justice Flaux put to Mr Kealey on Thursday.
 18 As my Lord Lord Justice Flaux put to Mr Gaisman
 19 yesterday morning, causation issues involve facts as
 20 well as law. I think the same point arose with
 21 Mr Howard today. We hope that this paragraph is helpful
 22 in indicating how we say the insured peril in our simple
 23 clause does work in relation to a range of potential
 24 facts concerning COVID-19. And this is the basis on
 25 which Argenta is dealing with its policyholders.

1 As you can see from what we say about Leicester at
 2 paragraph 56(3), Ms Mulcahy was completely wrong in her
 3 submission against Argenta at {Day3/159:6} to line 13,
 4 when she suggested that it is Argenta's position that if
 5 coverage is otherwise established then coverage is, in
 6 her words, prevented by a public authority response.
 7 That is not the position that Argenta has taken to
 8 its policyholders, nor the position that Argenta puts
 9 forward in this litigation.
 10 Ms Mulcahy raised the question how Argenta's
 11 approach would apply to a regional shutdown; so if, for
 12 example, cases in central Leicester provoked the
 13 government to lock down the entire East Midlands. The
 14 answer is, if the policyholder's premises is in
 15 Leicester, then the policy responds, because the
 16 lockdown regulations have been made in consequence of
 17 occurrences within 25 miles. On the other hand, if the
 18 premises is more than 25 miles from Leicester, that will
 19 not be the case and the policy will not respond.
 20 Now, of course there may be intermediate facts where
 21 the circle around the premises includes some, but not
 22 all, of the cases that triggered the regional lockdown.
 23 That could give rise to a factual question as to whether
 24 the occurrence within the circle were sufficiently
 25 significant to the decision to lockdown that they amount

1 to an effective cause of the interruption that has been
 2 caused by the regulations.
 3 A similar point arose in exchanges between my Lord
 4 and Mr Kealey on Day 4 at pages 85 to 86, {Day4/85:1} My
 5 Lords, I adopt his answer in relation to Argenta and
 6 Leicester. Putting it much less elegantly than
 7 Mr Kealey did, ultimately this is a question of fact and
 8 it falls to be answered by reference to the established
 9 legal concept of proximate cause.
 10 The nub of the argument that is put forward
 11 specifically against Argenta to try to satisfy the
 12 requirement for proximate cause can be found in the
 13 FCA's skeleton argument at {1/1/299} at paragraphs 940
 14 to 942. In the first sentence of paragraph 940 my Lords
 15 see that the FCA relies on points that it makes against
 16 QBE, and in relation to those I adopt what Mr Howard has
 17 said in writing and orally against those points, in
 18 addition to everything in my own skeleton argument that
 19 goes to the same points.
 20 Then your Lordship sees that the FCA quote from our
 21 skeleton, and they accept that we throw the causal issue
 22 into relief by making clear the way we say causation
 23 works in this case. And we do; we don't shy away from
 24 the proposition that actually this is really quite
 25 clear, it is not as complex as the arguments put forward

1 against us make it seem.
 2 There is a global pandemic of COVID-19. The
 3 pandemic has had many consequences, mostly unpleasant
 4 and damaging ones. The consequences that are relevant
 5 to each particular individual Argenta policyholder under
 6 their policies are, I would venture to suggest, the
 7 following six.

8 First, in the case of many such policies the
 9 pandemic has caused there to be occurrence of the
 10 disease within 25 miles of the premises insured under
 11 that particular policy. I have shown your Lordships
 12 that that is common ground on the pleadings.

13 Now, your Lordships may think, looking at
 14 paragraph 941 of the FCA's skeleton, that they dispute
 15 that proposition in the skeleton argument. But
 16 nevertheless, as I have shown you by reference to the
 17 reply, paragraphs 52 and 58.1, it is actually common
 18 ground that causation runs in the direction we say it
 19 runs, and that the pandemic is the cause of the
 20 occurrences in particular premises.

21 What may be going on here, if I have correctly
 22 understood those paragraphs of the reply and
 23 paragraph 941, is a distinction being drawn by my
 24 learned friends on behalf of the FCA between (1)
 25 occurrences generally in any and all 25-mile circles,

1 which they say are the facts that comprise the pandemic,
 2 and (2) occurrences in any particular 25-mile circle
 3 which they accept are caused by the pandemic.

4 Now, what matters for present purposes is that from
 5 the perspective of any one individual policy and
 6 policyholder, the pandemic has caused the occurrences in
 7 the relevant 25-mile radius, and not vice versa, and
 8 that, as I have shown you, is common ground.

9 That was the first consequence. The others are
 10 shorter to state.

11 The second consequence of the pandemic is that it
 12 has caused occurrences of the disease in numerous other
 13 places, both within the UK and elsewhere in the world.

14 Thirdly, it has caused parliament to impose
 15 restrictions on the whole country, and the government to
 16 give guidance asking people to alter their behaviour.

17 Fourthly, it has caused parliament to impose
 18 restrictions on some localities, so far most notably in
 19 Leicester, though there seems to have been one or two
 20 others very recently.

21 Fifthly, it has caused foreign legislatures and
 22 governments to do the same things.

23 Sixthly, both directly through its impact on people
 24 and indirectly through the legislation and government
 25 guidances, the pandemic has caused persons all over the

1 world to alter their behaviour, and that includes in
 2 particular the customers and potential customers of each
 3 Argenta policyholder.

4 Now, in identifying those six effects of the
 5 pandemic, I have deliberately referred to overseas
 6 governments and persons as well as UK ones, even though
 7 the FCA avoids ever mentioning them. That is because
 8 the customers of Argenta's policyholders will include
 9 foreign tourists, and some of their lost business will
 10 have been caused by actions in response to COVID taken
 11 overseas.

12 Of those six consequences of the pandemic, the first
 13 is an insured peril under Argenta1; the others are not.

14 Under an orthodox application of the legal concept
 15 of causation, this is a straightforward situation to
 16 analyse. You have an event, the pandemic, which causes
 17 six identified conditions to eventuate. Five of them,
 18 conditions numbers 2 to 6 on my list, may well have
 19 caused loss to many Argenta policyholders, but those
 20 five conditions are not insured perils and nor is the
 21 originating event, and it follows that the loss is not
 22 insured.

23 Adding in the first condition, which is an insured
 24 peril but which does not cause loss, does not change the
 25 analysis on any orthodox version.

1 It is different, of course, if the first condition
 2 does cause loss, which it might do, in the ways we have
 3 identified at paragraph 56 of our skeleton argument. We
 4 are not saying there is absolutely no possibility of
 5 that happening. But even in that case where the first
 6 condition does cause loss, the other five remain
 7 irrelevant to the policyholder's claim.

8 So on the basis of that orthodox analysis, the vast
 9 majority of claims under Argenta1 will fail to establish
 10 causation because the loss was not caused by an
 11 occurrence of the disease within 25 miles. And in many
 12 ways that is just a longer way of stating the common
 13 ground that I set out in six propositions at the outset.

14 Of course, as your Lordships know, the FCA does not
 15 accept that the orthodox causal analysis to that issue
 16 is applicable to these facts. It says that the remote
 17 causal event, the pandemic, and all its consequences
 18 form a single indivisible event or cause or factor.
 19 Then they say that the policy contemplates that the
 20 insured peril might arise from a pandemic and might
 21 arise from national restrictions consequent upon
 22 a pandemic, and then, in a brazen non sequitur, they say
 23 it follows from that that the pandemic and all its other
 24 consequences also become part of the insured peril.

25 Putting their point in other words, they say that

1 the insured can trace a claim in the following way.
 2 Square 1 is the insured peril that you rely on. From
 3 there you climb a ladder up the causal chain from the
 4 insured peril to its remote cause, the pandemic. Then
 5 you slide down a snake, back down the causal chain by
 6 a different route, through the uninsured consequences of
 7 the uninsured pandemic, in order to reach the final
 8 destination of the loss. So that is how you get from
 9 your insured peril to the loss, by going up the causal
 10 chain and then down it a different route. That is
 11 a rather serpentine process which Mr Edelman invites
 12 this court to hold amounts to satisfaction of the
 13 requirement, which it is common ground policyholders
 14 must satisfy, to show that the loss was proximately
 15 caused by the insured peril in Argenta's simple clause.

16 Now, I have referred in that submission to causation
 17 operating as a chain, as have other counsel in this
 18 case, including Mr Edelman himself and also Ms Mulcahy
 19 in her submissions against Argenta, so I do not think
 20 that is a controversial approach. But just in case your
 21 Lordships might want authority for it, apart from the
 22 numerous authorities dealing with breaking the chain of
 23 causation, other authorities that refer to the chain of
 24 causation generally, that are in our bundles, include
 25 The Kos, at {J/115/29}, at paragraph 75, and ARC Capital

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1 v Brit at {K/162/8}.
 2 MR JUSTICE BUTCHER: There are quite a few authorities that
 3 say causation is not a chain but a web.
 4 MR SALZEDO: Causation more generally may be a web, my Lord,
 5 but in terms of working out how one thing causes another
 6 as a matter of "but for" factual causation, in my
 7 submission a chain is the way to understand it if that
 8 is the way the causes are.
 9 It can become more complicated, in the sense that
 10 you can have more than one link at any given level of
 11 the chain. You may need three or four identified events
 12 to cause the next one, or it may be that you have more
 13 than one individual event, each of which would suffice
 14 to cause the next one. In that sense you can say it is
 15 all more complicated so I am going to call it a web.
 16 But nevertheless, it is my submission that where you can
 17 identify that one or more things caused the next thing,
 18 it makes perfect sense, as do many of the authorities,
 19 to talk about it as a chain.
 20 That is what we have here. There is no real dispute
 21 about the way in which different facts have caused the
 22 next fact. That is why I say in my submission it is
 23 appropriate. This is not a case where one doesn't call
 24 it a chain; it is. And what the FCA's submissions are
 25 trying to do is to create this very strange process

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1 where you go up the chain and down it by a different
 2 route in order to reach the end. I am sure Mr Edelman
 3 would agree that, well, one could call it all a web
 4 because that almost matches his idea of saying it's
 5 a jigsaw.

6 But as far as I am aware, you can't quite say a web
 7 will do, because it won't do for him. It has to be
 8 a jigsaw, where you get all of the other consequences of
 9 the top cause are suddenly brought into the insured
 10 peril, which is a sort of sister consequence, if you
 11 like, through what he calls a jigsaw.

12 My Lords, while there is a lot of authority for
 13 a chain approach to causation, where that is applicable
 14 as it normally will be, as far as I'm aware my Lords
 15 will not find any authority for the serpentine or jigsaw
 16 approach in these bundles, or indeed anywhere else.

17 MR JUSTICE BUTCHER: The likelihood is that the proper
 18 characterisation of this question is going to depend on
 19 the terms of the policy, isn't it?

20 MR SALZEDO: Yes. Absolutely, my Lord, I entirely agree.
 21 I am endeavouring not to repeat more than I have to, but
 22 I absolutely adopt what Mr Howard has recently had to
 23 say on that subject. Yes, it does of course turn on the
 24 terms of the policy, and I have made my submission that
 25 the simple Argenta clause is simply a statement of

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1 proximate cause, which is a well understood concept, and
 2 indeed it is common ground that proximate cause is what
 3 is required.

4 There is nothing --
 5 MR JUSTICE BUTCHER: What I meant was whether we are looking
 6 towards a chain or towards a web or whatever, is likely
 7 to be guided by the terms of the policy.

8 MR SALZEDO: My Lord, yes. And in those terms I think the
 9 submission I am making is that there is nothing special
 10 in the simple Argenta clause that could possibly direct
 11 one to an unusual approach to causation. It's the usual
 12 approach.

13 I wondered if I might try your Lordship's patience
 14 with -- sorry.

15 LORD JUSTICE FLAUX: Your primary position is the one you
 16 set out at the beginning of your submissions, that if we
 17 look at the wording of your policy it is clearly using
 18 words of proximate cause, and it is saying the
 19 interruption has to have been proximately caused by any
 20 occurrence of a notifiable human disease within the
 21 policy area, within the 25 miles; and if it has not
 22 been, that is the end of the enquiry, whether it is
 23 a web of causation or a chain of causation. And you say
 24 the FCA's argument, in terms of policy construction, has
 25 to involve writing words into the policy.

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1 MR SALZEDO: Yes.
 2 LORD JUSTICE FLAUX: And if you are right about that, it is
 3 a point that Mr Howard in a sense made earlier today, if
 4 you are right about that then these fine arguments about
 5 causation don't actually get anywhere, because they just
 6 lose on construction.
 7 MR SALZEDO: Yes, that is exactly right, my Lord. I think
 8 as so often an advocate finds himself in the position
 9 where if his first argument is accepted, then the rest
 10 is a waste of time. And it is indeed my submission that
 11 your Lordships could just take the first five minutes of
 12 my submissions and discard the rest. But of course
 13 I have to guard against the risk that I could prove
 14 wrong on that. But your Lordship absolutely has
 15 understood correctly what I have been trying to submit
 16 so far.
 17 I was going to just suggest another example, I know
 18 there has been a lot of examples, just to illustrate
 19 what I mean about the going up and down the chain and
 20 why it is so inappropriate. It is a very short one.
 21 Imagine domestic house insurance against property
 22 damage caused by fire. The assured peril is fire
 23 causing property damage. Let's say there is a massive
 24 electrical storm, which causes lightning, which causes
 25 a small fire in the garden of the property but no

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1 financial loss. The storm also floods the house,
 2 causing very serious damage and loss. On the FCA's
 3 approach, they would say: look at this fire insurance,
 4 the parties must have realised and contemplated that one
 5 possible source of a fire would be an electrical storm,
 6 it's a perfectly obvious possible source of a fire, and
 7 the parties must know that a storm might cause loss
 8 through flooding as well. The lightning and the rain
 9 are just component parts of the storm and it would
 10 follow that by insuring against fire, the insurer has
 11 equally given insurance against a storm and against the
 12 flood damage caused by the storm. In my submission,
 13 that is the logic of the FCA's approach to our policy
 14 and the other policies, and it is plainly wrong.
 15 In some cases, of course, a proper and orthodox
 16 analysis of the facts might be that the remote cause is
 17 so potent that it is the only proximate cause of any
 18 loss, and in that sense you could have everything being
 19 causally indivisible; but that orthodox approach would
 20 not assist the FCA in relation to Argenta1, because the
 21 pandemic is not an insured peril.
 22 The FCA's alternative to the jigsaw, about which
 23 I think your Lordships have heard perhaps a bit less so
 24 far, is that each local occurrence of COVID is itself
 25 a concurrent effective cause. That, in my submission,

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1 is wrong for at least three reasons, which I will give
 2 very shortly.
 3 First, it is obviously wrong as a matter of common
 4 sense, which is the way in which effective causation is
 5 ultimately assessed in English law. Despite some
 6 reservations having been expressed, that is nevertheless
 7 where we are. And on any common sense view, no one
 8 single occurrence of COVID is a substantial or effective
 9 cause of the national lockdown and all that followed
 10 from the national lockdown.
 11 The second reason is that the FCA's position on this
 12 is self-contradictory. As I have already shown you in
 13 the reply at paragraphs 52 and 58.1, the FCA say that
 14 the pandemic is the cause of local occurrences and that
 15 no particular local occurrence is the cause of any
 16 government action.
 17 Now, I must be missing something, because it does
 18 seem to me, and I submit, that that is directly
 19 contradicting Mr Edelman's alternative way of looking at
 20 causation as a set of millions of concurrent effective
 21 causes. Because there would have to be millions,
 22 because on his case a single person with COVID would
 23 have to be enough to be an effective cause, because his
 24 case depends on saying: if you can prove one case within
 25 25 miles, you have proved what you need.

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1 The third reason why it is wrong, my Lords, I adopt
 2 a submission that was made -- perhaps we can bring it
 3 up -- on {Day2/25:4} where at lines 4 to 13 Ms Mulcahy
 4 aptly pointed out that the legal concept of an effective
 5 or proximate cause sometimes encompasses two substantial
 6 causes of the same event, and perhaps, perhaps in cases
 7 that haven't yet come to trial, one can imagine it
 8 encompassing three or four. But as she points out,
 9 there is nothing in the authorities that gives any
 10 encouragement at all to the idea that you might have
 11 millions of effective proximate causes of the same
 12 event. It is just not the same concept. So we say that
 13 alternative way of putting it is just as wrong.
 14 My Lords --
 15 LORD JUSTICE FLAUX: At the moment I am having trouble
 16 finding --
 17 MR SALZEDO: Sorry, my Lord, it is {Day2/25:4} to 13. She
 18 says:
 19 "What is interesting when one looks at authorities
 20 on proximate causes is that they only identify two
 21 concurrent proximate causes. It is clearly conceptually
 22 possible for there to be more than two, but the court
 23 should perhaps bear that in mind when considering the
 24 sheer number of concurrent causes that are being put
 25 forward by the insurers, are they really all being said

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1 to be concurrent proximate causes of equal or nearly
2 equal efficiency ."

3 My Lord, I submit, because obviously my clause is
4 simple enough, I don't have to worry about what other
5 insurers may be submitting, I submit that Ms Mulcahy may
6 or may not be right in terms of four or five causes,
7 perhaps not, but she certainly is right in terms of
8 millions . That is a completely different idea .

9 My Lords, that is what I wanted to say about
10 proximate cause. I then have three shorter headings,
11 the first of which is exclusions .

12 Just to bring back the Argenta wording at {B/3/59},
13 there are three exclusions on the right-hand side. We
14 understand that the FCA accepts that all three apply in
15 principle ; we gave the references for that in our
16 skeleton at paragraph 18, footnote 33, which is
17 {1/11/10}, no need to go to that. But as we say at
18 paragraph 63 of our skeleton , which is {1/11/28} -- I'm
19 sorry , I have skipped a couple of lines in my notes, my
20 Lords.

21 We understand the FCA accepts that they all apply.
22 The FCA accepts that the third exclusion means that
23 a policyholder cannot claim for a loss of business at
24 premises A as a result of an occurrence of infectious
25 disease at premises B. They say that in the reply at

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1 paragraph 54. But as we say at paragraph 63 of our
2 skeleton , at {1/11/28}, this is in substance the very
3 type of claim that their main argument seeks to justify .
4 So we say the exclusion does confirm, and Ms Mulcahy
5 made some play with that word, but we say it does
6 confirm that our main argument is right and that this
7 clause does not cover that kind of thing.

8 My Lords, the next heading in my notes is "but for"
9 and the Orient-Express. Now, I have shown you that at
10 {B/3/56} Argenta has a trend clause which is in similar
11 form to other insurers . As we set out in our skeleton
12 at paragraph 70, and as my learned friend Mr Turner has
13 already shown you in his submissions, in the FCA's
14 skeleton , at {1/1/300} paragraph 947, it is common
15 ground in Argenta's case -- you may recall Mr Turner
16 pointing this out because he couldn't understand why it
17 wasn't common ground in his, but it is common ground in
18 Argenta's case -- that the defined term "Damage" in
19 Argenta's trend clause, and in the "Basis of Settlement"
20 definition , is to be read as referring to the relevant
21 peril in that small number of instances where the peril
22 is not damage with a capital "D", which of course
23 includes the instances we are dealing with.

24 So my Lord, I wanted to just make it clear that that
25 is common ground for us, so you know how to read our

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1 trends clause .

2 Now, my Lords, apart from making that point, I had
3 not planned to add to the submissions that others have
4 made about counterfactuals and the operation of the
5 trends clause . I have been slightly tempted by
6 Mr Justice Butcher's interesting thought experiments
7 concerning trains and pirates , despite my natural
8 humility as the Tail End Charlie. But that said, I am
9 conscious that I think my Lord did say that possibly
10 these examples are not really critical to the case, so
11 unless your Lordships encourage me I am going to move on
12 rather than delving into them. But I did have one or
13 two thoughts about them.

14 Can I give one thought, without encouragement, which
15 is simply that it may be relevant, in looking at those
16 thought experiments, to analyse what is the damage and
17 what is the loss , as well as what is the insured peril .
18 That may make a difference to exactly how one analyses
19 them, in that the damage in a business interruption
20 policy may be quite different , for example, to the
21 damage in a property-type insurance .

22 My Lords, I take your Lordships' silence as an
23 invitation to move on, which I do.

24 LORD JUSTICE FLAUX: The answer to the ship, to the example
25 of the pirates , may very well be the one that Mr Howard

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1 gave, which is because the insured peril is loss or
2 damage to the ship as a consequence of whatever it
3 happens to be, pirates in this instance, the owner has
4 suffered the relevant insured loss at the moment when
5 the pirates board the ship. That might be the answer.

6 MR SALZEDO: It might be, my Lord. Whether there is a loss
7 when they board or at some later date, and also whether
8 in that instance one would start arguing about whether
9 The Golden Victory and the Bwlfa approach apply or not,
10 are all issues that I am sure your Lordships are
11 probably not going to want to try to decide in this
12 case.

13 LORD JUSTICE FLAUX: We are not in that territory.

14 MR SALZEDO: No. Exactly so.

15 The final --

16 LORD JUSTICE FLAUX: You will appreciate that my Lord and
17 I have discussed these various issues together, but it
18 seems to me that one answer to the train example is that
19 we are not in the territory where there is, as it were,
20 another cause up the line that is the true cause of the
21 loss . Because these are all things that are going on
22 at, as it were, at the same time.

23 Your primary point is if you were asking the
24 question, what is the proximate cause of the loss that
25 is suffered , other than in your exceptional cases, the

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1 short answer is it's the pandemic and the government
2 restrictions that have been imposed. It is not the
3 local occurrence.
4 MR SALZEDO: Yes. Exactly so. My Lord is exactly right,
5 and that's right. So these issues are very much down
6 the line, to maintain the train analogy, so far as I am
7 concerned. I do have an interest in them because, as
8 I say, we accept that there may be some claims that
9 respond, in which case we would look to apply the trends
10 clause. So we have an interest in "but for" causation
11 in that context.

12 It may be that one of the points on the train
13 example is that "but for" causation comes in at two
14 different stages. One is what is the cause, is it the
15 insured peril; and the other is what is the loss under
16 the trends clause. And the loss and the cause are not
17 necessarily answered by exactly the same analysis. But
18 it may be that that is enough on trains and ships.

19 My Lords, the other point that I need to cover,
20 takes us right back to the beginning of the trial.
21 It is the declarations. Your Lordships may or may not
22 still remember, on {Day1/3:24} through to page 4,
23 line 7, if that could be brought up, in case anybody has
24 already forgotten what happened two weeks ago. About
25 five minutes into this trial Mr Edelman picked on

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1 Argenta for a special attack for seeking a declaration
2 in relation to the question whether claims could be
3 brought for losses prior to the date when COVID became
4 notifiable. And he did so in quite strong terms which
5 were calculated to, and did, attract adverse public
6 attention. As you can see from the way he put the point
7 at lines 5 to 7 on page 4, {Day1/4:5} the objection is
8 not to insurers seeking declarations in general. And
9 that is also clear, we don't need to go to them, from
10 paragraph 11 of the FCA's skeleton and paragraph 68 of
11 their reply at {A/14/35}. The one objection that is
12 made is to the second sentence of the declaration, that
13 we reformulated in our skeleton argument; that is
14 {I/11/35}, paragraph 82(a).

15 Obviously, my Lords, if there are any issues about
16 the wording of declarations, they fall to be addressed
17 later, in the light of whatever has fallen from your
18 Lordships in the judgment. But the question of
19 principle is the one I need to address after Mr Edelman
20 attacked us on it.

21 We dealt with the issue of why we were adding this
22 second sentence at 82.1, in our skeleton on pages 16 to
23 17 of {I/11/16}, paragraphs 36 to 37. As your Lordships
24 will see when paragraph 36 pops up on your screen, it
25 seemed to us that, at least for a simple disease clause

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1 like ours, it was inconsistent for the FCA on the one
2 hand to concede what they called a trigger for cover and
3 that it included notifiability, whilst on the other
4 arguing that pre-notifiability losses could be claimed.
5 We don't need to go to these, but the dates of
6 notifiability were expressly pleaded in the particulars
7 of claim at paragraph 37 and they were admitted in
8 Argenta's defence at paragraph 54.

9 So it follows that if it is useful to refer to
10 triggers at all, which as I understand them are
11 components of the insured peril, then in relation to
12 COVID-19, which is all that this case concerns, the
13 trigger of notifiability was satisfied on certain agreed
14 dates. That cannot sensibly be disputed, neither here
15 nor in what Mr Edelman has called other fora.

16 There is also no doubt that the question when the
17 trigger applies is within the scope of these
18 proceedings. I have just referred to the fact that the
19 dates were pleaded; but the fact that that question is
20 within the scope of the proceedings was stated in the
21 questions for determination, which was annexed to the
22 FCA's particulars of claim at {A/5/1} and published on
23 the FCA's website. As your Lordships see, when that
24 comes up, there is a preamble, and the penultimate line
25 of the preamble, the last sentence says:

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1 "The purpose of this document is to identify the
2 scope of the litigation ..."

3 If we then go on to page {A/5/3} at box 7, the first
4 paragraph, last line -- I'm waiting for it to come up.
5 First box 7, first paragraph, last line, we can see that
6 the scope of the litigation includes:

7 "When does the trigger apply?"

8 Now, as I say, it is clear on the pleadings when the
9 trigger was satisfied. Mr Edelman pursued, both in his
10 skeleton and then again orally, an argument that
11 pre-notifiability losses could be recovered, on the
12 basis of his jigsaw argument when you apply it to the
13 counterfactual. There is no need to go there now, but
14 I am referring to his skeleton at paragraph 313 and to
15 the oral argument on {Day2/121:1} through to page 126.

16 With all respect to Mr Edelman, the argument is
17 plainly wrong for all the reasons that other insurers'
18 counsel have developed in relation to the
19 counterfactuals. But your Lordships have heard it and,
20 as far as I understand it, the FCA is inviting your
21 Lordships to determine it.

22 What, then, is the issue when the FCA wishes to
23 reserve for other fora and which we are to be criticised
24 for trying to shut down? If your Lordships uphold the
25 FCA's arguments on proximate cause, then you will not be

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1 making any of the declarations that we seek, so no issue
2 can arise. On the other hand, if your Lordships prefer
3 Argenta's arguments on the main point, then most
4 COVID-19 business interruption claims under Argenta1
5 will fail because the losses were not proximately caused
6 by an insured peril. That will be nothing to do with
7 the date of notifiability, and the position of those
8 policyholders would not be altered one iota by arguing
9 for an earlier date of notifiability. It would make no
10 difference.

11 However, as I've shown you by reference to
12 paragraph 56 of our skeleton, we accept that they may
13 still be valid claims, even assuming our analysis is
14 completely correct. In relation to those claims, loss
15 can only be claimed from the date of notifiability, for
16 the reasons given in our skeleton at paragraphs 36 and
17 37, including our reference to the authority of the
18 Court of Final Appeal in New World Harbourview. That is
19 the point that Mr Edelman has argued against, both in
20 writing and orally.

21 So, my Lords, Argenta does not invite your Lordships
22 to, using his phrase, shut out anybody from any arguable
23 points that are not properly part of this test case.
24 But the question whether there can be any claim under
25 Argenta1 for losses that arose before COVID became

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1 notifiable is within the scope of this test case, and it
2 has been argued by Mr Edelman in his skeleton and
3 orally; and on what basis, we ask rhetorically, should
4 Argenta be shut out from arguing to the contrary? We
5 don't know that any has been suggested.

6 If there is some other point that Mr Edelman is
7 concerned about, then I have certainly no intention of
8 trying to shut it out, there is no sneaky trick here,
9 but I quite genuinely do not understand what it is. We
10 therefore do ask your Lordships to make findings which
11 correspond to the declarations that we have referred to
12 in our skeleton argument, on that as on the other points
13 that they concern.

14 My Lords, unless I am able to assist your Lordships
15 any further, those are my submissions on behalf of
16 Argenta.

17 LORD JUSTICE FLAUX: I don't have anything. I don't know if
18 my Lord has anything.

19 MR SALZEDO: If your Lordships allow me the five minutes,
20 then I think the result of that is that insurers have
21 not taken their extra half an hour that Mr Edelman was
22 complaining about yesterday.

23 LORD JUSTICE FLAUX: No. Right.

24 MR EDELMAN: I don't know if it is helpful, if I could just
25 for one minute deal with that last point from

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1 Mr Salzedo.

2 LORD JUSTICE FLAUX: Hang on a moment. What are you
3 proposing that we should do now.

4 MR EDELMAN: My Lords, I am in your hands. I am ready to
5 start now, but if you would prefer to start tomorrow
6 morning I am ready to do that as well. I just thought
7 it might be convenient, regardless of which that was,
8 for me to say one or two sentences to deal with that
9 last point.

10 LORD JUSTICE FLAUX: Why don't you start by dealing with
11 that point and we will see how we go.

12 (4.07 pm)

13 Reply submissions by MR EDELMAN

14 MR EDELMAN: I think Mr Salzedo has misunderstood what was
15 only the emerging peril point, which is not asserting
16 a right to pre-notification losses, it is simply saying
17 that when you have post-notification losses which the
18 FCA proceeds on the basis of as being recoverable, that
19 in the adjustment process you don't take into account
20 the downturn in turnover caused prior to notifiability,
21 at a stage when the disease was not notifiable but was
22 nonetheless emerging. But it is not claiming
23 pre-notification losses.

24 If other insured policyholders want to challenge the
25 New World Harbourview decision on that point, that is

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1 their prerogative. The FCA doesn't seek to do so in
2 this litigation, and does not assert a positive case
3 that losses prior to notifiability should be recoverable
4 under any policy which specifies notifiability as
5 a qualifying condition.

6 LORD JUSTICE FLAUX: Speaking for myself, Mr Edelman, it
7 seems to me if the argument you are trying to run is
8 wrong, and I'm not saying whether it is right or wrong,
9 but if it is wrong then it would seem to follow that any
10 attempt to claim directly, as it were, as opposed to
11 indirectly, pre-notification losses or pre-notifiability
12 losses would be doomed to failure, and I can't for the
13 life of me see what the point is in leaving the matter
14 open.

15 I mean, Mr Salzedo invites us to deal with it. His
16 policy responds to notifiable human disease. If you
17 have got a disease which hasn't yet been notified, how
18 can you claim losses pre-notification? I just don't
19 understand the point, I'm afraid. I don't understand
20 what it is you are trying to reserve on behalf of, as it
21 were, notional Argenta policyholders for the future.

22 MR EDELMAN: It is not obviously just Argenta policyholders,
23 it's --

24 LORD JUSTICE FLAUX: No, I understand that point.

25 MR EDELMAN: It's a whole raft --

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1 LORD JUSTICE FLAUX: But it's rather specific.
 2 MR EDELMAN: My Lord, one cannot overlook the nature of this
 3 case as a test case of issues that the FCA has chosen to
 4 argue on behalf of policyholders. And for the court to
 5 start ruling on issues where the policyholders have not
 6 had a chance to argue it, however good or bad my Lord
 7 may now think the argument to be, it was certainly
 8 argued vigorously in the New World Harbourview case,
 9 albeit unsuccessfully, at both first instance and on
 10 appeal.
 11 My Lord, I am not going to argue the point because
 12 it's not an issue that we have taken. But it would be
 13 inappropriate, in my submission, for the court to give
 14 declarations on something which has avowedly not been
 15 argued by the FCA, and which is at least something that
 16 policyholders might want to argue, whatever my Lord
 17 might think of it.
 18 My Lord, I think you are on mute.
 19 LORD JUSTICE FLAUX: Sorry. I was saying we have more than
 20 enough issues to deal with, so we will bear in mind the
 21 point. I think I understand the point you are making.
 22 And if it is not within the list of issues, it is not
 23 within the list of issues. We haven't actually looked
 24 at the list of issues lately. Obviously when it comes
 25 to writing our judgment we are going to have to look at

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1 the list of issues and answer the issues we have been
 2 asked to answer, and not issues we haven't been asked to
 3 answer. So to that extent you are right.
 4 I think it would be sensible if we broke for now.
 5 It has been quite a long day. So unless you
 6 particularly want to go on for another 20 minutes,
 7 I would have thought the best thing is for you to
 8 start -- the interveners are coming on at the end, are
 9 they?
 10 MR EDELMAN: They are, my Lord. They have asked for some
 11 extra time if we get some extra time, but I am in
 12 my Lord's hands as to whether we start at 10.00 am or
 13 10.30 tomorrow. It is entirely a matter for my Lord.
 14 LORD JUSTICE FLAUX: Subject to what Mr Justice Butcher
 15 thinks, I think we should start at 10.00 am. Yes, he is
 16 nodding, so I think we will start at 10.00 am. As
 17 I said, I don't think I can sit beyond 4.30 tomorrow. I
 18 mean, I suppose in extremis I could probably sit
 19 slightly later, but I am not encouraging anybody to go
 20 on longer than the time they have been allotted.
 21 MR EDELMAN: My Lord I hope we will keep to the timing as we
 22 kept to in opening.
 23 LORD JUSTICE FLAUX: I hope you didn't think I was being
 24 intemperate yesterday.
 25 MR EDELMAN: My Lord, yesterday --

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1 LORD JUSTICE FLAUX: We were all rather hot and tired.
 2 MR EDELMAN: On Day 3 we finished bang on 4.00 pm to allow
 3 the interveners their half an hour that day and the half
 4 an hour the next, so I hope we will keep to that timing
 5 again.
 6 LORD JUSTICE FLAUX: Okay. We will break now until 10.00 am
 7 tomorrow morning, Mr Edelman. Thank you very much.
 8 (4.13 pm)
 9 (The hearing adjourned until 10.00 am on
 10 Thursday, 30 July 2020)

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