

# OPUS2

The Financial Conduct Authority v Arch Insurance (UK) Limited & Others

Day 1

June 16, 2020

Opus 2 - Official Court Reporters

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1 Tuesday, 16 June 2020  
 2 (10.30 am)  
 3 Case Management Conference  
 4 MR JUSTICE BUTCHER: Good morning.  
 5 MR EDELMAN: Good morning, my Lord.  
 6 MR JUSTICE BUTCHER: If everyone is present virtually, you  
 7 had better start, Mr Edelman.  
 8 MR EDELMAN: My Lord, there is quite a long cast list for  
 9 this, the first CMC in this piece of litigation.  
 10 For the FCA there is myself, Ms Mulcahy and  
 11 Mr Coleman. Mr Coleman may speak if any issues arise as  
 12 to the application of the test case scheme.  
 13 For Arch, I understand it's Mr Lockey and Mr Brier.  
 14 For Argenta, Mr Salzedo and Mr Bolding.  
 15 For Ecclesiastical and Amlin, it's Mr Kealey,  
 16 Mr Wales, Ms Ananda and Mr Moore.  
 17 For Hiscox, it's Mr Gaisman, Mr Fenton, Mr Harris  
 18 and Mr Wright.  
 19 For QBE, it's Ms Ansell and Ms Bousfield.  
 20 For RSA, it's Mr Turner and Mr Jones.  
 21 For Zurich, it's Mr Rigney, Mr Orr, Ms McColgan and  
 22 Ms Menashy.  
 23 My Lord, those are the --  
 24 MR JUSTICE BUTCHER: I should say, Mr Edelman, I didn't  
 25 think all of those were actually on the call, but

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1 perhaps I'm wrong. Anyway, it doesn't matter. I was  
 2 sent a list of who is on the call.  
 3 MR EDELMAN: You have an advantage over me, my Lord, because  
 4 I was not given any such list. I took it from the  
 5 skeleton arguments.  
 6 My Lord, some preliminary matters. You will have  
 7 firstly noted the correction in our reply skeleton  
 8 argument of an error in relation to the Cottagesure  
 9 Action Group, who are not, contrary to press reports  
 10 that the FCA have seen, immediately represented  
 11 at present.  
 12 MR JUSTICE BUTCHER: Yes, I saw that.  
 13 MR EDELMAN: Yes.  
 14 My Lord, secondly you will have seen that each  
 15 insurer has submitted a skeleton argument and I am  
 16 afraid to say that they are repetitive. All I want to  
 17 observe at this stage is that this is not in accordance  
 18 with clause --  
 19 MR JUSTICE BUTCHER: Mr Edelman, can I just stop you before  
 20 you make that point? Everyone who is not Mr Edelman  
 21 should mute their microphones, please.  
 22 (Pause)  
 23 Yes, please go on.  
 24 MR EDELMAN: Yes.  
 25 As my Lord will have seen, the skeleton arguments

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1 are very repetitive. It is not in accordance with  
 2 clause 9.2 of the framework agreement in which insurers  
 3 agreed as far as reasonably practicable, amongst other  
 4 things, to co-ordinate their written submissions to the  
 5 court so as to minimise duplication.  
 6 I just express the hope that the level of  
 7 duplication that has occurred for this CMC is not  
 8 repeated for the next CMC and in particular is not  
 9 repeated for the trial because otherwise the burden not  
 10 only on the FCA but also on the court will be greatly  
 11 increased in having to read through multiple submissions  
 12 making essentially the same point.  
 13 MR JUSTICE BUTCHER: I endorse that. There may have been  
 14 particular reasons for it on this occasion, but one  
 15 certainly hopes that it won't be the case in the future.  
 16 MR EDELMAN: Yes, my Lord, I wasn't going to say anything  
 17 about why it occurred this time. It was merely, as it  
 18 were, a shot across the bows for insurers to get  
 19 together and try and ensure that common issues are dealt  
 20 with in one document by one representative insurer.  
 21 The final very preliminary point is that my Lord  
 22 should have received a very slightly revised case  
 23 memorandum to replace the version which was at A1 to A3.  
 24 If my Lord hasn't noticed it, it doesn't matter, there  
 25 is nothing significant changed in it, but I just put

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1 that on the record.  
 2 MR JUSTICE BUTCHER: Right, I haven't noticed it.  
 3 MR EDELMAN: The changes were very minor.  
 4 My Lord, now if I can move to the agenda. The first  
 5 item on the agenda is the application by the FCA to  
 6 disapply the 25-page limit for its particulars of claim,  
 7 which is at page 4 of the --  
 8 MR JUSTICE BUTCHER: I thought I had already made an order  
 9 on that.  
 10 MR EDELMAN: Right. If so, it hasn't reached me and I can  
 11 move on.  
 12 MR JUSTICE BUTCHER: It was submitted to me electronically.  
 13 I made the order on the papers and it's in the bundle,  
 14 so I think that's --  
 15 MR EDELMAN: I think I may have missed it.  
 16 MR JUSTICE BUTCHER: -- all water under the bridge,  
 17 Mr Edelman.  
 18 MR EDELMAN: My Lord, I'm sorry, yes.  
 19 My Lord, the next item is the test case scheme and  
 20 why that should apply, either because it does apply or  
 21 because it is appropriate to apply it, which  
 22 I understand is agreed.  
 23 Then there is the application for an expedited  
 24 trial, which I understand is also agreed. I will return  
 25 to these matters in detail in a moment.

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1 Then finally the management and trial of the claim  
2 in accordance with directions, which are almost entirely  
3 agreed but with a limited number of issues.

4 Now, my Lord, the background to this case is set  
5 out, as my Lord has seen, in the case memorandum and in  
6 the witness statement of Mr Brewis, which hopefully  
7 my Lord has seen and read.

8 Before I turn to the applications, can I just make  
9 some introductory remarks about the case?

10 Essentially, this is a claim brought by the FCA  
11 against eight insurers who have been denying claims  
12 under commonly occurring forms of extensions to business  
13 interruption policies on grounds of coverage and  
14 causation, which raise issues of general application and  
15 which have been disputed by policyholders, thereby  
16 generating controversy and uncertainty.

17 The sums involved are, I'm told, may exceed  
18 €1 billion. You can see that referred to in Mr Brewis'  
19 statement. In this action what the FCA is seeking to do  
20 is to resolve that controversy within the constraints of  
21 the test case scheme and the timescale that that allows,  
22 by addressing the coverage and causation issues of  
23 general application that have arisen.

24 My Lord, just to make it clear, the FCA's purpose in  
25 doing so is to seek to reduce controversy and

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1 uncertainty in the market it regulates surrounding the  
2 payment of business interruption claims and to put  
3 itself in the position of being able to offer further  
4 guidance to the insurance market on this topic in its  
5 role as regulator and of course to protect consumers.

6 Although as regulator the FCA is not an adversary of  
7 insurers, the parties are agreed that in this claim  
8 the FCA will be seeking to the best of its ability to  
9 argue the case for the policyholders under the selected  
10 policies so that the grounds for declinature of general  
11 application relied on by insurers can be properly tested  
12 before the court.

13 The role of the team of solicitors and counsel  
14 acting for the FCA will therefore be to adopt  
15 an adversarial role, notwithstanding the common and  
16 agreed purpose of this claim, which is to address the  
17 controversy and uncertainty that has arisen as to the  
18 payment of business interruption losses under policies  
19 of insurance. We will be adopting an adversarial role  
20 against insurers, but that should not be taken to  
21 override our role and function as the regulator.

22 MR JUSTICE BUTCHER: I understand that. You will have to  
23 adopt that role in order for the process to work.

24 MR EDELMAN: My Lord, I thought it was appropriate, as this  
25 is the first CMC, the first time it's come before the

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1 court, to put that on the record.

2 My Lord, now moving to the applications.

3 The test case scheme application is at page 5 of the  
4 bundle, and it's supported by the grounds at page 8.  
5 Insurers, as I understand it, support the FCA's  
6 application and we have explained the grounds for the  
7 application of the scheme or alternatively the exercise  
8 of the court's discretion in our skeleton.

9 My Lord, I should also refer to the fact that the  
10 judge in charge of the commercial list,  
11 Mr Justice Teare, having consulted with the Chancellor  
12 and Lord Justice Flaux as supervising Lord Justice for  
13 the Commercial Court, has written to my instructing  
14 solicitors to the effect that they consider it  
15 appropriate in view of the particular importance raised  
16 for the case for it to be treated as envisaged under  
17 paragraph 2.5(d) of the relevant Practice Direction and  
18 for the case to be heard by a two-judge court consisting  
19 of a Commercial Court judge and a Lord Justice of  
20 Appeal. That was subject to my Lord, as the managing  
21 judge of this trial, agreeing to that process.

22 My Lord, I'm obviously in a position or Mr Coleman  
23 will be in a position, if necessary, to develop the  
24 submissions on this, but we would invite you to grant  
25 our application for the case to be one to which the

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1 financial markets test case scheme should apply, and  
2 I will deal with the number of judges when I come to the  
3 direction, but at the moment I'm simply asking my Lord  
4 to agree to the application at this hearing.

5 MR JUSTICE BUTCHER: Right. As I understand it, everyone  
6 agrees to that --

7 MR EDELMAN: Yes, they do.

8 MR JUSTICE BUTCHER: -- so the only question is whether  
9 I do, and I do agree. I have decided that this case  
10 should be admitted to and managed under the financial  
11 markets test case scheme. As you know, that scheme is  
12 set out in Practice Direction 51M. It is a pilot scheme  
13 for a period up to 30 September 2020. It requires that  
14 the claim is a Financial List claim as defined in  
15 CPR 63A.1(2).

16 Now, it is right to say that cases concerning  
17 insurance will not generally fall within the definition  
18 of a Financial List claim, but this is a claim which, in  
19 my judgment, raises issues of general importance to the  
20 financial markets because the issues raised are of  
21 relevance to widely used policy wordings. As the FCA  
22 has been informed, some 8,500 claims under policy  
23 wordings that are likely to be affected have been  
24 notified to them as at the end of May, as I understand  
25 it. Of course the issues which will be decided are

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1 relevant to a considerable number of reinsurances .  
 2 Furthermore, as noted in the guide to the  
 3 Financial List , the court may order cases to be dealt  
 4 with in that list which fall within the spirit but not  
 5 the letter of the criteria in part 63A.1(2) and are of  
 6 general market importance. That appears to me to be the  
 7 position here .

8 And when all the parties , given that they include  
 9 the FCA and important insurance markets, agree that the  
 10 matter should be in the Financial List , I consider that  
 11 the court should be inclined to agree, and I do .

12 I am also satisfied that the claim can be  
 13 satisfactorily determined in relation at least to  
 14 a significant number of matters as a test case and that  
 15 the arguments of those with opposing interests can be  
 16 properly put before the court, though it will be  
 17 necessary to keep under review exactly what issues can  
 18 be determined in accordance with those criteria . I am  
 19 satisfied that there will at least be some such issues  
 20 so I accede to the application that the matter should be  
 21 dealt with under the financial markets test case scheme .

22 MR EDELMAN: I'm grateful, my Lord .

23 We then move on to the next topic, which is part of  
 24 the same application, expedition, with the supporting  
 25 grounds at page 9, the second item on the application .

9

1 That is again supported by insurers and I also  
 2 understand that the court is able to accommodate  
 3 an eight-day hearing with two judges, subject to  
 4 my Lord's agreement, commencing on 20 July. I will  
 5 again ask my Lord to make an order for an expedited  
 6 trial .

7 MR JUSTICE BUTCHER: Yes. I am also satisfied that the case  
 8 is a proper one for expedition . There is a real and  
 9 pressing urgency about the matter for the reasons  
 10 explained in Mr Brewis' witness statement and I expect  
 11 expedition to promote, not to interfere , with the proper  
 12 and efficient administration of justice .

13 MR EDELMAN: I'm very grateful, my Lord .

14 Now I turn to the directions , and my Lord will have  
 15 to have these open at page 11. These are the draft  
 16 directions and this is the major topic for this morning .

17 We start with the fact that most of these directions  
 18 are largely agreed, but there is one correction which  
 19 will be necessary to paragraph 6, which should be  
 20 reduced from three to two and comprising  
 21 a Financial List Commercial Court judge, and a Lady or  
 22 Lord Justice of Appeal. That is the limitation that  
 23 Mr Justice Teare, the judge in charge of the  
 24 Commercial Court, has communicated, but obviously it  
 25 requires my Lord's agreement as well .

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1 MR JUSTICE BUTCHER: Yes. Mr Edelman, I do agree, and I can  
 2 inform the parties that the case will be tried by  
 3 Lord Justice Flaux and by me .

4 MR EDELMAN: I'm grateful, my Lord .

5 We then move on to the other direction , just one  
 6 other non-contentious alteration , and that is to  
 7 paragraph 13. At the request of an insurer who wishes  
 8 to reserve its position as to intervention , the FCA has  
 9 agreed that the deadline for application should be  
 10 extended to 5 pm on 24 June so that the intervening  
 11 party and any other potential intervening parties have  
 12 the opportunity to review the finalised defences of  
 13 insurers in order to consider whether intervention is  
 14 really necessary . And hopefully the defences will  
 15 demonstrate that all issues that would properly and  
 16 reasonably be taken on these forms of policies are being  
 17 taken .

18 So we would invite the court to make that  
 19 alteration . At the request of that potential  
 20 intervener , I would also ask the court to encourage  
 21 insurers to accede to requests from other insurers to  
 22 review their draft defences on a common interest  
 23 privilege basis so as to give more time to those other  
 24 insurers to consider their position on intervention , and  
 25 the FCA are prepared to instruct its solicitors ,

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1 Herbert Smith Freehills , to share any served defences  
 2 direct with any party whom so asks on the evening of  
 3 the 23rd, when those defences are due for service , given  
 4 the risk of the delay and loading those defences onto  
 5 the FCA website .

6 Subject to the encouragement, any encouragement  
 7 my Lord sees fit or not to give, the only amendments  
 8 I ask is for the time to be changed to 5 pm and the date  
 9 24 June .

10 MR JUSTICE BUTCHER: Right. Well, encouragement sounds  
 11 appropriate . I don't know that I need to hear everyone  
 12 in relation to encouragement, but perhaps if anyone  
 13 wants to say anything about it , they should .

14 MR EDELMAN: I'm grateful, my Lord . Obviously if there is  
 15 some good reason for the defence not to be shared, that  
 16 will be a matter for the insurer . But if they can, it  
 17 would be helpful to speed up this process .

18 So, my Lord, we now move to the contentious items on  
 19 the directions , which are items 11 and 12 on page 13 of  
 20 the bundle .

21 On item 11, my Lord has the two alternative  
 22 wordings, rival . My Lord will have seen our wording and  
 23 our position dealt with in our skeleton argument .

24 There has been, in our submission, no substantive  
 25 answer to that . The position is that all insurers have

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1 disavowed any intention to serve evidence of fact. That  
 2 has been maintained, having seen our particulars of  
 3 claim. The FCA currently has no intention of serving  
 4 evidence of fact. No one has sought to identify any  
 5 aspect of the case on which factual evidence might be  
 6 necessary. All insurers have agreed that this case  
 7 should proceed under the test case scheme and they have  
 8 also agreed in the framework agreement that they would  
 9 discuss and seek to agree with the FCA what type of  
 10 evidence would be submitted to the court prior to this  
 11 CMC, but no substantive proposals about factual evidence  
 12 have been made.

13 We don't want to shut the insurers out from seeking  
 14 to introduce factual evidence of which they have not yet  
 15 been able to think, but it does now require the rigour,  
 16 we submit, of an application to introduce such evidence  
 17 if it cannot be agreed. We set out in our skeleton the  
 18 benefit of the rigour of that approach and we submit  
 19 that that ought to be applied.

20 My Lord, I have nothing further to say.

21 MR JUSTICE BUTCHER: All right. Mr Edelman, can I just ask  
 22 this question: has there been discussion about whether  
 23 anyone wants to have evidence? I'm not encouraging it.  
 24 I'm just asking what has been the position as to factual  
 25 matrix.

13

1 MR EDELMAN: My Lord, there has been no discussion about  
 2 factual matrix evidence and, as I understand it, none is  
 3 intended to be brought before the court.

4 MR KEALEY: My Lord, can I interrupt? I don't think you  
 5 should safely assume that there won't be any factual  
 6 evidence and nor should Mr Edelman or the FCA. We are  
 7 giving serious consideration to whether or not there is  
 8 factual matrix evidence in relation to one of my  
 9 clients, and if we can avoid having to put it in, we  
 10 shall, and if we can't avoid it, then we shall put it  
 11 in, if we may.

12 There are also other matters that we are considering  
 13 arising out of the particulars of claim served by  
 14 the FCA, drafted in part by Mr Edelman or in full by  
 15 Mr Edelman, raising certain factual matters which, to  
 16 our mind, were not necessary to be in the particulars of  
 17 claim, but they are there, and there are one or two  
 18 remarks or observations in the particulars of claim that  
 19 cannot be left unremarked, and so we're considering  
 20 factual evidence in relation to that as well.

21 Some of it is already covered in the correspondence.  
 22 I don't know if Mr Edelman is aware of a letter from my  
 23 instructing solicitors, DAC Beachcroft, which raises at  
 24 least in part a question as to a matter which appears in  
 25 the particulars of claim. I don't want to detain you at

14

1 the moment. I am not going to go into the detail at the  
 2 moment. This is under serious consideration, and whilst  
 3 it's under serious consideration it would not be  
 4 appropriate for me to mention it any further. But  
 5 I don't want your Lordship or indeed Mr Edelman or  
 6 the FCA to think that there might not be factual  
 7 evidence on behalf of my clients -- on behalf at least  
 8 of one of my clients.

9 MR JUSTICE BUTCHER: Right.

10 MR EDELMAN: My Lord, I don't know if Mr Kealey is then  
 11 speaking on behalf of everybody. I was led to  
 12 understand he was the spokesman for everyone, but if  
 13 anyone else wants to speak, I will give them  
 14 an opportunity to do so before I reply.

15 MR KEALEY: My Lord, I'm not a spokesman for everybody. It  
 16 just so happens that one of my client's names begins  
 17 with "A" and therefore I am afraid I drew a short straw  
 18 because A is the first letter of the alphabet and  
 19 therefore I went first. I don't speak for anyone else.  
 20 I speak for my clients in relation to factual evidence  
 21 and so I don't know what other co-insurers' counsel will  
 22 or will not say on the subject.

23 MR GAISMAN: My Lord, may I be permitted to address  
 24 your Lordship, if your Lordship can hear me?

25 MR JUSTICE BUTCHER: I can.

15

1 MR GAISMAN: Good. This is Jonathan Gaisman on behalf of  
 2 Hiscox, my Lord.

3 My Lord, we have not, to my knowledge, disavowed the  
 4 intention to serve any evidence of fact, and it may help  
 5 to give a little colour to the apparently arid debate  
 6 over paragraph 11 if I indicate the sort of evidence  
 7 that Hiscox at least has in mind. If I may, I will just  
 8 take up a very few minutes by way of explanation.

9 My Lord, this topic is not covered in our skeleton  
 10 argument and I apologise to your Lordship and Mr Edelman  
 11 for that, but we have had to do a great deal of reading  
 12 and thinking in a very compressed timetable and we had  
 13 to file our skeleton argument for the CMC only two and  
 14 a half working days after getting all the material that  
 15 your Lordship knows we got last Tuesday late evening.

16 Paragraph 60 of the FCA's skeleton gives three  
 17 reasons why it's said to be desirable to require any  
 18 party who seeks to serve factual evidence to obtain the  
 19 court's permission. As we will see, none of those  
 20 reasons will apply to the sort of evidence we have in  
 21 mind.

22 My Lord, all we are minded to do is to seek to add  
 23 to the FCA's chronological table of agreed facts some  
 24 additional facts which are no different in character  
 25 from those already proposed. By the way, this has

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1 nothing to do with the argument over expert evidence  
 2 through prevalence of the disease which is raised by  
 3 paragraph 12.  
 4 The facts we have in mind should not be  
 5 controversial, but in case the FCA in due course does  
 6 not agree them, we will seek to prove them.  
 7 We are concerned, my Lord, broadly speaking, with  
 8 two types of evidence. First, previous Asiatic  
 9 pandemics in the UK and secondly the Swedish experience  
 10 of the present pandemic.  
 11 Let me just say a very little about each of those,  
 12 if I may, my Lord. The Asiatic flu pandemics of 1957  
 13 and 1968 to 1969 -- I don't know whether your Lordship  
 14 has had a chance to look at the FCA's proposed  
 15 chronology of agreed facts in bundle 3, but if  
 16 your Lordship picks up --  
 17 MR JUSTICE BUTCHER: I have looked at it.  
 18 MR GAISMAN: Would your Lordship look at item 4 on page 4?  
 19 Your Lordship will see here that there is a reference to  
 20 the National Risk Register of Civil Emergencies, 2017  
 21 edition, and there is then a heading "What is the risk?"  
 22 To summarise this very briefly, as you can see at  
 23 the foot of the first paragraph, there is a high  
 24 probability of a flu pandemic occurring, but it's  
 25 impossible to predict when.

17

1 Then, taking this very shortly, in the last  
 2 paragraph on that page there is the potential, as  
 3 your Lordship sees, for between 20,000, and 750,000  
 4 fatalities.  
 5 Your Lordship will also have noticed that the FCA  
 6 has included in this bundle -- in this chronology  
 7 I should say -- references to the Zika virus and the  
 8 Ebola outbreaks. That's on pages 3 and 5 of the bundle.  
 9 Now, according to the framework agreement,  
 10 clause 1.2, the agreed facts are the facts "necessary to  
 11 resolve the disputed issues". I won't give  
 12 your Lordship the reference. So this fact is included  
 13 in the proposed agreed facts because the FCA considers  
 14 that it is necessary to include them.  
 15 The only relevance of this that we can see must be  
 16 to demonstrate that parties to contracts of insurance  
 17 must have appreciated the probability of a flu pandemic  
 18 and therefore the parties to the contract in the present  
 19 case must be assumed to have intended to cover them in  
 20 the absence of an express exclusion, and indeed -- I'm  
 21 not inviting your Lordship to go to it -- this point is  
 22 taken up by my learned friend Mr Edelman in paragraph 33  
 23 of the particulars of claim.  
 24 Now, there is of course no point now or at any stage  
 25 before the trial of arguing the relevance of particular

18

1 facts sought to be agreed, especially if they can be  
 2 agreed as facts. Somebody may argue in due course that  
 3 if predictability is part of the background, the right  
 4 question may not be the predictability of a pandemic but  
 5 the predictability of the draconian measures taken by  
 6 the UK Government in response because, without those  
 7 measures, any case that Hiscox's insurances -- and  
 8 I speak only for Hiscox -- were triggered would be  
 9 somewhat ambitious.  
 10 If reliance is to be placed by the FCA on the  
 11 prospective probability of a pandemic such as the  
 12 present, it must be no less relevant to point out that  
 13 in the case of previous pandemics which have struck the  
 14 UK and caused very significant levels of was  
 15 mortality -- 80,000 in the case of the 1968/1969  
 16 pandemic -- these were not accompanied by any sort of  
 17 Government interventions of the sort that have given  
 18 rise to the present insurance claims which are remotely  
 19 comparable to the present.  
 20 Now, as I say, we are concerned with two particular  
 21 pandemics, the 1957 pandemic and the 1968/1969 pandemic,  
 22 which I'm old enough to remember. At the time it was  
 23 called "Hong Kong flu" or, in a less politically correct  
 24 age, "Mao flu" -- shades of President Trump before the  
 25 fact -- which killed 1 million to 4 million people

19

1 worldwide and, as I say, 80,000 in the UK.  
 2 Now, the significance of all this is of course not  
 3 for today, but your Lordship and Lord Justice Flaux will  
 4 want to see all sides of this question. There is no  
 5 reason why these facts should not be agreed pursuant to  
 6 clause 2.1 of the framework agreement. But if the FCA  
 7 does not agree them, then the same clause states  
 8 explicitly that insurers are not prevented from  
 9 advancing non-agreed facts as part of their case.  
 10 Then a word, if I may, about the Swedish experience.  
 11 For this purpose could I ask your Lordship to re-read  
 12 one paragraph of our skeleton argument, namely  
 13 paragraph 35?

(Pause)

14 Your Lordship can start at the second sentence.  
 15 Your Lordship will have seen this, and I'm not going to  
 16 give your Lordship very long because your Lordship will  
 17 simply need to remind himself of the point here, which  
 18 I won't repeat.  
 19 My Lord, it is a key plank, as we understand it, of  
 20 the FCA's case that the entire corpus of the  
 21 Government's advice, guidance and mandatory regulation,  
 22 starting before closures and lockdown, is to be regarded  
 23 as what is called one single body of public authority  
 24 intervention; particulars of claim, paragraph 4.1. On

20

1 that argument there is no difference between the  
2 Government's initial guidance, say, and subsequent  
3 mandatory closures and lockdown.

4 That's obviously an argument for another day, but it  
5 is not impossible to conceive of an argument that there  
6 is a distinction, for the purposes of the Hiscox policy  
7 triggers at least, between guidance and recommendations  
8 on the one hand and mandatory proscriptions on the  
9 other.

10 That leads one on, in particular once the mandatory  
11 restrictions have been imposed, to the central issue  
12 which your Lordship will have seen from the particulars  
13 of claim arises, which -- assuming against insurers for  
14 the present that the cover is triggered in principle.

15 The question is this: what is the measure of  
16 indemnity in principle? That in turn raises the issue  
17 of how does one answer the question, for the purpose of  
18 causation and the application of trends clauses: what  
19 would the situation have been but for the restrictions?

20 Your Lordship will have seen that the central point  
21 made by the FCA in paragraphs 74 and 77 of its  
22 particulars of claim is that when examining these issues  
23 it is impermissible for insurers to construct  
24 "artificial counterfactuals that would not or could not  
25 in the real world have occurred". That's paragraph 74.

21

1 It follows that the FCA's argument is that insurers are  
2 not allowed to answer the question, "What would have  
3 been the position but for the restrictions?", by saying,  
4 "But there would still have been COVID". The FCA's  
5 case, as your Lordship will have seen, is that the two  
6 things, Government intervention and COVID, form  
7 an indivisible whole and you can't imagine a world  
8 merely without the restrictions but still with COVID  
9 because that's not realistic. The two are inseparable.

10 Now, obviously we're going to debate all this at the  
11 trial and there may be several ways in which it's  
12 possible to examine that question. One way may be --  
13 and I put it no higher than that -- to compare the  
14 situation in the UK with that of Sweden, for example.

15 Now, Sweden is a country which, as is common  
16 knowledge and as is the fact, has not imposed anything  
17 like the same mandatory restrictions on use and denials  
18 of access as have been imposed in the UK. Your Lordship  
19 will know that restaurants and businesses have not been  
20 required to shut; people haven't been ordered to stay at  
21 home. Much more has been done by guidance and by  
22 recommendation, not itself mandatory.

23 This is all a matter of record and there is no  
24 reason why the content of the regulations passed and not  
25 passed in Sweden should not be agreed.

22

1 Now, if it were to be the case that reliable  
2 sources, such as the Swedish Central Bank, reported  
3 that, in spite of the absence of such restrictions,  
4 businesses in Sweden have suffered significant losses as  
5 part of the general contraction in economic activity, it  
6 being obviously unnecessary for the purposes of the test  
7 case to determine the percentage in fact of such  
8 diminution in activity, that might -- and I say no more  
9 than this -- be said to have a potential bearing on the  
10 argument which we foreshadowed in paragraph 35 of our  
11 skeleton and which I asked your Lordship to re-read.

12 It might therefore be said, with what force we will  
13 have to consider later, that if businesses in  
14 a neighbouring European country in which there are no  
15 comparable restrictions suffered measurable losses  
16 despite the absence of any such restrictions, there is  
17 no reason in principle why perhaps some proportion of  
18 a UK business' losses could not properly be said to have  
19 been caused by COVID alone.

20 Now, there is no doubt, there can be no serious  
21 doubt, expressing the matter at the highest level of  
22 generality, which is all one needs to do, that  
23 businesses in Sweden have suffered financial losses in  
24 the absence of lockdown and closures. If that's all  
25 agreed, then the trial can proceed on that basis and we

23

1 can argue about relevance at the trial. But if the FCA  
2 does not agree, it will be necessary to adduce evidence  
3 on it and some such factual material at a high level of  
4 generality will need to be before the court.

5 Now to come back, with that explanation -- which  
6 I appreciate is news both to your Lordship and to  
7 Mr Edelman -- to the issue over paragraph 11 of the  
8 draft, why should insurers have to apply for permission  
9 to serve any of this evidence unless some of it is  
10 strictly expert evidence? Why should they not be  
11 entitled to serve it as of right, as would ordinarily be  
12 the case?

13 And if we come back -- and then I will,  
14 metaphorically speaking, sit down -- to the three  
15 reasons given in paragraph 60 of the FCA's skeleton,  
16 which your Lordship will take up, the first reason put  
17 forward by the FCA is irrelevant. It is we who are  
18 putting forward the evidence. It is the FCA, therefore,  
19 which is required to use its best endeavours to agree  
20 the facts. I hope it does so.

21 MR JUSTICE BUTCHER: I'm sorry, which paragraph is this,  
22 Mr Gaisman?

23 MR GAISMAN: Paragraph 60 of the FCA's skeleton. I'm sorry,  
24 it's probably a wrong reference.

25 MR JUSTICE BUTCHER: No, it's right. No, go on.

24

1 MR GAISMAN: I was just addressing (a), (b) and (c) very  
2 quickly. I just said (a) is irrelevant because it's we  
3 who are putting forward this evidence. The FCA has to  
4 use its best endeavours to agree it and I hope they  
5 will. The need for evidence arises only if they don't.

6 As for the second point made in paragraph 60, I have  
7 explained why Hiscox considers that the evidence is  
8 necessary for the just determination of the issues.  
9 Whether it is so will be determined at the trial. But  
10 the evidence that we have in mind is no different from  
11 the reams of evidence that the FCA has put forward in  
12 the chronological section of its agreed facts.

13 The third point made by the FCA relates to the  
14 disclosure, and it is obvious from what I have said that  
15 no question of disclosure arises.

16 That's all I want to say.

17 MR JUSTICE BUTCHER: Mr Gaisman, what I wanted to --  
18 obviously what you have said is of importance and no  
19 doubt helpful, not only to me but to Mr Edelman, but the  
20 question which I have to address today is really  
21 a practical one.

22 MR GAISMAN: Yes.

23 MR JUSTICE BUTCHER: Suppose there were a significant body  
24 of evidence which was not agreed by the FCA, what would  
25 be the consequences for the trial -- or perhaps the

25

1 question is: if there were a body of evidence which was  
2 not agreed by the FCA, would that simply be something  
3 which we had to take into account on 26 June at the  
4 second CMC in determining what matters could be dealt  
5 with at the trial and which could not?

6 It's those practical questions which I would like  
7 you to address.

8 MR GAISMAN: Well, I understand that your Lordship doesn't  
9 want to encumber the trial itself with evidential  
10 disputes, although any evidential disputes on  
11 paragraph 11 would obviously be likely to pale into  
12 insignificance by comparison with those in relation to  
13 paragraph 12.

14 The difficulty is being able to understand, my Lord,  
15 at the second CMC, before one has seen the case as  
16 a whole, what the significance of the evidence is and  
17 how it fits in. That's a difficult thing for  
18 your Lordship to do. Your Lordship, it's true, will  
19 have had the defences by then.

20 I hesitate, my Lord, because I know better than  
21 your Lordship and my learned friend the sort of evidence  
22 we have in mind, and it would be a very few pages of  
23 documents, so far as Sweden is concerned, mainly simply  
24 setting out -- which can't possibly be disputed -- what  
25 legislature, mandatory guidance, non-mandatory guidance

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1 and recommendations there have and haven't been. I know  
2 that's not quite the question your Lordship is asking  
3 me, but I do find it difficult to concede that there can  
4 be much dispute by way of that. It's simply a matter of  
5 knowing what a friendly European country has done by way  
6 of legislature in the last few months.

7 Then there will be a very small amount of material,  
8 such as the Central Bank report, saying the economy has  
9 been badly hit. I would have thought that fact can't  
10 possibly be disputed. The amount by which it's been hit  
11 the trial court will not have to decide.

12 All I want to do is to illustrate the possibility  
13 that one can subtract the regulations, the restrictions,  
14 and still have the disease. My learned friend says  
15 that's artificial and at the trial I want to say, "No,  
16 it isn't artificial". There is very little factual  
17 substratum that is required in order to put that point  
18 in play.

19 It's very hard to predict what disagreement there  
20 would ever be, my Lord, but I really assure  
21 your Lordship that this is not some Trojan horse. We  
22 are seeking simply to put in some facts which, as it  
23 were, throw up the point for legal construction. There  
24 will be no findings of fact that I would be asking  
25 your Lordship to make beyond, "This is what the Swedish

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1 Government has done". But it's all in quasi-legislative  
2 or guidance or recommendations or -- some is in Swedish  
3 but we have translated -- and that, despite the absence  
4 of lockdowns and closures and the UK experience,  
5 businesses in Sweden suffered measurably; the measure in  
6 question being completely irrelevant for the purposes of  
7 the debate.

8 MR JUSTICE BUTCHER: Yes. I suppose the question then  
9 becomes, in a sense, this: if you have a good reason for  
10 putting this material before the court, then the court  
11 will give you permission. Why shouldn't there be at  
12 least the permission hurdle? The danger which I am  
13 concerned to guard against is that that there is the  
14 service of material which is put in and which may  
15 disrupt the trial --

16 MR GAISMAN: I agree.

17 MR JUSTICE BUTCHER: -- which is not relevant.

18 MR GAISMAN: My Lord, all I would say -- and I see the way  
19 your Lordship's mind is working -- is whether or not  
20 there is good reason for this evidence to be put in  
21 might only appear at the trial, and I would want to  
22 guard against a situation in which -- as I say, this  
23 must be theoretically possible -- the court were to rule  
24 that we should not have permission to adduce the  
25 evidence and on Day 4 of the trial the court wished that

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1 it had reached the contrary decision .  
 2 I think that's highly unlikely because the material  
 3 is not very ambitious and the point in a way can be  
 4 illustrated not quite without it , but in any event --  
 5 but having said that , my Lord -- and I hope I have shown  
 6 your Lordship the sort of evidence we have in mind --  
 7 there is no cause for alarm .  
 8 MR JUSTICE BUTCHER: I would also say, Mr Gaisman, if that's  
 9 the sort of evidence that you are intending to adduce,  
 10 it's highly likely that if you require permission to  
 11 adduce it , I would give it because I can see the reason  
 12 why you want it .  
 13 MR GAISMAN: Yes .  
 14 MR JUSTICE BUTCHER: Mr Edelman will have heard what I have  
 15 just said .  
 16 MR GAISMAN: Yes, my Lord. I won't say any more .  
 17 MR JUSTICE BUTCHER: Right .  
 18 Does anyone else want to say anything before  
 19 Mr Edelman replies on this ?  
 20 MR KEALEY: Only that we ally ourselves fully with  
 21 Mr Gaisman and his clients in relation to this  
 22 submission , which it was agreed at least among ourselves  
 23 should be made by Mr Gaisman on behalf of course of his  
 24 clients , but also collectively .  
 25 MR TURNER: My Lord --

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1 MR JUSTICE BUTCHER: Sorry, that was someone else's voice .  
 2 Who was it ?  
 3 MR TURNER: It's David Turner for RSA, my Lord, and  
 4 I just want to put my hand up very quickly because,  
 5 having disavowed in my skeleton argument any intention  
 6 on the part of RSA to adduce factual evidence , we are  
 7 giving consideration to something slightly less exotic  
 8 than Mr Gaisman's clients in the form of limited factual  
 9 evidence , if not agreed, as to the fact of an impact of  
 10 COVID-19 on sectors of the UK economy in advance of  
 11 Government guidance and restrictions .  
 12 I don't need to say any more than that because  
 13 your Lordship will understand immediately the potential  
 14 significance of such evidence and one would hope that it  
 15 will be agreed and it would not be necessary to quantify  
 16 the extent of that impact merely to establish that it  
 17 existed . And otherwise we ally ourselves entirely with  
 18 what Mr Gaisman has said .  
 19 MR JUSTICE BUTCHER: Thank you. Anyone else? No .  
 20 Mr Edelman ?  
 21 MR EDELMAN: My Lord, can I just make it clear at the  
 22 outset --  
 23 MR RIGNEY: My Lord, I'm so sorry to interrupt Mr Edelman .  
 24 I thought just to say , my Lord -- do forgive me --  
 25 Zurich also has given consideration to the introduction

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1 of factual evidence . It's very limited in much the same  
 2 way that has been discussed already . The question is  
 3 the availability of pandemic insurance , specific  
 4 pandemic insurance , but beyond that , my Lord, I don't  
 5 need to add anything at all to what's already been said  
 6 by Mr Gaisman and by Mr Kealey .

7 I do apologise for interrupting , but I thought you  
 8 ought to know that that's our position .  
 9 MR JUSTICE BUTCHER: Thank you .  
 10 Right , could everyone mute their mics other than  
 11 Mr Edelman? Thank you .  
 12 MR EDELMAN: My Lord, the problem that the FCA has been  
 13 facing is that these insurers have not paid anything to  
 14 policyholders . It's not a case of them saying "Well,  
 15 for reasons (a), (b), (c), we're only going to pay you  
 16 part of your loss ". They have not paid them anything at  
 17 all .  
 18 MR JUSTICE BUTCHER: Mr Edelman, I'm going --  
 19 MR EDELMAN: There are points of principle, my Lord .  
 20 MR JUSTICE BUTCHER: We don't need to get over-controversial  
 21 in relation to the terms of paragraph 11 .  
 22 MR EDELMAN: No, my Lord, but it's important that --  
 23 Mr Gaisman has presented submissions that may go to  
 24 issues on quantum , but what the policyholders are facing  
 25 in this case is a blanket refusal to pay anything at

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1 all , and it is those issues of principle which the FCA  
 2 wish to have addressed . That may impinge indirectly on  
 3 whether causation defences give rise to a partial  
 4 defence to claims , but the critical point is that these  
 5 policyholders are being told that nothing is going to be  
 6 paid at all .

7 My Lord, as for the content of evidence , we have  
 8 said that we will use our best endeavours to agree facts  
 9 which appear to be uncontentious in the sense that they  
 10 are , for example, a matter of public record or which are  
 11 obviously facts which ought objectively to have been  
 12 known to both parties to the contract . But if there are  
 13 either contentious facts or facts which are not , in the  
 14 view of the FCA, relevant to the issues of principle  
 15 which fall to be decided in this action , then we will  
 16 not agree them and then we would require the court to  
 17 express a view and of course be bound by the court's  
 18 ruling as to whether the evidence ought to be put before  
 19 the court , and if so on what basis , with or without  
 20 cross-examination , and whether it is relevant . And if  
 21 irrelevant it will be excluded , or if insufficiently  
 22 relevant the court may exercise a discretion not to  
 23 include it .

24 But at least the application process means that  
 25 evidence which has already gone through the filter of

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1 the FCA seeking to use its best endeavours to agree  
2 something where possible and has failed that test, then  
3 there should be a further hurdle for the court.

4 I add one more thing: this litigation is unlike  
5 other litigation in that, although the legal team for  
6 the FCA are, as I have explained, having to take  
7 an adversarial approach, this is not a party which is in  
8 essence hostile to the adversary. It is the regulator  
9 and wishes to have a fair and just adjudication of these  
10 policyholders' claims. As I said at the outset, we will  
11 do our best for policyholders, but there is no  
12 partisanship on the FCA in wanting to achieve a certain  
13 result on any particular policy. We're just here to  
14 argue the case for policyholders. So the insurers can  
15 have faith that we will approach the agreement of  
16 evidence in good faith.

17 My Lord, if my learned friend Mr Gaisman wants to  
18 put in evidence about Sweden and ignore what happened in  
19 Spain and Italy and France and everywhere else in most  
20 of the industrialised and commercialised world, that  
21 of course is entirely a matter for him. We can't stop  
22 him doing it.

23 MR JUSTICE BUTCHER: Yes. So the issue is as to whether  
24 I should approve the claimant's proposed wording for  
25 paragraph 11, which is that parties seeking to rely on

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1 factual evidence should make an application for  
2 permission to the court by 4 pm on 18 June, or the  
3 defendants' proposed wording of paragraph 11, which is  
4 that parties wishing to rely on factual evidence should  
5 simply serve statements of witnesses of fact without  
6 an application.

7 It seems to me that I should prefer the claimant's  
8 proposed wording in relation to paragraph 11 to provide  
9 the discipline of needing the court's permission. If  
10 there is a case that the evidence is relevant and, if it  
11 hasn't already been agreed by the FCA, bearing in mind  
12 what Mr Edelman has said about the FCA undertaking to  
13 use its best endeavours to agree evidence, if there is  
14 such evidence, then the court will obviously be likely  
15 to give permission for it to be used. But it does seem  
16 to me that the filter of permission is a necessary or at  
17 least a desirable one, given that the trial is of a very  
18 limited window and the court has to have control over  
19 what is likely to be in dispute and take up time at the  
20 trial.

21 So I am going to favour on this the claimant's  
22 proposed wording for paragraph 11.

23 MR EDELMAN: I am grateful, my Lord.

24 My Lord, there is now a much longer topic, which is  
25 the issue as to paragraph 12 arising out of our

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1 reference to the Cambridge and Imperial work.

2 My Lord, the shorthand writers have asked for  
3 a break at about 11.40. My Lord, I am happy to carry on  
4 until about then and then stop in mid-flow, unless  
5 my Lord wants to take a break now before we move on to  
6 a new topic.

7 MR JUSTICE BUTCHER: No, I think you should go on for about  
8 another 15 minutes, Mr Edelman.

9 MR EDELMAN: That's what I was proposing to do, but I just  
10 wanted to check with my Lord first.

11 So the topic which has generated the most heat in  
12 the skeletons, the last issue generated heat on the day  
13 but not in the skeletons, is in relation to  
14 paragraph 12. Can I just say at the outset that we are  
15 prepared to extend the date for an application for  
16 expert evidence to 24 June and to make it clear that  
17 such application should be dealt with at the second CMC.

18 Obviously there is an issue of principle that has  
19 been raised by the defendants as to our entitlement to  
20 plead what we have said in paragraphs -- in particular  
21 paragraphs 24 to 28.

22 I don't know whether it would be helpful for  
23 my Lord to have a look at those paragraphs. I don't  
24 know if my Lord has looked at them in detail, but it  
25 might be helpful if I take you through those paragraphs

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1 and explain what we're saying insofar as it's not  
2 already clear.

3 MR JUSTICE BUTCHER: Well, Mr Edelman, I've read them,  
4 I think I've read them twice, but I would like you to  
5 take me to them if you think that that would be helpful.

6 MR EDELMAN: My Lord, in that case what I will simply do is  
7 just skim through them just to identify the different  
8 things that the paragraphs are doing because there  
9 appears to be an objection to all of 24 to 28, albeit  
10 that in particular in the Hiscox skeleton, from my  
11 learned friend Mr Gaisman, it appears that the focus  
12 really is on the Cambridge analysis, the  
13 under-reporting.

14 I'm not sure whether all the insurers are prepared  
15 to narrow their objection just to the under-reporting  
16 issue and whether it goes, as I understand it, not to  
17 the fact of under-reporting, because they all seem to  
18 accept that there was massive under-reporting, but  
19 whether or not we are entitled to plead and put before  
20 the court the Cambridge analysis and to invite the court  
21 to apply a methodology on that.

22 Can I just focus on what the four paragraphs are  
23 dealing with? We start at page 343. My Lord will have  
24 seen that paragraph 24 -- and my Lord will see referred  
25 to also in paragraph 28.1 -- that deals with the

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1 Government data on reported cases, that's tests and  
 2 deaths, and those are the tested cases which we deal  
 3 with.  
 4 Then at 28.2 we also give information as to the  
 5 geographic spread of reported cases, and, with respect,  
 6 we consider that those paragraphs must be utterly  
 7 unobjectionable from the defendants because they do no  
 8 more than recite and apply Government-released data on  
 9 testing. It requires no expert evidence, no expert  
 10 involvement. The facts are the facts.  
 11 We then go on to 26 and 27, where we refer to, in  
 12 particular, the Cambridge analysis, and, in 27, showing  
 13 what the Cambridge analysis says about the level of  
 14 under-reporting, which we then apply in 28.3 on  
 15 page 345.  
 16 Now, the insurers seem to approach this question as  
 17 if the Cambridge analysis is some expert evidence that  
 18 the FCA has obtained to bolster its case. If they had  
 19 even glanced at the Cambridge report or looked at our  
 20 agreed facts on this topic, they would have seen that  
 21 this is a joint Cambridge University/Public Health  
 22 England modelling team which is publishing its work and  
 23 providing the Government and Public Health England, in  
 24 particular, with the statistics it needs and relies on,  
 25 for example in relation to the R rate.

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1 So this is not just some random model that the FCA  
 2 has commissioned in order to ambush these insurers with  
 3 scientific evidence in the particulars of claim. This  
 4 is the modelling which is being used by the Government  
 5 for its R rates.  
 6 What we invite the court then to do is to devise  
 7 a methodology -- my Lord can see this now in 28.4 --  
 8 based on either deaths or reported cases or the  
 9 under-counting ratio being applied to uplift  
 10 reporting -- those are the three options in (a), (b) and  
 11 (c) -- to average across small areas.  
 12 So that's a methodology. That's purely a matter of  
 13 argument as to whether that is a method that  
 14 policyholders can use to get over the hurdle of seeking  
 15 to prove incidence in their particular geographic area.  
 16 Now, typically in a policy like that of Mr Kealey,  
 17 whose clients rather surprisingly took the lead on  
 18 this -- given that they have a clause with a 25-mile  
 19 radius area, giving a square mile area, as we have  
 20 already said, of about 2,000 square miles -- have said  
 21 that -- obviously they wish to take issue with  
 22 policyholders as to their ability to prove the incidence  
 23 of COVID-19 within a 2,000-mile square area, but so be  
 24 it. They want to take it. It's perhaps slightly more  
 25 relevant to Hiscox, who have a 1-mile radius, but it's

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1 in those particular cases where it's even more important  
 2 that policyholders have a methodology.  
 3 As you see, what we seek to do is invite the court  
 4 in our pleading to apply a methodology which  
 5 policyholders can use to discharge the burden of proof  
 6 which will be on them under the policies as to the  
 7 incidence of COVID-19 in their locality.  
 8 I should add an important rider, which I'll come to  
 9 in more detail later: we make it plain that we are not  
 10 seeking to preclude insurers from seeking to prove in  
 11 any given case that this averaging process is  
 12 a misleading picture on the specific circumstances of  
 13 an individual case.  
 14 MR JUSTICE BUTCHER: What do you mean by an "individual  
 15 case"? A particular area of the country?  
 16 MR EDELMAN: A particular insured. Let's say -- I can't  
 17 imagine this arising with Amlin, to be perfectly honest,  
 18 with 2,000 square miles -- but in the Hiscox case and  
 19 the 1-mile radius, where they can say, "This averaging  
 20 is irrelevant for you because your property has no other  
 21 properties within a 1-mile radius of it and therefore  
 22 the averaging process is not reliable". But as I'll  
 23 come to explain, that is rather inherently unlikely  
 24 because the policies that are being tested that involve  
 25 the 1-mile limit are for bowling clubs -- one might

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1 think that they might have a significant population  
 2 around them, otherwise they'd be pretty empty most of  
 3 the time -- and retail outlets. Again, one might think  
 4 they're not the sort of premises likely to be a single  
 5 building with no other buildings within a mile around  
 6 them or maybe only one or two buildings with one or two  
 7 occupants that Hiscox have managed to ask and they have  
 8 said, "No, nobody had it here".  
 9 So this is all wholly artificial, in our submission.  
 10 But let's deal with the point. That's the sort of  
 11 situation that they might want to be able to show. They  
 12 may show there is nothing in a particular area, no  
 13 outbreak at all in a local authority area, but so far we  
 14 have only -- the published data I think has only come up  
 15 with one local authority with no reported cases.  
 16 MR JUSTICE BUTCHER: Mr Edelman, I don't want to take you  
 17 out of your course because I want to hear you develop  
 18 the whole thing, obviously. I want you to concentrate  
 19 on exactly what it is I've got to decide today. Just  
 20 before you do leave the point you have just been making,  
 21 are you envisaging that it would be open to the insurers  
 22 to raise these points in relation to individual policies  
 23 at this hearing at the end of July?  
 24 MR EDELMAN: No. No. What we want -- and I'll put this  
 25 upfront -- is the court to settle on a methodology which

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1 will in effect give policyholders a -- it's something  
 2 equivalent to a rebuttable presumption.  
 3 MR JUSTICE BUTCHER: When you say "methodology" -- and  
 4 I think this is what the insurers are saying -- you're  
 5 saying that the court should make some findings of fact  
 6 by the application of a methodology?  
 7 MR EDELMAN: No, my Lord. What we're asking the court to do  
 8 is to proceed on the premise of the Government's models  
 9 as to the rate of under-reporting and an under-reporting  
 10 rate which the Cambridge analysis, which is fed through  
 11 to the Government -- hence the latest predictions about  
 12 maybe continuing lockdowns in some parts of the country  
 13 whereas others are released based on this work -- we're  
 14 back at an earlier date now. We're back in March when  
 15 the lockdown started for the purposes of this case.  
 16 What we're simply asking the court to do is to take the  
 17 Cambridge analysis figures, because those are what are  
 18 being used, and to use that to formulate the methodology  
 19 we outline in paragraph 28.4(c).  
 20 MR JUSTICE BUTCHER: If you're just asking the court to say,  
 21 "Could that be enough evidence?", well, that's one  
 22 thing. But it's a different thing to say, "Is that  
 23 enough evidence?"  
 24 MR EDELMAN: Or "Should it be".  
 25 MR JUSTICE BUTCHER: And then, "Should it be", is that

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1 a matter which the court can decide? I mean, the court  
 2 has to decide matters effectively of law and  
 3 construction. I'm not quite sure how you get to the  
 4 position that the court can say "It should be" or -- and  
 5 I'm not quite sure how the court can get to the  
 6 establishment of a rebuttable presumption either.  
 7 MR EDELMAN: My Lord may be familiar with the case of  
 8 *Equitas v R&Q*, dealing with the allocation of the  
 9 Kuwait Airport aviation losses for reinsurance purposes,  
 10 in which it was not possible actually to break down the  
 11 LMX spiral settlements. What the court did in that case  
 12 was to say that an actuarial model is sufficient proof  
 13 because of the difficulties of actually proving the  
 14 pounds and pennies of the LMX spiral settlements.  
 15 What we are seeking to do is to invite the court to  
 16 say that, because of the difficulty for a policyholder,  
 17 an individual small business policyholder, in proving  
 18 the incidence of disease as an individual policyholder  
 19 on their own, the court needs to come up with  
 20 a mechanism equivalent to the actuarial model in the  
 21 *Equitas v R&Q* case which a policyholder is entitled to  
 22 use to prove his case and which ordinarily will be  
 23 treated by the court as a sufficient discharge of the  
 24 burden of proof, because at the moment -- and my Lord  
 25 has seen the extracts from *Amlin* and *Amlin's* declinature

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1 letters -- the insurers are putting policyholders to  
 2 proof on this topic. This is and has always been a very  
 3 real concern of the FCA.  
 4 MR JUSTICE BUTCHER: Yes. Now, that I certainly see,  
 5 Mr Edelman, and I absolutely understand the concern  
 6 which is driving the FCA in relation to that. The  
 7 difficulty is how exactly that is addressed.  
 8 MR EDELMAN: My Lord, what I have sought to do is to deal  
 9 with it with that analogy, that the courts do accept  
 10 models and methodologies in order to overcome hurdles on  
 11 proof if it can be satisfied that the approach will give  
 12 a reliable picture, subject -- but it's not decided --  
 13 here you have the escape clause that you're not actually  
 14 having to decide that it does give a necessarily 100%  
 15 accurate answer in every case because there may be one  
 16 in 1,000, but we suspect there won't be even one in  
 17 1,000 or one in 10,000 where it doesn't give an accurate  
 18 result because it will provide the answer to the vast  
 19 majority of cases and will prevent insurers from  
 20 stonewalling by saying, "Well, if there was an outbreak  
 21 within X miles of your property and if you can prove  
 22 that, then maybe the clause might apply". We want to  
 23 clear this problem and it was in our questions for  
 24 determination from the very outset as to how  
 25 policyholders can go about proving the incidence of

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1 disease.  
 2 That's why we're asking the court to endorse  
 3 a mechanism which will relieve the policyholders of  
 4 actually having to prove this on a case-by-case basis  
 5 when they haven't got the resources to do so. That's  
 6 the reality and that's perhaps the obstacle that needs  
 7 to be overcome and it needs to be overcome somehow. If  
 8 this test litigation doesn't overcome it, then it will  
 9 leave policyholders with a Pyrrhic victory because they  
 10 will still get people like *Hiscox* and maybe even *Amlin*,  
 11 who have been saying to a policyholder in London, "Well,  
 12 if there was an outbreak within a 25-mile radius".  
 13 I mean, insurers need to be told what is sufficient  
 14 evidence for a policyholder to present to them, subject  
 15 to their right to plead special facts.  
 16 So that is what we will be asking the court to do.  
 17 The question is: should we be precluded from doing this?  
 18 At the moment we hadn't envisaged that we would -- we  
 19 don't currently envisage that we would be needing any  
 20 expert evidence. If necessary, we can try and find out  
 21 these people who did this analysis. But if my learned  
 22 friend looked at this -- there is no evidence from their  
 23 skeletons if they have looked at this at all -- they  
 24 would have seen that the reason this model was  
 25 adopted -- and they can see this from the first few

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1 lines of the Cambridge published report on the net --  
2 that this is taken from a major study that the relevant  
3 department of Cambridge University conducted into the  
4 2009 swine flu outbreak.

5 That was a model that was formulated to predict what  
6 the under-reporting was for that. It was tested against  
7 all other models to see whether it was reliable and the  
8 authors of the report suggested that it might be useful  
9 to the public health authorities for future outbreaks,  
10 and hence we have that same model being now applied to  
11 the current outbreak.

12 MR JUSTICE BUTCHER: Right. Mr Edelman, we will have  
13 a ten-minute break now and then you can resume.

14 MR EDELMAN: Yes.

15 MR JUSTICE BUTCHER: Obviously I have carefully considered  
16 your reply skeleton argument as well and I would like to  
17 come back to that after the break.

18 MR EDELMAN: Certainly, my Lord, yes. I'm grateful.  
19 (11.46 am)

20 (A short break)

21 (11.54 am)

22 MR JUSTICE BUTCHER: Mr Edelman, I can see you are there.  
23 Shall we make a start?

24 MR EDELMAN: Yes, my Lord.

25 Does my Lord want me to continue? I think my Lord

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1 said you wanted me to deal with some matters raised in  
2 our reply skeleton, which I'm happy to do at this stage.

3 MR JUSTICE BUTCHER: No, I want you to continue, but in  
4 a sense the bottom line for today's purposes, as far as  
5 you're concerned, is what you have put in your reply  
6 skeleton, isn't it?

7 MR EDELMAN: Yes, my Lord, and what -- it's not entirely  
8 clear what the defendants are asking my Lord to do about  
9 it. There is no application to strike out paragraphs 24  
10 to 28 and they say that they don't want us to rely on  
11 any expert evidence on this topic and they say --  
12 perhaps they're saying that paragraph 12 should be  
13 edited accordingly. We're quite happy, as I said, to  
14 amend the date there to the 24th, so that if they really  
15 want to get expert evidence, they can go and get it.

16 As far as we're concerned, we just have the fact  
17 that these are the statistics on which the Government  
18 are relying for their strategy and that should be good  
19 enough for the insurers. So our submission is that you  
20 should make an order in accordance with paragraph 12,  
21 let's wait and see what the insurers actually say in  
22 their defences about this and then the parties can  
23 either agree a way forward or, if not, this will have to  
24 be dealt with at the second CMC. If we do adduce any  
25 expert evidence -- I'm not sure whether we can or

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1 will -- it would merely be from these people saying,  
2 "This is what the model produces".

3 It may be that the defendants are under the  
4 misapprehension that the Cambridge analysis is some  
5 one-off scientific study because they hadn't read it.  
6 I won't comment on facial expressions when I referred to  
7 the origin of the study, but if you look at the report,  
8 what's on the web, the first thing it does is refer back  
9 to the 2009 study and refer to the fact it's with  
10 Public Health England.

11 I don't know if my Lord did see the agreed facts  
12 document, which is in the third volume. It starts at  
13 page 66. I just wanted to show you very quickly what  
14 that says.

15 (Pause)

16 MR JUSTICE BUTCHER: Yes.

17 MR EDELMAN: I'll take it very briefly, my Lord. It goes  
18 through the data, and you have the testing data in  
19 section 1 and that is explained all the way through --  
20 and then through to page 70. Then you have the options  
21 as to how one can -- how a policyholder might prove  
22 incidence of disease in the relevant policy area, and  
23 option 1 is:

24 "Premises located within an LTLA where there has  
25 been at least one reported case."

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1 Then over the page, option 2:

2 "Relevant policy area incorporates more, potentially  
3 many more, than one LTLA and there has been at least one  
4 reported case in any of them."

5 Mr Kealey for Amlin, who is leading the charge on  
6 this apparently, so I'm told, you can see the  
7 application of his client's radius by the circle in that  
8 page and that rather gives you a graphic illustration of  
9 how large a 25-mile radius actually is and how many  
10 major towns it will incorporate.

11 Then option 3:

12 "Insured premises fall within a region, whether  
13 UTLA, LTLA or a region which is larger than the relevant  
14 policy area in which there has been a reported case."

15 Then you can use that as a reported case. Then  
16 "Hospital and ONS data", and there is a reference to  
17 that.

18 Then finally and more relevantly for the purposes of  
19 this dispute, page 75, "True level of infection", and  
20 I want to invite my Lord's attention particularly to  
21 page 76. It says:

22 "Similarly a team of statistical modellers at  
23 MRC Biostatistics Unit at University of Cambridge are  
24 working in conjunction with Public Health England to  
25 provide regular nowcasts and forecasts of COVID-19

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1 infections and deaths at a regional level. The  
2 Cambridge analysis models a range of estimated  
3 infections as at a particular date in each region." And  
4 it gives an example of a median of an estimated range of  
5 cumulative infections in the East of England by  
6 21 March."

7 My Lord, if one goes to the report, what one has is  
8 this graph, and, one can just run the mouse up and down  
9 the line of the graph and it will give you, at each day,  
10 the upper, median and lower level of cases, actual true  
11 level of infection cases, that this model predicts.

12 Just so my Lord knows, a 95% CRL -- my Lord may  
13 already know that -- is called a credible interval, and  
14 it's a distribution of possible values as a 95% credible  
15 interval of line between the upper and lower numbers.  
16 So it's not quite the same as a confidence level, but  
17 similar to it.

18 MR JUSTICE BUTCHER: I'm not sure what the difference is  
19 because confidence intervals usually rely on 95%,  
20 but ... probably I don't need to know for today's  
21 purposes.

22 MR EDELMAN: No, I don't think my Lord needs to know for  
23 today. It's the difference -- it's a Bayesian analysis  
24 and it's the difference between a Bayesian analysis and  
25 a pure statistical analysis.

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1 My Lord, the critical point, paragraph 40:

2 "The court should properly take into account the  
3 confirmed test cases of COVID-19 account for only a tiny  
4 proportion of those actually infected in assessing  
5 whether there have been individuals infected with  
6 COVID-19 in the relevant policy area."

7 Now, I suspect and I anticipate that paragraph 40 is  
8 in fact common ground because the insurers take as  
9 a point against policyholders, as my Lord has seen from  
10 our skeletons, that regardless of what was happening in  
11 their area, this was part of a wider pandemic, and on  
12 their causation defence they say, "The loss was caused  
13 by what was going on in the country as a whole and so  
14 the incidence of COVID-19 in your area was not causative  
15 of your loss".

16 We will argue that at trial, but it demonstrates  
17 that there isn't -- this isn't an issue of principle and  
18 it does mystify us as to why the insurers are objecting  
19 to all this because in a sense the true infection rate  
20 supports their overall pandemic in the country causation  
21 case.

22 Obviously for forensic reasons they have chosen to  
23 object to what we have said, but it's simply the raw  
24 data that -- my Lord, I've lost your video picture.  
25 I don't know if I have lost you on screen as well.

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1 Right. I think I have lost you temporarily, my Lord.  
2 Can you hear me?

3 MR JUSTICE BUTCHER: Yes, you were just saying the true  
4 infection rate supports their ...?

5 MR EDELMAN: Their pandemic case. One would have thought  
6 that they would have adopted the Cambridge analysis on  
7 which the Government is relying as demonstrating how  
8 widespread the disease actually was. But for what  
9 appeared to be perhaps forensic reasons, they are  
10 objecting to the use of these statistics.

11 MR JUSTICE BUTCHER: I think part of what you say is that  
12 the mutual objective embodied in the framework agreement  
13 is to ensure that there should be the greatest degree of  
14 certainty that is capable of being achieved and, as it  
15 were, putting forensic obstacles in the way of that is  
16 not in accordance with the mutual objective.

17 MR EDELMAN: Yes. My Lord, I was going to sum up and that  
18 obviously is the primary point. This proof of incidence  
19 was and is being presented by insurers as an obstacle,  
20 a general obstacle, to policyholder recovery. The  
21 letters of declinature are taking general points about  
22 policyholders having to prove incidence, as my Lord has  
23 seen, even when the radius is 25 miles.

24 So this is an obstacle. It was something that the  
25 insurers knew the FCA wished to have resolved. I quite

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1 accept -- and Mr Kealey I'm sure may take you to the  
2 letters and documents where they reserve their position  
3 and commented on the inclusion of question 6, which  
4 my Lord has seen referred to in the skeletons, of the  
5 questions for determination. But they have known from  
6 the outset that how policyholders should be able, in  
7 principle, to prove incidence was something that needed  
8 to be decided and has to be decided for certainty in the  
9 market going forward.

10 As we say, we understand that insurers are nervous  
11 about anything the court might say being treated as the  
12 last word on any individual case and we're prepared to  
13 agree with them a form of words which would protect  
14 their position. We are also prepared to consider any  
15 re-wording of 24 to 28, if they have any legitimate  
16 concerns about it. But the goal must be to end up with  
17 a methodology that can be applied by the vast majority  
18 of policyholders and which then puts the ball in the  
19 insurers' court to say whether the methodology for  
20 particular reasons shouldn't apply on a particular case.

21 MR JUSTICE BUTCHER: Yes. Anyway, the bottom line of what  
22 you are saying today, Mr Edelman, is that the order that  
23 you seek is that paragraph 12 should be made, amended to  
24 24 June, that we should see what is in the defences put  
25 in by the insurers, see what is actually in issue and

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1 revisit this at the next CMC?  
 2 MR EDELMAN: Exactly, my Lord, yes, and any application for  
 3 expert evidence will be dealt with at the next CMC.  
 4 If the insurers accept that the Cambridge analysis  
 5 is a legitimate way in which the infection rate, at  
 6 regional level down to the level that the analysis gives  
 7 one analysis -- that that is a legitimate and reasonable  
 8 analysis, that may be all we need. The rest is  
 9 argument. It will be legal argument based on an analogy  
 10 with cases like Equitas v R&Q, where we will argue that  
 11 it's impossible for anyone to actually prove on  
 12 an individual basis who did and didn't have coronavirus;  
 13 in particular, their particular locality. But what one  
 14 can do is apply a methodology which will give one  
 15 a balance of probabilities confidence.  
 16 It's not a Fairchild case, where one is saying  
 17 that -- one is substituting a burden of proof, applying  
 18 some weak test. What is posing the legal question for  
 19 a court: how does the court allow someone to prove  
 20 a case in these circumstances? Just as in my LMX spiral  
 21 analogy where it is impossible to work out all the  
 22 individual settlements, one does it by a modelling  
 23 process and that's all we're going to be asking the  
 24 court to do.  
 25 MR JUSTICE BUTCHER: Right.

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1 MR EDELMAN: So I should say that we don't accept we have  
 2 acted in breach of the framework agreement. I think we  
 3 have explained that in our reply skeleton, why we  
 4 consider we are within it -- at the outset of the  
 5 agreement, it's construction and application, and anyway  
 6 this does apply to interpretation of it because it's  
 7 whether the disease has occurred. How can you say  
 8 whether it's occurred? We don't need to go into those  
 9 niceties because we say as a matter of principle this is  
 10 something that is within the scope of the framework  
 11 agreement and it only requires expert evidence if the  
 12 insurers want to say that the Cambridge analysis on  
 13 which the Government have been relying is so much waste  
 14 paper and is ridiculous, far-fetched.  
 15 MR JUSTICE BUTCHER: Yes. Is there anything else you want  
 16 to say, Mr Edelman?  
 17 MR EDELMAN: I think that's it.  
 18 MR JUSTICE BUTCHER: Is it Mr Kealey who is taking the lead  
 19 on this?  
 20 MR EDELMAN: As I understood it.  
 21 MR KEALEY: Can I just correct one or two things?  
 22 In R&Q v Equitas, as Mr Edelman must know because he  
 23 must have read it very recently, there were two  
 24 questions essentially that Mr Justice Gross decided.  
 25 One was whether, as a matter of law, the model or

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1 a model could be used for Equitas to discharge the  
 2 burden of proof. That was a question of law.  
 3 The second question was a matter of fact: was the  
 4 model that was used by Equitas in its attempt to  
 5 discharge the burden of proof sufficient evidence? In  
 6 other words, was it a robust, reliable model? That was  
 7 an entire question of fact.  
 8 In relation to R&Q v Equitas, it mustn't be  
 9 forgotten that expert evidence was called in order to  
 10 validate the model and in order to prove that the model  
 11 was the best evidence available to the court and was  
 12 reliable and reasonable evidence upon which one could  
 13 rely to discharge the burden of proof. That's the first  
 14 point, my Lord.  
 15 Secondly, the attitude of insurers in this case is  
 16 not merely forensic. That, with the greatest of respect  
 17 to Mr Edelman, is absolute nonsense. What happened is  
 18 that, for the very first time, on 9 June -- in other  
 19 words not very long ago -- Mr Edelman and his clients  
 20 served the particulars of claim and at the same time the  
 21 agreed facts documents. Since then insurers have  
 22 struggled to deal with these or certain of these  
 23 objectionable paragraphs.  
 24 As Mr Edelman said I would -- and I shall -- I shall  
 25 actually take your Lordship to the questions for

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1 determination, the questions for determination which  
 2 were proposed by Mr Edelman's clients on 30 or 31 May of  
 3 this year and in particular question 6; secondly, the  
 4 expression of uncertainty and lack of understanding  
 5 expressed by my instructing solicitors as to what was  
 6 meant by question 6; thirdly, the failure on the part of  
 7 the FCA to answer that question ever until -- unless if  
 8 it is to be treated as an answer -- the particulars of  
 9 claim and the proposed agreed facts were served.  
 10 MR JUSTICE BUTCHER: Sorry, Mr Kealey. Yes, you can  
 11 obviously take me to all of that. But for what purpose?  
 12 What are you actually asking me to do today to which  
 13 that exercise will be germane?  
 14 MR KEALEY: I'm asking your Lordship to make a ruling today  
 15 that the FCA should not be permitted, pursuant to  
 16 paragraph 12, I think it is, of the directions, which  
 17 the FCA is seeking to have determined -- should not be  
 18 permitted pursuant to that paragraph to adduce expert  
 19 evidence in respect of the facts and matters -- and I'm  
 20 going to take your Lordship to them -- alleged by  
 21 the FCA in its particulars of claim between  
 22 paragraphs 24 and 28.  
 23 The one thing I can agree with Mr Edelman, my Lord,  
 24 is that certain of those paragraphs between 24 and 28  
 25 are unobjectionable. I'll take your Lordship to those

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1 in a moment. I'll also take your Lordship --  
 2 MR JUSTICE BUTCHER: Paragraph 12 merely provides that if  
 3 a party is asking for permission to rely on expert  
 4 evidence, it shall serve it by, as Mr Edelman now says,  
 5 24 June.  
 6 MR KEALEY: Yes.  
 7 MR JUSTICE BUTCHER: Now, what's wrong with that?  
 8 MR KEALEY: What is wrong with that, my Lord, is that we  
 9 have not got and we have not had and we will not have  
 10 had enough time to be able to deal with these paragraphs  
 11 and the Cambridge analysis and the other analysis by  
 12 then.  
 13 MR JUSTICE BUTCHER: What would be certainly very helpful to  
 14 know is what your defences are going to say on these  
 15 matters, isn't it?  
 16 MR KEALEY: Our defences will say, my Lord, that it is  
 17 denied that whatever geographical curtilage is involved,  
 18 it is denied, and/or the insured, that is to say  
 19 the FCA, is put to proof as to whether or not there was  
 20 a COVID-19 case satisfying the particular --  
 21 MR JUSTICE BUTCHER: Is that really consistent with the  
 22 mutual objective of obtaining as much certainty for as  
 23 many people as possible?  
 24 MR KEALEY: Yes, it is. Yes, it is, because achieving as  
 25 much certainty as possible -- and your Lordship should

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1 have a look at the mutual objective -- it was, my Lord,  
 2 consistent with the need for expedition and  
 3 proportionality.  
 4 If your Lordship goes to page 616 in bundle A, you  
 5 will see the framework agreement and you will see  
 6 preamble I.  
 7 (Pause)  
 8 There are ways of doing this, my Lord, which are  
 9 completely different from the way in which we have been  
 10 confronted by this. It is no coincidence, my Lord, that  
 11 none of the insurers, not one of the eight, despite  
 12 themselves or their teams, envisaged anything like this  
 13 evidence being held against us in this case.  
 14 There is a world of difference, my Lord, between  
 15 saying a particular methodology is acceptable, which is  
 16 a question of law, and saying, "Look at these two  
 17 analyses, presume that they are correct and apply them".  
 18 What your Lordship actually --  
 19 MR JUSTICE BUTCHER: Of course I understand that, Mr Kealey.  
 20 What I want to know is how do you say this is going to  
 21 be resolved on a practical basis because otherwise we  
 22 could conduct the entirety of this test case, which is  
 23 meant to be obtaining the maximum clarity possible for  
 24 the maximum number of policyholders, and leave open the  
 25 possibility that there needs to be a proof in the

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1 individual cases. How would we resolve that and when?  
 2 MR KEALEY: Well, the way in which it should have been done,  
 3 which is probably the way in which it should therefore  
 4 be done, is quite simple. If this material was intended  
 5 to have been relied upon and is intended to be relied  
 6 upon, then if it is robust, then it should be entitled  
 7 to be relied upon. But the FCA should have given the  
 8 insurers the opportunity to evaluate this evidence. It  
 9 may be perfectly good evidence, but it's no good,  
 10 I'm afraid --  
 11 MR JUSTICE BUTCHER: I mean, this is all slightly  
 12 backward-looking. I think it maybe be the determinative  
 13 answer, but if there is a possibility of resolving this  
 14 issue, then shouldn't we be looking at trying to do so?  
 15 MR KEALEY: You should absolutely be doing that, my Lord,  
 16 and what we have proposed in the first instance -- the  
 17 best way forward for the hearing at the end of July,  
 18 my Lord, is for your Lordship then to decide what can  
 19 happen thereafter, on, if necessary, an expedited  
 20 basis -- but the first thing that you should be doing,  
 21 my Lord, is assuming for the purposes of the hearing  
 22 that there is a COVID-19 case within a certain  
 23 geographical limit of an insured premises and then also  
 24 assuming, as a contrary assumption, that there is not  
 25 and applying the contractual terms to those two assumed

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1 facts.  
 2 What that leaves over -- and I totally appreciate,  
 3 my Lord, that that will not determine whether, either  
 4 generally or any particular case, COVID-19 was actually  
 5 present within a particular radius or geographical limit  
 6 in any particular case -- I accept that, my Lord.  
 7 If you can make those assumptions, then what you are  
 8 able to do is apply the terms to those assumed facts and  
 9 you have made a large step, you have made a leap  
 10 forwards, my Lord, because what you will have done is  
 11 you will have determined, firstly, what effect  
 12 a COVID-19 case outside that geographical limit has upon  
 13 insurance coverage, what effect a COVID-19 case within  
 14 that geographical limit has upon the existence of  
 15 coverage, and what is left over then, my Lord, is to  
 16 determine as best we can -- not in July because we don't  
 17 have the time -- is to determine whether there is some  
 18 mechanism, some methodology, which is robust and  
 19 reliable, which can determine the factual question, not  
 20 necessarily in any individual case, but perhaps on  
 21 a collective of cases.  
 22 If Mr Edelman is right that the Cambridge analysis,  
 23 which -- my Lord, I should actually say he talks about  
 24 a Bayesian model -- if your Lordship, which  
 25 your Lordship won't have done, actually looks at the

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1 analysis , it 's a novel mechanism, my Lord. It 's not  
 2 an old one. It 's a novel one that they have used.  
 3 What your Lordship should know -- and it is a highly  
 4 controversial thing -- the model seeks to derive the  
 5 number of infections from the number of deaths. That's  
 6 how it does it. It does it over about 11 countries in  
 7 Europe and it estimates that across all 11 countries  
 8 between 7 million and 43 million individuals have been  
 9 infected up to 28 March. And what they say is, "In this  
 10 report we fit a novel Bayesian mechanistic model of the  
 11 infection cycle to observe the deaths in 11 European  
 12 countries ". The range, my Lord, of infection is  
 13 somewhere between 1.88% and 11.43% of the population.  
 14 That model, my Lord -- it 's no good my learned  
 15 friend saying that somehow or other it has some  
 16 governmental imprimatur. Just because it has some  
 17 governmental imprimatur doesn't mean that it is  
 18 good, right or reliable . One knows, my Lord, that in  
 19 relation to government scientists and government data,  
 20 sometimes they happen not to be right for some reason or  
 21 another. Therefore just because it appears to be  
 22 something from Cambridge and/or something from Imperial  
 23 and/or something from Oxford doesn't make it  
 24 intrinsically and irresistibly reliable . This is  
 25 an emerging science .

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1 MR JUSTICE BUTCHER: Obviously I don't want to have the  
 2 position where you say, "Oh, well, we can't really  
 3 determine this until the science has become clearer".  
 4 MR KEALEY: I am not suggesting that.  
 5 MR JUSTICE BUTCHER: These are circumstances in which there  
 6 has to be a modicum of urgency about the determination  
 7 of these matters.  
 8 MR KEALEY: Absolutely right, and it's no good Mr Edelman  
 9 saying -- I will address what your Lordship has just  
 10 said. It 's no good Mr Edelman saying, "Oh, well, they  
 11 always knew this was coming". This seems to have  
 12 escaped every single insurer in this case that it was  
 13 coming. So that is not a good enough answer.  
 14 What might have been a more straightforward thing  
 15 for Mr Edelman to have said is that, "Yes, they left it  
 16 a bit late ", a bit like this Government, my Lord,  
 17 perhaps should have said they left the lockdown a bit  
 18 late. They haven't quite got round to being able to say  
 19 that. Well -- and obviously the FCA hasn't got round to  
 20 saying, "Well, we should have told you earlier ".  
 21 So what your Lordship, however, is interested in is  
 22 how do we go forward. Well, as I say, the initial way  
 23 that your Lordship goes forward is as proposed by  
 24 insurers , that we do this on assumed facts. Some  
 25 wordings will succeed; some wordings will fail ; in other

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1 words, if you have an assumed fact of a COVID-19 case  
 2 outside a range of, say, 1 mile in terms of radius , so  
 3 that 's 3.14 square miles, then some wordings will  
 4 protect the insurer , some wordings will not.  
 5 Similarly in relation to a 25-mile radius, some  
 6 cases will succeed; some cases will not succeed. It may  
 7 be that all cases will not succeed. That's a question  
 8 of contractual interpretation applied to assumed facts.  
 9 Then what your Lordship has to consider is how can  
 10 we actually lance this boil satisfactorily between the  
 11 parties with as much expedition?  
 12 There is one thing, my Lord, that this will not be  
 13 capable of being dealt with, as your Lordship has seen  
 14 from Mr Wilkes' witness statement -- it 's not capable  
 15 and it won't be capable of being dealt with at the end  
 16 of July. I don't know when it --  
 17 MR JUSTICE BUTCHER: Now, Mr Kealey, there you are beginning  
 18 to push at an open door, which is that I think it 's  
 19 going to be extremely difficult to fit into the  
 20 eight-day window any actually contested expert evidence.  
 21 MR KEALEY: Well, any open door, my Lord, I can slip  
 22 through, however slight the openness happens to be.  
 23 Assuming, my Lord, I have managed to slip through, the  
 24 next question is : when can this be dealt with? How soon  
 25 can it be dealt with? In all honesty, I don't know,

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1 my Lord. The reason I don't know -- your Lordship has  
 2 read Mr Wilkes' witness statement. Most experts,  
 3 my Lord -- and we have been all the way to America --  
 4 are heavily engaged mainly advising governmental or, if  
 5 not governmental, then local governmental authorities ,  
 6 so we have a difficulty . But it must be dealt with  
 7 soon.  
 8 The one thing I have to emphasise to your Lordship,  
 9 however harsh I may sound, our sympathies are not  
 10 against the policyholders or the insureds in this case.  
 11 We are not trying to derail this. I don't know why  
 12 Mr Edelman says this is a forensic point. I don't quite  
 13 understand what he means in litigational terms when one  
 14 takes a forensic point or doesn't take a forensic point.  
 15 But putting all that to one side, I couldn't help but  
 16 think it might be a pejorative description .  
 17 This isn't a forensic point, but these insurers have  
 18 absolutely bust a gut to try and get this on the road.  
 19 We have co-operated and collaborated with the FCA and we  
 20 have entered into a framework agreement at incredibly  
 21 short notice. We have agreed an expedited hearing which  
 22 is incredibly curtailed and condensed. We are striving  
 23 to agree assumed facts, agreed facts, et cetera ,  
 24 questions for determination. Sometimes, unfortunately,  
 25 we don't get the responses that we think we deserve,

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1 such as the questions that we specifically asked in  
2 relation to question 6. For some reason or other  
3 the FCA simply did not get back to us. We don't know  
4 why. If one were uncharitable, one would be able to  
5 give an answer. I'm not so uncharitable as to give that  
6 answer.

7 But we have bust a gut to get this going because it  
8 is as much in our interests as it is in the insureds'  
9 interests, as it is in the national interest, that we  
10 have this matter determined as soon as reasonably  
11 practicable, commensurate with proportionality and  
12 fairness.

13 This -- Mr Edelman's word -- this ambush -- it's not  
14 our word -- for some reason or other he says that we  
15 think it's an ambush. We just think it was rather  
16 incompetent that they never told us in advance. But  
17 that's their problem, not mine. My problem is I have to  
18 deal with this on behalf of my clients and indeed other  
19 insurers have pushed me forward to make this case as  
20 their, as it were, spokesman, even though I don't  
21 represent them, simply in order to collaborate and have  
22 only one useless mouthpiece as opposed to eight or,  
23 rather, seven other very, very good mouthpieces.

24 So I'm the mouthpiece that is being used and we have  
25 to deal with this and that's what we have been trying to

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1 do. So don't think, my Lord, that we have some  
2 antagonism towards having this matter dealt with. That  
3 is absolutely false. We want this matter to be resolved  
4 as swiftly and fairly as possible, and if it takes  
5 an appeal to the Supreme Court by the FCA if it loses,  
6 then so be it, and vice versa.

7 So the question is, the immediate question is --  
8 Mr Edelman says he doesn't understand what we want.  
9 Well, we can't have expert evidence on this point -- and  
10 I'll go into the pleadings in a moment just to say what  
11 particular paragraphs are disturbing us -- but we can't  
12 have expert evidence on this which we do not have time  
13 to respond to. Mr Edelman's clients obviously knew  
14 about this long before 31 May 2020. It's quite obvious.  
15 That is stated in the fourth defendant's skeleton. It's  
16 not been rebutted by any evidence or any reply skeleton.

17 They have obviously known about this a long time.  
18 They put it in the questions for determination in a way  
19 that we did not understand. And now they tell us in  
20 their reply skeleton that they had six days to get some  
21 expert. I don't know who this expert is. It probably  
22 was one of the authors. They probably simply asked him,  
23 "Can you explain to us the model and do you consider it  
24 to be reliable?" I don't know because we haven't got an  
25 expert's report.

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1 MR JUSTICE BUTCHER: So the problem from your point of view  
2 is if you are expected to rebut any expert evidence  
3 which Mr Edelman might rely on if he makes  
4 an application under paragraph 12?

5 MR KEALEY: That is absolutely right, my Lord. He says --  
6 I understand from what he says that he is not going to  
7 rely upon any expert evidence.

8 MR JUSTICE BUTCHER: Isn't one way forward to say that if he  
9 wants to rely on any expert evidence, he should serve  
10 what it is. You don't have to deal with this area in  
11 expert evidence yourself. If you can't or don't agree  
12 to it, and there would have to be actually the hearing  
13 of expert evidence on this subject, then that can't be  
14 dealt with at the trial in July?

15 MR KEALEY: Correct, and I should just say something. It's  
16 not that we don't want to deal with it. It will  
17 probably be -- and I can't guarantee -- that we can't  
18 deal with it.

19 MR JUSTICE BUTCHER: No, I understand that and I thought  
20 that was what I was really saying --

21 MR KEALEY: My fault.

22 MR JUSTICE BUTCHER: -- because, as I say, I think it's  
23 going to be extremely difficult to envisage fitting in,  
24 just in terms of the time, but -- time for preparation  
25 for expert evidence for a July hearing.

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1 MR KEALEY: Well --

2 MR JUSTICE BUTCHER: But what I do feel Mr Edelman has  
3 a point in saying, we don't actually yet quite know what  
4 is the ambit of the issue here.

5 MR KEALEY: Ah, well, let me just -- if your Lordship goes  
6 to the pleadings -- it might be just worth having  
7 a quick look, my Lord. If your Lordship goes into the  
8 first bundle, bundle A, at divider 5 -- it's really very  
9 simple. If your Lordship goes to page 342, to  
10 paragraph 21:

11 "To the extent that the following matters are not  
12 agreed, the FCA reserves the right to rely on expert  
13 evidence as to the prevalence of COVID-19 in the UK as  
14 follows."

15 If I can just state: paragraph 22, if your Lordship  
16 could just read it, is unobjectionable as it stands.  
17 Paragraph 23 is likewise unobjectionable as it stands.  
18 If your Lordship turns over, paragraph 24 is  
19 unexceptionable and unobjectionable as it stands.  
20 Paragraph 25, subject to perhaps one small  
21 qualification, is likewise unobjectionable as it stands.  
22 Then you have the bombshell, my Lord:

23 "On the balance of probabilities and by  
24 a methodology based on estimating the number infected  
25 from the daily number of deaths, such as ..."

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1 So this is apparently only an exemplification, as in  
 2 fact -- in fact that is Professor Neil Ferguson, my  
 3 Lord. He is I think the last name.  
 4 "... report 13, estimating the number of infections  
 5 and the impact on non-pharmaceutical intervention from  
 6 COVID-19 in 11 European countries, Imperial College  
 7 London 30 March and Birrell et al., COVID-19 nowcast and  
 8 forecast Cambridge analysis [that's 5 June] the ratio  
 9 between the likely number of cases of COVID-19 and the  
 10 reported cases can reliably be estimated."  
 11 So what they have done, my Lord, that's to say  
 12 the FCA, they have taken those two papers, the first of  
 13 which is controversial on any view, and said, "Because  
 14 we can estimate the number of actual infections from the  
 15 number of reported deaths, we can then compare the  
 16 number of actual infections with the number of reported  
 17 infections and the ratio between the two is the  
 18 under-counting ratio".  
 19 So, for example, if your Lordship then goes to  
 20 paragraph 27, and taking these particular regional  
 21 zones, they then -- or rather this pleading then says  
 22 that on that basis it is possible to estimate the  
 23 under-counting ratio in England.  
 24 If your Lordship goes, for example, to 26 March --  
 25 that is in the left-hand column -- your Lordship will

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1 see that the relevant data are then set out, and you see  
 2 reported cases, my Lord, 17,956. So as at that date  
 3 there had been just short of 18,000 reported COVID-19  
 4 case -- not deaths, but cases, my Lord.  
 5 Then it says "Estimated cases taken from Cambridge  
 6 analysis". So the Cambridge analysis, if it is robust  
 7 and reliable, estimates that in fact, by that date,  
 8 there were just short of 2.5 million cases in England  
 9 and the under-counting ratio is 138.1; in other words,  
 10 the fraction of 2.5 over 18 is about 138.  
 11 Then it is said, paragraph 28:  
 12 "The FCA will seek declarations that without  
 13 prejudice to an insured's right to prove the presence of  
 14 COVID-19 through other evidence specifically called by  
 15 them, on the balance of probabilities ..."  
 16 So here we have, my Lord, factual declarations.  
 17 These aren't declarations of legal interpretation.  
 18 Firstly:  
 19 "... the true number of individuals [et cetera] ...  
 20 is at least as great as the number of reported cases."  
 21 Well, that is unobjectionable, my Lord. That  
 22 doesn't depend upon the Cambridge analysis.  
 23 "Hence, given the reported cases, COVID-19 was  
 24 sufficiently widespread that it was present within every  
 25 LTLA zone in England by at least the 31st."

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1 Well, that's actually not quite accurate, if you  
 2 look at the underlying data, but we don't need and we  
 3 don't require expert evidence in relation to 28.2. But  
 4 that's simply an inaccuracy on the part of the person  
 5 who compiled this particular paragraph.  
 6 You can go to the end, my Lord, of that paragraph.  
 7 Then you have 28.3, and here we come into the  
 8 real -- we return to the controversy:  
 9 "The true number of individuals infected on relevant  
 10 dates in March in a regional upper-tier local authority  
 11 or lower-tier local authority zone is at least as great  
 12 as the number of cases derived by applying the  
 13 under-counting ratio for the relevant regional zone to  
 14 the reported cases in the regional zone."  
 15 So what the pleader has done -- having calculated  
 16 the under-counting ratio from the analyses or the models  
 17 referred to in paragraph 26, you then apply the  
 18 under-counting ratio to the reported figures for any  
 19 particular zone.  
 20 Then you compound the problem, my Lord, in 28.4:  
 21 "Case of COVID-19 ..."  
 22 MR JUSTICE BUTCHER: Of course I understand your broad point  
 23 in this. Do you have a case about whether any of this  
 24 is right or not? You can't tell me yet.  
 25 MR KEALEY: No.

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1 MR JUSTICE BUTCHER: When will you have a case as to whether  
 2 it's right or not?  
 3 MR KEALEY: I actually don't know, my Lord, and the reason  
 4 I don't know is because -- your Lordship has read  
 5 Mr Wilkes' witness statement, I take it.  
 6 MR JUSTICE BUTCHER: Yes, I have.  
 7 MR KEALEY: Yes, yes. Well, Mr Wilkes, no mean partner of  
 8 DACB, has been trying to find an expert to help us. So  
 9 far he has not succeeded. He has gone to America,  
 10 Europe, England, and we haven't got one yet. Maybe we  
 11 would have got one if we had had more time; maybe we  
 12 wouldn't, my Lord. I don't know. But that doesn't mean  
 13 to say that either it should be ignored that we don't  
 14 have one or that we should stop looking. In fact, my  
 15 own personal submission, my Lord, is that we should  
 16 continue looking so that we can work out whether this  
 17 modelling, this novel model -- so described in its own  
 18 report -- this novel model is reliable and robust, and  
 19 even if not reliable and robust as to 100%, to what  
 20 degree is it reliable and robust. Should therefore  
 21 insurers accept it, even though it may have some flaws  
 22 or weaknesses?  
 23 MR JUSTICE BUTCHER: So what you are saying is that there  
 24 can't be a determination -- you're saying that there  
 25 can't be a determination in July as to the facts, that

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1 on the balance of probabilities this is the position?  
 2 MR KEALEY: Correct.  
 3 MR JUSTICE BUTCHER: But there would have to be  
 4 a determination in relation to a number of assumed  
 5 facts, but that the issue of what is the position in  
 6 relation to the balance of probabilities would then have  
 7 to be decided as a matter of expert evidence at some  
 8 subsequent point?  
 9 MR KEALEY: Yes -- or it may be, my Lord -- and I can only  
 10 posit this as a possibility -- it may be that if and  
 11 when we get our expert evidence, we will be told, in  
 12 an echo of what your Lordship said about 15 minutes ago,  
 13 that this is the best evidence available and you are not  
 14 going to get much better evidence in the future. Then  
 15 the question is: if this is the best evidence available,  
 16 as in *Equitas v R&Q*, which I have on my other screen --  
 17 if that is the best evidence that is available, is it  
 18 robust evidence intrinsically and therefore should we  
 19 accept it?  
 20 MR JUSTICE BUTCHER: If your point is really a practical  
 21 one, that you can't deal with this by July, should I be  
 22 laying down some contingent directions for how this  
 23 would be dealt with and, if so, what and when?  
 24 MR KEALEY: Well, if I were a purist, which I'm not, I would  
 25 say that this should never have been in this particular

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1 litigational arena at all. But I have just told your  
 2 Lordship I'm not a purist, I'm a pragmatist when it  
 3 comes down to this, and also I am, as I have indicated  
 4 before, very alive, as are my clients, to the fact that  
 5 policyholders need to know what their position is and  
 6 they need to be treated as fairly as insurers and that  
 7 insurers need to be treated as fairly as they.  
 8 Therefore, taking a completely pragmatic approach,  
 9 my Lord, I think -- and it is a thought; it's not  
 10 a submission -- I think that what your Lordship should  
 11 be seeking to do is to work out how this can be  
 12 accommodated to the mutual benefit and satisfaction of  
 13 all parties as soon as reasonably practicable following  
 14 the July trial, and therefore -- your Lordship has just  
 15 mentioned the possibility of contingent orders or  
 16 contingent directions. Certainly that should be  
 17 something that should be considered, probably actually  
 18 not today, but certainly at the next CMC once the  
 19 parties have, as it were, retired and considered what  
 20 they should try and do in order to reach agreement --  
 21 satisfactory to all parties, not just the FCA.  
 22 So that is what, as a pragmatist, I propose. But in  
 23 the interim, my Lord, if the FCA want to advance the  
 24 matter, they have the proposed partial solution that we  
 25 have suggested and indeed so have other insurers, which

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1 is to have some fairly straightforward assumed facts so  
 2 that at least the principles of law, which after all are  
 3 what we thought we were dealing with in this case, can  
 4 be dealt with at or by the end of July.  
 5 Now, as I've said, my Lord, it may be that by the  
 6 end of July we will know far more, that's to say my  
 7 clients and indeed the other insurers, about the state  
 8 of expertise and the modelling and whether it's  
 9 a reliable model, et cetera, or if it's not totally  
 10 reliable, to what degree it is reliable, and if that  
 11 degree is sufficiently reliable, whether they should  
 12 accept what is being proposed, subject only to one  
 13 thing, my Lord: what your Lordship should not forget is  
 14 that what the FCA has done in paragraph 28.4 of its  
 15 pleading, having identified what they say is the correct  
 16 numbers in any particular zone or area of infected  
 17 persons, they have then averaged those numbers  
 18 throughout the area; in other words, if you have  
 19 100 square miles and you have 100 people with COVID,  
 20 then you average by way of some form of even  
 21 distribution one person per square mile.  
 22 Now, that is not something that we can intrinsically  
 23 accept, either as a matter of logic, legal logic or  
 24 necessary scientific analysis, but that is something  
 25 that we will have to consider very carefully as well;

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1 for example, there may have to be a question of weighted  
 2 averages. So if you have 100 square miles with little  
 3 houses -- I don't mean that pejoratively -- but houses  
 4 dotted around, but one major conurbation, then you might  
 5 say, well, you can average out some numbers for that  
 6 conurbation but thereafter you can't do it simply on the  
 7 geographical basis, one per square mile or one per  
 8 square 10 miles or 10 square miles.  
 9 These are things, my Lord, I can assure you we have  
 10 been struggling with ever since we got this on 9 June.  
 11 And this is not a forensic point. This is a point that  
 12 we take in the full spirit and indeed the letter of the  
 13 framework agreement and in relation to what we thought  
 14 we were confronted with.  
 15 Since my learned friend enjoyed part of a jury  
 16 speech, I just want to take your Lordship to the end of  
 17 our skeleton. Your Lordship will have seen at the end  
 18 of our skeleton -- and indeed it's now crept into the  
 19 bundle, so I don't really mind where your Lordship sees  
 20 it, as it were -- but if your Lordship goes to the end  
 21 of our skeleton, we attached to that a letter from  
 22 DAC Beachcroft and our responses to the FCA's questions  
 23 for determination. This just shows my Lord, if I might  
 24 respectfully suggest, why it is that we take quite  
 25 personally the suggestion that we are being forensic or

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1 unfair, whatever pejorative implication my learned  
2 friend cares to throw at us.

3 MR JUSTICE BUTCHER: Is this going to help me, Mr Kealey,  
4 really? I'm not really interested in mud-slinging.

5 MR KEALEY: No, it's not going to help you very much,  
6 my Lord, save to this extent: it will show your  
7 Lordship -- and maybe your Lordship doesn't need to know  
8 or is satisfied -- that we haven't been playing around.  
9 We have been trying to get -- the only reason I do this,  
10 my Lord --

11 MR JUSTICE BUTCHER: I'm not thinking to myself that the  
12 insurers have been playing around because I think every  
13 party has been trying to bring the matter on, including  
14 the court, I may say, as quickly and as satisfactorily  
15 as possible.

16 MR KEALEY: Then I needn't take your Lordship to this. I'll  
17 just mention it. We specifically targeted --  
18 your Lordship probably knows this -- that part of the  
19 questions to which these paragraphs in the particulars  
20 of claim or which these paragraphs in the particulars of  
21 claim address. Of course we hadn't got the particulars  
22 of claim in those days. Those only came on the 9th.  
23 But as early as the beginning of the month we were  
24 saying, "Can you please help us on what this means?",  
25 and help came there none.

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1 I know your Lordship has just said that you don't  
2 think we have been playing around, but that was not the  
3 impression I received from my learned friend's  
4 submissions, and we take that very, very seriously,  
5 because if a conduct authority says, "Oh, well, this is  
6 just a forensic point", that is not something that  
7 a conduct authority should say unless it is good to be  
8 said, and it is not.

9 So, my Lord, I think that the FCA and these  
10 insurers, who have collaborated so well until this silly  
11 little spat, should continue to collaborate and I think  
12 with the assistance of your Lordship they will  
13 successfully do so.

14 MR JUSTICE BUTCHER: Right. So, Mr Kealey, what exactly is  
15 it you want me to do?

16 MR KEALEY: Right. No expert evidence, my Lord, on those  
17 paragraphs, the ones that I have mentioned, at the July  
18 hearing. That is a -- to use my learned friend's words  
19 in the questions for determination, that should be  
20 a given.

21 Secondly, this should be revisited at the second CMC  
22 by your Lordship as to how this matter should and can  
23 realistically and reasonably be dealt with. I do not  
24 know how far advanced either party or either sets of  
25 parties will be by then, but certainly I can promise for

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1 my clients -- I'm sure that other counsel will promise  
2 on behalf of their clients -- that they will do  
3 everything that they reasonably can to be collaborative  
4 with the FCA, as indeed they have in the past, to get  
5 this sorted out, including continuing to look for expert  
6 evidence, so that by the time of the second CMC it may  
7 not be that we have advanced very much, but nonetheless  
8 it cannot be the case that we won't have advanced at  
9 all.

10 So your Lordship has --

11 MR JUSTICE BUTCHER: With a view that at least -- and if  
12 nothing else works, there would at least be the  
13 determination of matters on the basis of assumed facts  
14 in July?

15 MR KEALEY: Yes. Our position on expert evidence for the  
16 purposes of the end of July certainly won't have changed  
17 between now and then, but I'm taking as a given,  
18 my Lord, that we will not be dealing with this as  
19 a matter of expert evidence at the end of July because  
20 there is no way that I can say that that is possible or  
21 feasible. But hopefully we will have got somewhere,  
22 I don't know where, but somewhere further advanced as to  
23 how this matter can be dealt with -- not at the end of  
24 July because I'm suggesting to your Lordship that for  
25 the purpose of the end of July we should do it on the

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1 basis of assumed facts; COVID-19 within 1 mile, COVID-19  
2 not within 1 mile, et cetera.

3 Even though technically or strictly it doesn't fall  
4 within the framework agreement, and probably, I have to  
5 say, my Lord, doesn't even fall within the test case  
6 scheme, I think that your Lordship, as a matter of your  
7 inherent jurisdiction, should consider how best to  
8 advance the issue for the mutual benefit of all  
9 concerned. You shouldn't just say, for example, as  
10 a purist, "Well, this doesn't fall within the test  
11 scheme therefore it's a matter for some other judge at  
12 some other trial".

13 MR JUSTICE BUTCHER: I would regard that as being highly  
14 undesirable. If this is the route which we're going to  
15 go down, Mr Edelman, in reply, or indeed any of the  
16 other insurers, I would have thought it would be  
17 desirable that directions were given perhaps  
18 contingently for a prompt determination of that in front  
19 of me, whether or not it fell within the financial  
20 markets test case scheme and even though other issues  
21 might be the subject of appeals in the meantime anyway,  
22 within a really quite short period of time.

23 MR KEALEY: Well, my Lord, if I can say that I personally  
24 and my clients personally are sympathetic to that idea.  
25 I cannot speak for other insurers on this, but I would

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1 imagine that at least some of them will be equally  
2 sympathetic because, after all, as I've said ad nauseam,  
3 and therefore I will repeat just for your further  
4 nausea, this is not an attempt by anybody to derail the  
5 sense of these proceedings and I don't believe that's  
6 the FCA's proposal either. I'm sure that the FCA were  
7 doing the best they could in good faith. This just  
8 happens to have slipped through the net. But we are  
9 where we are, my Lord, and we don't want to go back. We  
10 need to go forward.

11 Sorry, my Lord, my phone is buzzing at me. I hope  
12 you don't hear it.

13 MR JUSTICE BUTCHER: No, but do you need to answer it?

14 MR KEALEY: No, my Lord. It's not one of my juniors or my  
15 clients telling me to buzz off or be quiet.

16 My Lord, I think I ought to pass the baton, as it  
17 were, to my fellow insurer counsel, who will be -- may  
18 have been listening to me with increasing anxiety,  
19 I don't know, my Lord. As I say, I'm here because one  
20 of my clients begins with "A".

21 MR JUSTICE BUTCHER: Yes, "AM" indeed is the problem, isn't  
22 it?

23 MR KEALEY: Well, it is, but I think I can probably get away  
24 with something else because I think they're preceded by  
25 M now, so I might be able to be down the list, my Lord,

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1 when it comes to the real thing.

2 MR JUSTICE BUTCHER: Right. Yes, so would anyone else on  
3 the insurers' side like to say anything on this issue?

4 MR GAISMAN: My Lord, may I just pick up one point? I have  
5 a permanent insecurity as to whether your Lordship can  
6 hear me.

7 MR JUSTICE BUTCHER: I can.

8 MR GAISMAN: Good.

9 It's a very short point. The factual question at  
10 issue is as to the true prevalence of the disease. The  
11 true incidence of COVID in the country is an issue which  
12 everybody knows to be highly contentious.

13 Now, your Lordship will have noticed this, but  
14 I confess I didn't on my first reading of paragraph 26  
15 of the particulars of claim. It's maybe worth going back  
16 to page 343, paragraph 26. The key element in the FCA's  
17 preferred model or models entails extrapolating the true  
18 number of cases from the number of deaths.

19 That gives a supposed true number of cases, which is  
20 then related to the reported cases by the under-counting  
21 ratio, which is a purely arithmetical function of those  
22 two numbers.

23 So the question at the heart of this debate is this:  
24 what is the mortality in the UK associated with  
25 COVID-19? Now, one would have to have been pretty

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1 inattentive over the last four months not to know that  
2 is a highly contentious question. But that is  
3 a question which nonetheless will have to be addressed,  
4 if it's not agreed, because that is at the heart, as we  
5 understand it, of the factual proposal that the FCA  
6 makes.

7 Now, my learned friend keeps talking about  
8 a methodology, and of course a methodology sounds like  
9 a question of law or a question of principle. So,  
10 for example, is it right to divide the country into  
11 local authority zones, as the FCA does? They only do  
12 that because that's the only way they can get at the  
13 data of the reported cases. Is it then right to apply  
14 an average across that local authority zone, as  
15 I understand it, an evenly distributed average, even  
16 though there might be a care home in one corner which  
17 has had a particularly disastrous mortality experience  
18 or reported case experience which totally skews the  
19 figures?

20 Then is it right to apply some sort of  
21 under-counting ratio, it being, I think, probably common  
22 ground that the actual number of cases is greater than  
23 the reported number of cases. We in our skeleton accept  
24 that and it sounds sensible, although others don't say  
25 so explicitly.

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1 Now, that's a methodology and that's what we  
2 understood was in question 6, and we could have that  
3 argued if it's thought useful to do so. The crucial  
4 extra step that Mr Edelman wants to go is to apply  
5 a particular under-counting ratio which, as I've now  
6 shown your Lordship, is derived from an assumption -- no  
7 doubt an assumption into which a great deal of work has  
8 gone -- as to the number of deaths -- sorry,  
9 an assumption as to the number of cases derived from the  
10 number of deaths.

11 That is the key, as we understand it, scientific  
12 question which of course can't be debated in July and  
13 which I cannot tell your Lordship -- there may be other  
14 questions, to do with modelling ... I always feel rather  
15 dismayed when someone talks about Bayesian logic or  
16 probability, but I will probably understand it one day.  
17 It's those sort of questions which -- and I quite  
18 understand your Lordship wants that debate to be moved  
19 forward, but that can't possibly be part of July and  
20 I think your Lordship calls that an open door. I just  
21 echo what Mr Kealey said on behalf of Hiscox. We're not  
22 trying to put obstacles in anybody's way and I'm  
23 surprised to hear my learned friend suggest that we  
24 were. But we have to have a fair crack at that point  
25 and, if we agree it, well, then the point will go away,

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1 but it's fairly controversial territory .  
 2 MR JUSTICE BUTCHER: I fully understand that, Mr Gaisman.  
 3 Obviously I could well see that if we had room enough  
 4 and time, the parties could spend a very long time  
 5 shaping up to argue that issue --  
 6 MR GAISMAN: Yes.  
 7 MR JUSTICE BUTCHER: -- but that's just not realistic,  
 8 is it?  
 9 MR GAISMAN: It's not, and I showed your Lordship, there is  
 10 a way forward consistent with paragraph 18 of my learned  
 11 friend's reply skeleton, which is to debate  
 12 a methodology. Now, there may be -- one could only get  
 13 so far with this because we don't want to get into  
 14 a situation where we're now facing expert evidence on  
 15 weighted averages versus an assumed even distribution or  
 16 how that works in different places or in different parts  
 17 of the country because that too will interfere with the  
 18 smooth running of the case.  
 19 So I don't want to be thought to be committing to  
 20 a particular set of questions, but some sort of  
 21 methodological discussion as a matter of principle I can  
 22 understand. But I've shown your Lordship the key  
 23 further step and it can't be done.  
 24 MR JUSTICE BUTCHER: Right.  
 25 MR GAISMAN: Thank you.

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1 MR JUSTICE BUTCHER: So it's now 1 o'clock. What I suggest  
 2 we do is we break now for an hour. If anyone else on  
 3 the insurers' side wants to say anything, they should  
 4 say it at 2 pm, and then Mr Edelman can reply on behalf  
 5 of the FCA in relation to this point.  
 6 Right. So we will resume at 2 o'clock.  
 7 (1.00 pm)  
 8 (The short adjournment)  
 9 (2.00 pm)  
 10 MR JUSTICE BUTCHER: Good afternoon, everyone. Is there  
 11 anyone else on the insurers' side who wants to address  
 12 that issue?  
 13 MS ANSELL: Yes, your Lordship, if I may.  
 14 MR JUSTICE BUTCHER: Yes, Ms Ansell.  
 15 MS ANSELL: I appear on behalf of the fifth defendant. We  
 16 endorse the submissions of Mr Kealey and maintain that  
 17 the trial can only go ahead on the basis of assumed  
 18 facts in July. You will appreciate that this is  
 19 important to my client, QBE, as they also have a 1-mile  
 20 radius as well as a 25-mile radius clause, so it's not  
 21 just Hiscox.  
 22 Insofar as that 1-mile radius is concerned, the  
 23 insured are from a much wider range of businesses, not  
 24 just the owner of -- I think the example given was  
 25 bowling clubs.

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1 I can confirm and want to confirm on behalf of QBE  
 2 that we will be doing all that we can to take these  
 3 matters forward and agree with what I think my learned  
 4 friend Mr Kealey described as the "pragmatic solution"  
 5 of having a trial of these issues shortly after the July  
 6 hearing.  
 7 Your Lordship, I want to take this opportunity,  
 8 whilst I'm on air, so to speak, as I don't know when  
 9 I will next be able to butt in, to deal with a comment  
 10 that my learned friend Mr Edelman made earlier; namely  
 11 that insurers have not paid anything or paid any claims.  
 12 I want to --  
 13 MR JUSTICE BUTCHER: I knew that when he said that, that was  
 14 likely to waste some of our time, as it were.  
 15 MS ANSELL: It is regretful, your Lordship, given the  
 16 publicity and the public nature of these proceedings,  
 17 and I just want to have on the record, so there is no  
 18 misunderstanding, that QBE have been taking a  
 19 policy-by-policy approach and on at least three policy  
 20 types policyholders have been told that cover is  
 21 available in principle, subject to the receipt of proper  
 22 claim submissions, and I believe that one interim  
 23 payment has already been made. So it was quite simply  
 24 an incorrect statement and it is important that that  
 25 error or misstatement is corrected for the record.

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1 MR JUSTICE BUTCHER: Right. I did not want to stop you from  
 2 saying that. It's understood.  
 3 MS ANSELL: I'm grateful. I have nothing further.  
 4 MR JUSTICE BUTCHER: Right, thank you. Anyone else?  
 5 Mr Edelman.  
 6 MR EDELMAN: My Lord, on that last point, I make it clear  
 7 that I was referring to the policies in issue, and there  
 8 are other policies out there with different wordings  
 9 where insurers -- I don't know whether there are others  
 10 other than QBE. There may well be and I accept there  
 11 may well be -- who have paid claims on other forms of  
 12 policy. What I was referring to is these forms of  
 13 policy and responding to the written submissions that  
 14 have been made in relation to these policies.  
 15 My Lord, can I just focus the debate on to what this  
 16 is really about? The defendants have tried to portray  
 17 our case as though it depends on the precise figures in  
 18 the Cambridge analysis. I just want to demonstrate one  
 19 point. If I may trouble my Lord just to take one look  
 20 back at page 76 in the third bundle, with our agreed  
 21 facts, and the table that the Cambridge analysis  
 22 produced in respect of the East of England.  
 23 Now, when applied to the number of deaths at the  
 24 relevant date, you will see that paragraph 39 says that  
 25 the median figure gives a number of reported cases as

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1 being just over 0.5% of those estimated by the Cambridge  
 2 analysis .  
 3 Just so my Lord has the picture , the difference , if  
 4 you go to the -- if you take the difference between the  
 5 lower and the upper, if you took 15,000 less cases, the  
 6 figure as a proportion changes from just over 0.5% to  
 7 0.68%, and if one goes up from 89,000 to 106,000, it's  
 8 0.47%. So the difference between the lower and the  
 9 upper is 0.2%.  
 10 The FCA is not concerned about whether it's 74,000,  
 11 89,000, or 106,000. What we are concerned about is the  
 12 order of magnitude. What was said about the forensic  
 13 point is that -- it's said that, "Well, Mr Edelman made  
 14 forensic criticisms of the fact that insurers have  
 15 denied claims on the causation basis by reference to  
 16 this being a nationwide pandemic, a nationwide  
 17 outbreak". What the FCA wants to know, so that it can  
 18 formulate an agreed basis for going forward with the  
 19 insurers -- my Lord, I've lost your picture. I don't  
 20 know if I've lost your video.  
 21 (Pause)  
 22 I'll wait until the judge returns .  
 23 (Pause)  
 24 Can I just check that everyone can hear me and it's  
 25 not me who has gone offline?

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1 MS ANSELL: I can hear you.  
 2 MR EDELMAN: Thank you very much. I just wanted to check it  
 3 wasn't me.  
 4 MR KEALEY: It says something about your advocacy, Colin!  
 5 MR EDELMAN: I know. I've burnt his line out.  
 6 (Pause)  
 7 MR JUSTICE BUTCHER: I'm very sorry, Mr Edelman. You had  
 8 just said that if the insurers had denied coverage due  
 9 to this being a nationwide pandemic.  
 10 MR EDELMAN: Yes. I think I mentioned in my opening  
 11 submissions on this aspect, Mr Gaisman in his  
 12 submissions accepted that there is significant level of  
 13 under-reporting .  
 14 What we want to know is what -- in their defences,  
 15 what are insurers prepared to admit about this? Because  
 16 if the difference between us is that it may not be as  
 17 high as the Cambridge analysis report suggests, but may  
 18 be, let's say, 1 in 100 for England as at 21 March and  
 19 not 1 in 153, then we can go forward on that basis, on  
 20 an agreed basis. But we really need to know what the  
 21 insurers' case is. And seeing as they are accepting  
 22 that and averring for the purposes of their own case  
 23 that there was a pandemic and that they are accepting  
 24 that there was a degree of under-reporting, what do they  
 25 actually say about the Cambridge analysis?

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1 We're not wanting them to agree the precise figures .  
 2 What do they have to say about it? It may be then we  
 3 can move forward. We are prepared to work  
 4 constructively to avoid any need for contention on this  
 5 because, in the vast majority of cases, whether it's 100  
 6 to 1, 90 to 1 or 110 to 1 isn't going to make any  
 7 difference at all .  
 8 Obviously if they're going to say, "Well, there were  
 9 only two unreported cases for every case", which  
 10 probably we all know anecdotally is far away from the  
 11 truth, from all the people that we will all have known  
 12 who contracted the disease, then obviously it does  
 13 become a bone of contention, but then it doesn't sit  
 14 happily with their case on pandemic.  
 15 So there's got to be some realistic level which they  
 16 can suggest in their defence, and that's why we want  
 17 a plea to it. We don't want a plea to it to hold their  
 18 feet to the fire. We want them to plead to it so that  
 19 we can ascertain what is actually agreed, where we can  
 20 go forward on an agreed basis .  
 21 Just putting it all off simply because they can't  
 22 agree and say they want scientific evidence to accept  
 23 that on 21 March it was 153 to 1 in England is not, in  
 24 our respectful submission, a sensible way forward.  
 25 This should only be put off if there is such

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1 an extreme difference between the parties that it  
 2 really, really makes a difference. But, as we see it,  
 3 as long as the insurers are prepared to accept  
 4 a reasonable order of magnitude in their defences, we  
 5 should be able to go forward on the basis that we can  
 6 agree that as the likely minimum, and then, if in due  
 7 course some policyholder needs to prove a higher  
 8 incidence, then they can do so. But that is unlikely to  
 9 have to be the case, given, as I've shown my Lord, that,  
 10 if one looks at the statistics, a difference of between  
 11 74,000, and 106,000 makes a difference of only 0.2%.  
 12 Now, this is not significant. Because the number of  
 13 reported cases were so few in those early days in March,  
 14 the early period in March, which is when everything  
 15 critical happened, the order of under-reporting is  
 16 likely to be something, as I said, for most insureds at  
 17 what we would categorise as being a reasonable level for  
 18 insurers to be able to agree.  
 19 My Lord suggested that this could go off to a second  
 20 trial. I have to say that the FCA is very concerned  
 21 about the cost implications of a second hearing and  
 22 whether it could justify incurring the cost of a second  
 23 hearing. So we would not be in favour of that option,  
 24 I'm afraid .  
 25 So what we were looking for is a positive way

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1 forward, in the sense that paragraph 12 of the order is  
2 a good discipline for insurers to be as positive as they  
3 can in their defences about making admissions. What we  
4 suggest is that insurers, as we've suggested from the  
5 outset, should plead a case, the FCA will in the spirit  
6 of the framework agreement seek to reach as much  
7 agreement as it can with insurers about this topic and  
8 hopefully resolve it -- resolve by agreement. But if  
9 not, then this matter will have to be dealt with again  
10 at the second CMC to see how it should be coped with.

11 My Lord, there were a couple of other matters that  
12 I have been asked to deal with. In particular, there  
13 was the criticism of the FCA in relation to the timing  
14 of the production of the report.

15 Firstly, no other insurer -- no insurer other than  
16 Amlin asked for an explanation of question 6. Amlin  
17 simply said they didn't understand what we meant in  
18 question 6 and would wait to see what the agreed facts  
19 said and they came with the points of particulars of  
20 claim. Of course, you know, there was a very  
21 significant amount of work to do and my Lord can see  
22 from the scale of the pleading this issue is by no means  
23 at the centre of the case. There are many issues of  
24 coverage, principle and to do with the individual  
25 policies, which are also important. I'm not saying this

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1 isn't important, but it's not a central issue in the  
2 case. It's just one of the many issues in the case; one  
3 of the many obstacles that policyholders are facing.

4 The information was put together as quickly it is  
5 could have been. There was no sitting on the report, no  
6 sitting on the information. Everybody was working to  
7 a deadline and this information was provided in time for  
8 the deadline for service.

9 There were a lot of people working very hard on all  
10 aspects of this pleading. Nothing was held back. There  
11 was no tactical consideration. There was no  
12 incompetence. There was no delay. Many people have  
13 been working into the early hours of the morning and  
14 longer to get this pleading out on time.

15 My Lord, I think that's all I need to say in  
16 response because, although there were very detailed  
17 points -- perhaps I should add this: it's still not  
18 entirely clear what insurers are seeking to exclude in  
19 any event, but, as I understand the position from  
20 Mr Kealey, the only passages he takes objection to  
21 are 26 and 27 and the reliance on that information in  
22 28.3. But, as I've said, the answer to that is not to  
23 prevent us from relying on those or to simply assume  
24 them; it's to require the insurers to plead to them and  
25 then we will see where we are.

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1 But we take on board entirely what my Lord has said  
2 as to the undesirability and potentially  
3 impracticability of having contested scientific evidence  
4 at the trial and that means that if insurers are  
5 realistic in their defences, we will be realistic in  
6 trying to agree something with them.

7 MR KEALEY: My Lord, can I just correct something that  
8 Mr Edelman inadvertently got wrong? We do object to  
9 28.4, with possibly the exception of 28.4(d).

10 MR EDELMAN: Yes, that's an argument, I think. I wasn't  
11 suggesting that you agreed to it. It's an argument  
12 point rather than an expert evidence point.

13 MR KEALEY: Very well. I don't want to cut across my Lord.  
14 And also another correction. We actually did call for  
15 an explanation of question 6 and the applicable words.  
16 If you look at the attachment to our skeleton, you will  
17 see precisely what we asked for and therefore precisely  
18 what we didn't get.

19 MR JUSTICE BUTCHER: Right. Thank you. Anything else?

DRAFT RULING - see separate transcript

Case Management Conference (continued)

22 MR JUSTICE BUTCHER: Mr Edelman, I hope that's clear.

23 MR EDELMAN: It is, my Lord, I'm grateful.

24 My Lord, just returning back to paragraph 11 -- and  
25 I hope this isn't contentious -- but on the date of the

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1 directions which currently is 4 pm on 18 June, the  
2 insurers have not yet responded to our agreed facts. We  
3 do need their response urgently. But given that they  
4 have not been able to respond yet to our agreed facts,  
5 can I suggest that the date under 11 be put back from  
6 the 18th, which is only two days' time, to the 22nd?  
7 That will give more time for insurers to submit their  
8 comments on our agreed facts and give all the parties  
9 more time to make an application.

10 I think that's to everyone's benefit and --

11 MR JUSTICE BUTCHER: Well, I would doubt whether there is  
12 any opposition to that, but we will leave a pause to  
13 see.

14 MR KEALEY: There is no opposition on the part of my  
15 clients.

16 MR GAISMAN: My Lord, it may be helpful for the date for the  
17 service of expert evidence to go back by the same  
18 amount. The only reason I say that is because, although  
19 I anticipate that most of our evidence in relation to  
20 Sweden will be evidence of fact, it may be -- I put it  
21 no higher -- that some of it is very technically  
22 regarded as evidence of expert opinion. If it is, it  
23 will be a minority and it will be an argument of no  
24 possible consequence since permission is required in  
25 either case. But it would be sensible to have those two

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1 on the same date, fact and expert.  
 2 The only other point I would raise -- and it arises  
 3 out of something that Mr Edelman said in reply to me  
 4 this morning -- is that I very much hope that in dealing  
 5 with what can and can't be agreed as facts, parties  
 6 don't take the position, "Well, I don't dispute it as  
 7 a fact, but I do dispute its relevance". Relevance is  
 8 for the trial, it's not for satellite litigation, and  
 9 there is no objection to a fact which is not inherently  
 10 controversial being allowed in even though, as is the  
 11 way in litigation, one side doesn't manage fully to  
 12 understand the other side's position or point of view.  
 13 So please can we not have agreement on either side on  
 14 the agreed facts stymied or impeded by obstructiveness  
 15 about relevance; for example, I may not see the  
 16 relevance of Mr Edelman's proposed agreed fact about the  
 17 Zika virus, but if he wants it in, that's fine, and  
 18 I would expect him to take the same approach in return.  
 19 MR EDELMAN: Well, if Mr Gaisman wants my comment, I have to  
 20 reserve my position on the relevance of introducing  
 21 evidence to do with another country and different  
 22 population size, different economic circumstances. We  
 23 will see what it says, but this is litigation that has  
 24 to be conducted efficiently, and delving into what  
 25 happened and didn't happen in another country when we

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1 have enough on our hands to deal with as to what  
 2 happened in the UK may cause objection. But I will have  
 3 to take instructions on that and we will have to  
 4 consider it. But I can't make --  
 5 MR JUSTICE BUTCHER: It's difficult to deal with this sort  
 6 of issue in the abstract. Obviously I expect both  
 7 parties to be realistic and not to try and gain tactical  
 8 advantages either way at this juncture.  
 9 MR EDELMAN: My Lord, can I just add this: it would be  
 10 helpful if Mr Gaisman is to introduce evidence as to  
 11 Sweden -- I'm not sure whether he wants to introduce  
 12 evidence as to what happened in Brazil as well, the  
 13 other country without a lockdown, but we will have to  
 14 see. If he wants to introduce evidence about Sweden,  
 15 if, without giving too much away, he could provide with  
 16 it a very short summary of the point or points that he  
 17 would want to make based on the evidence, that would  
 18 help us. Merely serving the evidence which, on the face  
 19 of it, has nothing to do with the UK without any such  
 20 explanation may cause a more negative reaction than  
 21 an explanation accompanying it would.  
 22 MR GAISMAN: My Lord, I gave an explanation this morning and  
 23 your Lordship was kind enough to say that your Lordship  
 24 could see why I wanted to rely on the evidence. Of  
 25 course your Lordship doesn't necessarily accept the

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1 evidence or think it is decisive, but your Lordship  
 2 could see why I wanted to rely on it, and I think if  
 3 Mr Edelman re-reads what I said this morning, he will  
 4 understand it too. I don't, with respect, see why he is  
 5 entitled to anything more.  
 6 MR EDELMAN: Just so he knows, the issue is going to be  
 7 how -- into what level of detail are we going on the  
 8 causation case because Mr Gaisman seems to be  
 9 considering going into what would become a quantum  
 10 exercise as to how much of a claim is payable, whereas  
 11 what the FCA is concerned about is not the adjustment of  
 12 claims, but whether claims are payable at all in  
 13 principle. So I'm not going to invite Mr Gaisman to  
 14 comment, but just -- as long as he has that point in  
 15 mind, our objection, if there is one, may be -- but  
 16 we'll have to see what he says -- if it's going into  
 17 issues of quantification, that is beyond the scope of  
 18 what this litigation is intended to investigate.  
 19 MR JUSTICE BUTCHER: Right. I think you are protected,  
 20 Mr Edelman, by the order which I made earlier, which is  
 21 that Mr Gaisman does have to apply --  
 22 MR EDELMAN: Yes.  
 23 MR JUSTICE BUTCHER: -- for any evidence, factual or expert,  
 24 and if I cannot even at that stage see the relevance,  
 25 then he may not get permission, but if I can, then he

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1 will.  
 2 MR EDELMAN: I think he was inviting me to agree to evidence  
 3 even if we thought it wasn't relevant and to leave it to  
 4 the court to decide at the trial whether it was relevant  
 5 and that is what I was objecting to. That would  
 6 undermine the whole purpose of my Lord's ruling on  
 7 paragraph 11.  
 8 MR KEALEY: My Lord, can I intervene for a second to detain  
 9 you? It is apparent from Mr Edelman's reply skeleton  
 10 that the FCA has had the assistance of expert evidence  
 11 in relation to the matters addressed in the questionable  
 12 paragraphs in the particulars of claim. I presume that  
 13 he will or his clients will have either a completed or  
 14 a fairly advanced expert's report. It would be  
 15 extremely helpful, if the FCA wishes to have agreement  
 16 as soon as possible in relation to the matters in  
 17 dispute in relation to paragraph 28 and thereabouts, if  
 18 they were willing to -- I can't oblige them to -- give  
 19 us sight of their experts' reports or evidence to date  
 20 and then we shall be in a better position, no doubt, to  
 21 ask our own experts, if and when we can find them, what  
 22 the answers are, and we might -- but I doubt it -- be in  
 23 a better position to deal with the matter, as he puts  
 24 it, constructively in the defence. But at the moment,  
 25 without any expert assistance on our part, we don't

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1 think that we're going to be able to say very much in  
 2 the defence about those paragraphs.  
 3 MR EDELMAN: If it helps, the figures that are obtained that  
 4 are set out in the table at paragraph 27 can be obtained  
 5 by scrolling up and down the graphs in the Cambridge  
 6 report, which is available publicly on the internet.  
 7 The screenshot on page 76 of bundle 3 is -- with the  
 8 boxes there, it demonstrates how that figure is  
 9 extracted. You just roll it up and down the graph on  
 10 the net, so that's where it's from. It's very clear.  
 11 MR KEALEY: That's not --  
 12 MR EDELMAN: If we have any additional information, I will  
 13 take instructions as to it being provided to insurers.  
 14 MR KEALEY: Well, I can draw a graph and say that's where  
 15 the information comes from, but, anyway, I'm not sure  
 16 that is going to be very constructive. But, as I say,  
 17 it would be very helpful, if the FCA wishes to defend  
 18 the integrity of these reports or assert the integrity  
 19 of these analyses, if we were to be able to see  
 20 something sooner rather than later.  
 21 MR JUSTICE BUTCHER: Well, Mr Edelman has said that he will  
 22 take instructions, if there is anything else, with  
 23 a view to giving it to you if it's going to be of any  
 24 assistance.  
 25 MR KEALEY: Very good. Thank you.

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1 MR JUSTICE BUTCHER: Yes.  
 2 MR EDELMAN: Right, my Lord, that concludes the issues on  
 3 the directions. I'm not sure whether any insurers are  
 4 actually going to raise it as an issue before you, but  
 5 there has been raised in the skeleton arguments an issue  
 6 about assumed facts and examples. From what I have read  
 7 in some of the skeleton arguments, at least, my Lord was  
 8 being asked to endorse or encourage the FCA to agree to  
 9 the particular examples that insurers have formulated.  
 10 If you are to be invited or encouraged to say anything  
 11 about this, then there is something that I would want to  
 12 say on the subject. But I don't want to waste my breath  
 13 unless that is going to be pressed by anyone today.  
 14 MR JUSTICE BUTCHER: Yes. Just before we get to that,  
 15 Mr Edelman -- and I hope I know what your answer to all  
 16 of this is going to be -- that when I looked at the  
 17 questions for determination list, I was somewhat nervous  
 18 about the generality of various of the questions and  
 19 I hope everyone appreciates that the questions which are  
 20 posed to the court, which I understand are going to be  
 21 embodied in a list of issues, must be definite and they  
 22 must admit of definite answers so that questions such as  
 23 "What is the meaning of ..." are just not going to be  
 24 capable of being answered.  
 25 The court can say that this or that doesn't fall

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1 within the meaning, but it can't give essay answers to,  
 2 What is the meaning of ..." or, for example, "What does  
 3 he have to prove?" is not acceptable.  
 4 Whether this or that might be enough proof is  
 5 possibly capable of being answered, but not "What does  
 6 he have to prove?", and equally, "What is the applicable  
 7 test of causation?", given a whole number of different  
 8 forms of words. Those are not going to be capable of  
 9 being answered like that.  
 10 I'm sure everyone appreciates that, but I thought  
 11 I ought to say it.  
 12 MR EDELMAN: My Lord, the contractual role of the questions  
 13 for determination was primarily as a scoping document,  
 14 and so that was to demonstrate to all signing up to the  
 15 framework agreement what was in and what was not in --  
 16 I should say what was potentially in -- because one  
 17 aspect, as you have seen, QBE, where -- one aspect of  
 18 their policy is not going to be tested and therefore  
 19 they would remain free to defend claims after the test  
 20 case which were pursued on that clause, which is not  
 21 being tested. I make that clear on the record for QBE's  
 22 benefit. But it was a scoping document and it was fully  
 23 intended to serve that purpose, rather than being a list  
 24 of issues for it.  
 25 MR JUSTICE BUTCHER: Right.

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1 So what you were saying before I said that was:  
 2 agreed and assumed facts, is anyone making any sort of  
 3 application in relation to them today?  
 4 MR EDELMAN: Yes.  
 5 MR JUSTICE BUTCHER: I have to say my understanding was that  
 6 the general view was that they would be continued to be  
 7 the subject of discussion.  
 8 MR EDELMAN: I hoped that would be the case. We have set  
 9 out our position on them in dealings with insurers. We  
 10 remain prepared to consider them, but we think the best  
 11 time to consider them, as with the finalisation of the  
 12 list of issues, is when the issues have been more  
 13 clearly defined by the pleadings and reference can be  
 14 made to the points in the pleadings.  
 15 We think that the issues of principle between the  
 16 parties may be -- if they're going to be the subject of  
 17 examples at all and they may not need to be -- but if  
 18 they are, may benefit from much simpler examples, but  
 19 some of them may not.  
 20 I can deal with that in a little bit more detail,  
 21 but I don't want to waste my Lord's time if none of the  
 22 insurers are wanting to press the issue of examples at  
 23 this hearing. I understand they want to reserve their  
 24 position for the second CMC, so if they're silent now  
 25 I make it clear I'm not taking that as any concession on

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1 their part, acceptance of anything I've said either  
 2 today or in our skeleton, but whether this can all be  
 3 put off to the second CMC if we can't agree it in the  
 4 meantime.  
 5 MR JUSTICE BUTCHER: Right. We will give a pause for any  
 6 insurer to say anything that they want to at this point.  
 7 MR KEALEY: Yes, my Lord. Mr Edelman has been very fair  
 8 about this. I just want him to confirm, because I'm  
 9 sure he will, that the date of 15 June in paragraph 2.3  
 10 of the framework agreement, which is in bundle A at  
 11 page 618, is therefore no longer applicable because  
 12 there the date of 15 June was designated to the date by  
 13 when any party should make any application in relation  
 14 to deletions, additions, supplementations and things  
 15 like that to the assumed facts.  
 16 MR EDELMAN: My Lord, what we envisage the example being,  
 17 that the assumed facts would provide a general range of  
 18 permutations and what we would suggest that the  
 19 insurers' examples, if any are used in any form, should  
 20 be a submissions tool for trial, so that they are --  
 21 we would not rely on that clause of the framework  
 22 agreement to preclude insurers from seeking to suggest  
 23 the use of examples at the second CMC.  
 24 I hope that's sufficient because I think all  
 25 Mr Kealey wants to know is are we saying that that

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1 paragraph, that clause of the framework agreement, would  
 2 prevent them from putting forward examples, and we say  
 3 it doesn't.  
 4 MR KEALEY: Well, I'm not sure --  
 5 MR JUSTICE BUTCHER: Mr Kealey went a little further than  
 6 that. I think what he wants confirmation of is that any  
 7 suggestions of amendment or addition, you won't say that  
 8 they are precluded by that clause.  
 9 MR EDELMAN: Since the assumed facts are really a range of  
 10 permutations, the permutations that could be relevant,  
 11 what will actually be relevant will be defined by the  
 12 list of issues, and then what will then develop the list  
 13 of issues will then overtake the questions for  
 14 determination and the assumed facts will be relevant  
 15 insofar as they are relevant for consideration, but they  
 16 have to remain the range of permutations.  
 17 For example -- I think maybe we are having to get  
 18 into this -- let me give one example of Hiscox with  
 19 a denial of access clause -- sorry, I hadn't got the  
 20 page turned up ready to deal with this, but I'll deal  
 21 with it when it's available in a moment. If I can just  
 22 show my Lord an example of this. It's page 399 in the  
 23 main bundle.  
 24 MR JUSTICE BUTCHER: Yes.  
 25 MR EDELMAN: My Lord will see there is a table there. The

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1 previous page, 398 and 397, will show you this is part  
 2 of our schedule for Hiscox. It has -- under the denial  
 3 of access clause, which is quoted there at the foot of  
 4 the table:  
 5 "We will insure you for your financial losses  
 6 resulting solely and directly from an interruption to  
 7 your activities."  
 8 And the non-damage denial of access is caused by:  
 9 "... an incident occurring during the period of  
 10 insurance which results in a denial of access or  
 11 hindrance in access."  
 12 So there are two concepts there, amongst others:  
 13 interruption and denial of access or hindrance in  
 14 access.  
 15 If you go over to page 401, my Lord will see the  
 16 sort of points that are being taken. On page 401 at  
 17 (i):  
 18 "An important requirement for cover is that the  
 19 business activities are interrupted, ie they have to  
 20 stop."  
 21 So that's interruption. Under (ii):  
 22 "A public authority has not denied you access or  
 23 hindered your access to the insured property. Whilst  
 24 the Government has ordered the general closure of many  
 25 businesses across the UK to reduce the spread of

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1 coronavirus, your business and the type of service it  
 2 offers was not included within the list of businesses  
 3 that are subject to a legally enforceable order to  
 4 close. This means that you can still access the insured  
 5 property."  
 6 You get a similar approach on page 406. This is  
 7 another Hiscox type of policy and it's item 18. It  
 8 says:  
 9 "As a preliminary point, on the basis of what you  
 10 have set out so far and our limited knowledge of the  
 11 insured's business, it is not clear to us that the  
 12 business is unable to use its premises by reason of  
 13 a restriction imposed by the recent legislation. As we  
 14 understand it, whilst the business served food on-site,  
 15 customers could also buy cakes from the business, as  
 16 other businesses that do not serve food on-site have  
 17 done and continue to do so."  
 18 They go on to say:  
 19 "Regulation 3.3 of Northern Ireland expressly  
 20 permits cafés or restaurants that sold food for  
 21 consumption off-site to carry on selling food for  
 22 consumption off-site."  
 23 So my Lord will see that there are some very simple  
 24 issues in this case which will require determination.  
 25 When I say "simple", I don't mean that the answer is

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1 easy. I just mean that they are narrow and simple to  
2 formulate.

3 On prevention of access, is it sufficient that the  
4 owner can still visit his premises or is access to the  
5 premises prevented if the Government prevents customers  
6 from going to the premises by ordering them not to go  
7 for non-essential shopping?

8 Interruption: if you are a coffee shop and you also  
9 have a counter serving cakes which are sold not just to  
10 customers in the café but also to customers who come  
11 into the shop and buy a cake, is your business  
12 interrupted because you can no longer operate as a café  
13 or, as Hiscox suggest, is it not interrupted because you  
14 can still sell your cakes?

15 Now, these are very simple fact situations which  
16 need to be addressed. Whilst our assumed facts cover  
17 all permutations, it is unlikely that the court, in  
18 order to answer these sorts of questions on the Hiscox  
19 policy, is going to need either to have resort to all  
20 the permutations in the assumed facts or to any detailed  
21 example.

22 So my answer to Mr Kealey is, yes, the assumed facts  
23 are there which set out the range of permutations that  
24 exist across these policies, but the extent to which any  
25 of those permutations will need to be considered to

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1 decide a particular case will depend on the issues.  
2 That's what -- when my Lord said that you want a list of  
3 issues, quite rightly that is geared to the particular  
4 issues on the policy. There are -- I'm not saying there  
5 aren't other issues on the Hiscox policy, but on those  
6 two aspects that is the issue.

7 MR JUSTICE BUTCHER: I see that. Absolutely, Mr Edelman.  
8 Perhaps I'm not understanding. I think at the moment  
9 you and Mr Kealey are addressing slightly different  
10 points. I mean, you're saying that these examples are  
11 just over-complicated and likely to take the eye off the  
12 ball and all that sort of thing and it can actually be  
13 rather more simply dealt with, and you may be right.

14 I think Mr Kealey is saying or I had understood him  
15 simply as saying, "Can we change these for better or  
16 worse, irrespective of that clause in the framework  
17 agreement which says the changes ought to have been done  
18 by now", I think.

19 MR EDELMAN: My Lord, I think the assumed facts were just  
20 intended to be the range of permutations, which may or  
21 may not be relevant to decide particular issues. So we  
22 are open to suggestions as to anything we have missed  
23 out.

24 My Lord, can I just turn my microphone off and on,  
25 because I can't hear clearly.

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1 MR JUSTICE BUTCHER: Part of the problem may be that  
2 Mr Kealey has his microphone on at the moment.

3 MR KEALEY: I have only just turned it on.

4 MR JUSTICE BUTCHER: Then someone else has a microphone on.

5 MR KEALEY: I think it's probably Mr Gaisman. He's usually  
6 the problem!

7 MR JUSTICE BUTCHER: I don't think he is on this occasion.

8 MR EDELMAN: I think someone has turned their microphone off  
9 now because the echoing has resolved.

10 Obviously if we have missed something out on the  
11 permutations, we are quite amenable to adding that in or  
12 amending it if there is an error, and we are not going  
13 to hold the insurers to that strict date if they want  
14 the assumed facts as currently structured corrected; but  
15 I make the point "corrected" because the introduction to  
16 the assumed facts does begin with a statement that, in  
17 due course, if and to the extent that examples are  
18 necessary, they will replace the need for a reference to  
19 the assumed facts, and that's precisely what we have in  
20 mind. If there are examples that are necessary, they  
21 will be used for arguing a particular case.

22 To give an example of a Hiscox case, we don't  
23 anticipate having to argue on the issues I just  
24 outlined. All the various permutations -- there is  
25 an issue of principle as to what prevention or hindrance

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1 of access involves. Does it extend to customers being  
2 prevented or hindered from accessing the premises or is  
3 it only the owner of the business whose access must be  
4 hindered or prevented? With interruption, must it be  
5 a complete cessation or is it sufficient that one aspect  
6 of the business is interrupted?

7 These are issues of principle, which is what the FCA  
8 understood that insurers wanted this litigation to  
9 resolve and what we want to resolve, without getting  
10 into numerous hypothetical permutations and scenarios  
11 which get away from the core question.

12 So that's why I'm nervous about what Mr -- I'm just  
13 not sure what Mr Kealey has in mind when he talks about  
14 amending the assumed facts.

15 MR JUSTICE BUTCHER: I think, Mr Edelman, we had better hear  
16 now what exactly Mr Kealey wants.

17 MR KEALEY: Well, my Lord, I wish one of my more  
18 pusillanimous brethren would take the baton away from  
19 me. I feel as if I'm the very aggressive point man  
20 here. I don't mean to be.

21 If your Lordship could go to the framework agreement  
22 at paragraphs 2.2 and 2.3 --

23 MR JUSTICE BUTCHER: Remind me of the page.

24 MR KEALEY: 618 in bundle A or bundle whatever it is. If  
25 I could echo all my learned friends, as it were, on my

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1 side -- and this is not intended to be a nasty  
 2 criticism -- your Lordship's gone. I suspect my  
 3 advocacy is as bad as Mr Edelman's.  
 4 (Pause)  
 5 MR JUSTICE BUTCHER: That just allowed me to find the page,  
 6 Mr Kealey.  
 7 MR KEALEY: I imagined that your Lordship had already  
 8 decided the point, as indeed my team sent me a WhatsApp  
 9 saying that I had managed to drive you away with my  
 10 boring advocacy, but there it is.  
 11 If your Lordship looks at paragraphs 2.2 and 2.3,  
 12 the whole idea of this, my Lord, is to make the task of  
 13 the parties, but actually more importantly the task of  
 14 the court, easier -- easier for -- your Lordship's  
 15 frozen. I don't know whether that's in shock or horror.  
 16 (Pause)  
 17 My Lord, I was saying if you look at paragraphs 2.2  
 18 and 2.3, the whole idea of this for the mutual objective  
 19 is to get proper determinations of issues of law and  
 20 that obviously is best for the parties, it's best for  
 21 the court. The court, after all -- once we have  
 22 finished our advocacy and we can all go on holiday, you  
 23 will be tasked with actually writing our judgments  
 24 telling us what the answers are and therefore you have  
 25 to have proper assumed facts. This is not a criticism

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1 on the FCA's assumed facts as such. They are very, very  
 2 helpful. But they only go so far and they are very  
 3 academic in certain respects and rather abstract in  
 4 others and they're very good in other respects. I'm not  
 5 making criticism.  
 6 What I am suggesting, however, is that what insurers  
 7 have done -- and in full collaboration, without  
 8 duplication -- each insurer has taken one category which  
 9 is identified by the FCA, for example nurseries or  
 10 churches, which I believe is category 7 and I believe  
 11 one of my clients insures those types of organisation,  
 12 and we have come and provided the court or sought to  
 13 provide the court with real-life examples with certain  
 14 permutations so that the court can actually see  
 15 a real-life type of case where, for example, a school is  
 16 required to close early or some pupils choose to  
 17 self-isolate early or go home to Hong Kong, if they are  
 18 from foreign parts, things like that.  
 19 All I'm trying to do at the moment, my Lord, is  
 20 say -- if you look at 2.2, it says that the FCA will  
 21 provide the assumed facts, we will then make comments,  
 22 they will then consider, and we of course don't expect  
 23 them to say, "Yes, we've considered. Now get lost", and  
 24 then it says in 2.3 that if we want to add, if we want  
 25 to delete and if we want, I think, to revise -- I can't

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1 remember -- then we have to make an application by  
 2 15 June or the first case management conference if  
 3 later.  
 4 So this is the first case management conference.  
 5 It's later than 15 June. And all I'm saying -- all I'm  
 6 saying -- is that we haven't made an application  
 7 hitherto and, given that we're going to continue  
 8 discussing this matter collaboratively, the court should  
 9 say that we should have until, say, the next CMC to make  
 10 such an application.  
 11 It's a very innocuous and rather balanced -- I know  
 12 it doesn't sound as if I'm normally balanced, but on  
 13 this occasion a balanced suggestion for the better  
 14 advancement of this case. That's all.  
 15 MR JUSTICE BUTCHER: Right. Does any other insurer want to  
 16 say anything about this? (Pause) No.  
 17 Mr Edelman?  
 18 MR KEALEY: I think that's a sub silentio approval and  
 19 endorsement.  
 20 MR EDELMAN: A rare event, Mr Kealey!  
 21 My Lord, I don't think there is anything between us,  
 22 really, in principle, in substance, because, as I have  
 23 already indicated, we would not regard that paragraph of  
 24 the framework agreement as preventing insurers from  
 25 continuing to formulate and advance examples. We will

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1 try and work with them to try and agree something. It's  
 2 just the more detailed examples they're contemplating  
 3 are best formulated once we have the pleadings, and the  
 4 reason I was talking about this being linked to the  
 5 assumed facts is that the introduction to the assumed  
 6 facts -- I won't bother my Lord with actually looking at  
 7 it, but I can read the relevant sentences:  
 8 "The following set of assumed facts has not been  
 9 tailored to the specific policies selected, but  
 10 represents an overview of what the FCA currently  
 11 perceives to be a range of possible fact patterns for  
 12 policyholders and in particular SME businesses affected  
 13 by the current situation. It is intended as a useful  
 14 and neutral document with high-level factual scenarios  
 15 in a form flexible enough to enable more detailed  
 16 factual scenarios arising in respect of particular  
 17 businesses and policies to be considered within its  
 18 framework. It specifically takes into account scenarios  
 19 which insurers, policyholders and brokers have put  
 20 forward."  
 21 So it's simply not a question of amending what is  
 22 intended to be a neutral and high-level document. It's  
 23 going to be, as this document itself contemplates -- the  
 24 example is going to be supplementing it. That's why  
 25 we're wholly prepared and have no problem with insurers

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1 bringing forward their examples at the second CMC if  
2 they cannot be agreed by the FCA. But that's to be done  
3 after the pleadings and in a sense it's nothing to do  
4 with the assumed facts document. They may be assumed  
5 facts, but it's not to do with the assumed facts  
6 document that the framework agreement is referring to.

7 So I think Mr Kealey has an unnecessary concern.  
8 MR JUSTICE BUTCHER: In concrete terms, I think Mr Kealey is  
9 suggesting that the date which is in the framework  
10 agreement of 15 June should be changed, let's say, to  
11 24 June. I mean, do you object to that? The debate  
12 between you or the discussion between you and Mr Kealey  
13 has been useful from my point of view in understanding  
14 what you are each going to be saying about these, but as  
15 a matter of concrete decision for today, do you have  
16 an objection to that?

17 MR EDELMAN: I don't want to rewrite the agreement and so  
18 what I would be prepared to agree to would be the  
19 insurers having the right to submit for the purposes of  
20 being assumed facts -- lower case "a", lower case "f" --  
21 for the purposes of trial have the right to apply -- to  
22 submit those examples to the court for consideration at  
23 the second CMC, and if the court approves, then they  
24 will be assumed facts for the purposes of the trial.

25 MR JUSTICE BUTCHER: Right.

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1 Mr Kealey, does that meet your point?  
2 MR KEALEY: I hope so. I really don't know. I just don't  
3 understand what the problem is, but there it is. There  
4 is obviously some sort of fundamental psychological  
5 issue here that for some reason or other we can't just  
6 have an extended date. Every single insurer has said,  
7 rightly or wrongly, that the document produced by  
8 the FCA is really not very consumer-friendly. We are  
9 perfectly happy to work with it and there it is.  
10 Mr Edelman has gone quite far enough. I just don't know  
11 why he requires me, on the occasion of this CMC, to make  
12 an application. I mean, I could make an application and  
13 say, "Well, choose our assumed facts". I don't think  
14 it's going to advance anything.

15 MR EDELMAN: I didn't require the insurers to make any  
16 application. We had made it plain that we were happy to  
17 contemplate any examples they might put forward but  
18 thought the most appropriate time to do so was after the  
19 defences had been served and I just wanted to know if  
20 any insurers objected to that. I'm not sure that they  
21 do.

(Pause)

22 MR KEALEY: You are back, my Lord.

23 MR EDELMAN: We are very near the end.

24 (Pause)

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1 MR JUSTICE BUTCHER: Now, it seems to me that you were  
2 really not arguing about anything very much. Mr Kealey  
3 can put in some further suggestions as to assumed facts,  
4 maybe not by way of additions, deletions or amendments  
5 to your document, but he can make those suggestions and  
6 he can make those suggestions up to -- I'm going to say  
7 the time of the second CMC, but I don't really mean  
8 that. I mean shortly before the next CMC; say 5 pm on  
9 the 24th.

10 Right, I hope that's clear. Right, is there  
11 anything else?

12 MR EDELMAN: No, my Lord. I have referred to an issue  
13 raised by QBE and I hope I have dealt with that to QBE's  
14 satisfaction, but that's all on my agenda as far as  
15 I know.

16 MR GAISMAN: My Lord, I asked your Lordship to extend the  
17 date for expert evidence to the same date as the date  
18 for which the factual evidence has been extended. That  
19 wasn't opposed, but I don't think your Lordship formally  
20 ruled.

21 MR EDELMAN: My Lord, I think we had dealt with at the very  
22 beginning, where I suggested that amended date.

23 I suggested at the very outset 4 pm on 24 June and  
24 I didn't -- I took that as being agreed by everybody.

25 MR GAISMAN: I think technically orders of the court require

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1 some sign of assent from the judge!

2 MR JUSTICE BUTCHER: So we are agreed, are we, that it's  
3 both factual and expert evidence by 4 pm on the 24th --  
4 is that right? -- because that wasn't my understanding,  
5 actually.

6 MR EDELMAN: No, factual is the 22nd, actually.

7 MR JUSTICE BUTCHER: The 22nd?

8 MR EDELMAN: Yes, but if we're not -- yes, factual,  
9 the 22nd. So perhaps, if my Lord is precluding the  
10 expert evidence we were considering then it ought to be  
11 the 22nd as well for fact -- expert, I'm sorry. It  
12 should be the same time and date under both; 4 pm on  
13 the 22nd.

14 MR JUSTICE BUTCHER: Right. Thank you. I think that's what  
15 Mr Gaisman wants.

16 MR EDELMAN: It was my fault.

17 MR KEALEY: My Lord, just to detain you literally one  
18 second. We shall be as laconic as possible in our  
19 defence, but despite all our efforts to be as laconic as  
20 possible, can we have permission to exceed 25 pages if  
21 necessary and appropriate?

22 MR JUSTICE BUTCHER: Yes. That applies to all insurers, but  
23 of course I am anxious that they shouldn't be merely  
24 duplicative and I am anxious that when you say you are  
25 going to be as laconic as you can be, you mean it,

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1 because very frequently I get applications on paper to  
 2 extend page limits with the promise that of course they  
 3 won't be used and then very frequently they are. But  
 4 I have no doubt that you will apply yourself to being as  
 5 succinct as you can be but give as much of your case as  
 6 you responsibly and properly can.  
 7 MR KEALEY: Thank you very much, my Lord -- I can hear  
 8 myself several times, which is always a disadvantage --  
 9 we shall, my Lord, and we shall be to the point. The  
 10 practicalities of collaborating with six other sets of  
 11 insurers can be quite challenging, but we're going to  
 12 try and do it as best we can.  
 13 MR JUSTICE BUTCHER: Yes, indeed.  
 14 Now, the next CMC, which is on Friday week, will be  
 15 held if possible with Lord Justice Flaux and me. If he  
 16 cannot be available, so be it, but that is the plan.  
 17 Clearly it is very important that there should be  
 18 a clear agenda for that CMC because there may be quite  
 19 a lot to be considered and I want to be sure that the  
 20 parties apply their minds in sufficient time to make it  
 21 a manageable occasion. I'm not sure that I can say more  
 22 than that, but it's going to be quite important.  
 23 Right. Is there anything else for today?  
 24 MR EDELMAN: Not from me, my Lord, and I believe not from  
 25 the insurers.

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1 MR JUSTICE BUTCHER: Right. Mr Edelman, will your team  
 2 produce an order?  
 3 MR EDELMAN: Yes.  
 4 MR JUSTICE BUTCHER: Thank you all very much and I will see  
 5 you all, some or even more of you, on Friday week.  
 6 (3.10 pm)  
 7 (The hearing adjourned until Friday, 26 June 2020)  
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