IN THE HIGH COURT OF JUSTICE **Claim No. FL-2020-000018**
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)
FINANCIAL LIST
FINANCIAL MARKETS TEST CASE SCHEME

BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Claimant

-and-

(1) ARCH INSURANCE (UK) LTD
(2) ARGENTA SYNDICATE MANAGEMENT LTD
(3) ECCLESIASTICAL INSURANCE OFFICE PLC
(4) HISCOX INSURANCE COMPANY LTD
(5) MS AMLIN UNDERWRITING LTD
(6) QBE UK LTD
(7) ROYAL & SUN ALLIANCE INSURANCE PLC
(8) ZURICH INSURANCE PLC

Defendants

DEFENDANTS' JOINT SKELETON ARGUMENT ON CAUSATION

INTRODUCTION

1. This skeleton argument contains combined submissions by all insurer Defendants on causation issues. It seeks to avoid duplication by addressing the general principles and arguments which affect all insurer Defendants equally. It provides a platform upon which the specific submissions of individual Defendants in relation to their own wordings are built.

2. It is intended that oral submissions at trial will be made by only one Counsel in relation to the basic principles of causation in insurance law which are addressed in this document.

3. This is not a case in which causation questions only arise on the footing that the operation of an insured peril under a coverage clause has already been established. Causation questions will arise as part of the argument about those coverage clauses, and whether their requirements can be proved by the FCA. Not only are the two issues of causation and coverage mutually informative, so that issues of causation are inherently bound up with whether the Insured can establish the operation of an insured peril, but those same issues are also bound up with whether (and, if so, what) loss was caused (whether proximately or in any tighter or looser sense required by a particular wording) by the insured peril.

4. Insofar as causation questions also arise in relation to the principles governing the amount of the indemnity – i.e. on the footing that some insureds have, to some extent, established the operation of an insured peril under some or other coverage clause – those causation issues must be addressed without it being known which insured peril has been proved, by which insureds and to what extent.

5. Given the relevance of the basic principles of causation to the construction and application of each coverage provision before the Court, those principles as addressed in this document must be individually applied to each coverage provision to the extent necessitated by the language and context of each such provision. To the extent necessary, this exercise is performed by each insurer Defendant in their individual written submissions. For present purposes, it is important to note that there is no single context in which causation issues arise, no single coverage provision to which those issues arise and therefore no single predicate which can be assumed for the purpose of the causation issues.

6. The causation issues raised by the FCA's pleaded case and advanced in its skeleton argument are (or at least appear to be) fundamental or potentially fundamental.

6.1 They go to the heart of the legal nature of policies of insurance, including the basis on which and the extent to which such policies in principle respond.

6.2 They require a consideration of (i) the legal nature of a policy of insurance; (ii) the essential promise made by an insurer under a policy of insurance; (iii) the loss for which an insurer is and is not liable under a policy of insurance; and (iv) the legal method by which the loss for which an insurer is liable is identified.

7. Unusually, it is therefore necessary to start at the very beginning, as being, in the circumstances, a very good place to start. All of this material is elementary, but in view of the case the FCA appears to be running, especially on 'but for' causation,[1] it is necessary to traverse some familiar ground.

THE (VERY) BASIC PRINCIPLES

What is the legal nature of an insurance policy?

8. **An insurance policy is a contract of indemnity.**

8.1 The law as it applies to policies of insurance is, fundamentally, the law of contract, because an insurance policy is a contract. The particular species of contract is a contract of indemnity. If authority for this proposition is needed, it may be found in section 1 of the **Marine Insurance Act 1906** {**K/1/1**}:

> *"A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."*

[1] Amended Particulars of Claim (**APOC**) at [4.3] {**A/2/4**} [53] {**A/2/35**} [59] {**A/2/39**} [74]-[79] {**A/2/44-46**}; see also the FCA Skeleton at [235]-[240] {**I/1/95-97**}, which suggests (wrongly) that this may be a case in which the need to show 'but for' causation could be dispensed with.

8.2 Non-marine insurance contracts, including policies of business interruption (**BI**) insurance, are likewise contracts of indemnity.[2]

9. **The insurer agrees to hold the insured harmless against specified loss.**

9.1 It has been long established that a contract of indemnity insurance is an agreement by the insurer to hold the insured harmless against specified forms of loss. In ***Firma C-Trade SA v Newcastle Protection and Indemnity Association ('The Fanti' and 'The Padre Island')*** [1990] 2 AC 1 (***The Fanti***) {**K/76/35**}, Lord Goff of Chieveley said (at 35 H):

> "*a promise of indemnity is simply a promise to hold the indemnified person harmless against a specified loss or expense…*"

9.2 The nature of the promise as being one to hold the insured harmless against specified forms of loss has been restated in many subsequent cases.[3] It is too well-established to be called into question.

10. **If the specified form of loss occurs, the insurer is in breach of its promise to hold the insured harmless against such loss. The legal nature of the insured's claim is for unliquidated damages for breach of contract.**

10.1 As Lord Goff said in ***The Fanti*** (at 35) {**K/76/35**}:

> "*…at common law, a contract of indemnity gives rise to an action for unliquidated damages, arising from the failure of the indemnifier to prevent the indemnified person from suffering damage, for example, by having to pay a third party.*"

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2 ***Castellain v Preston*** (1883) 11 QBD 380 *per* Brett LJ at 386 {**K/35/7**}: "*the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified*."

3 For example, ***Ventouris v Mountain (The Italia Express (No 2))*** [1992] 2 Lloyd's Rep 281, *per* Hirst J at 292 {**K/78/12**} (this point was common ground).

10.2 To the same effect is ***Chandris v Argo Insurance Co*** [1963] 2 Lloyds Rep 65 {**K/59**}, in which Megaw J held that the insured's cause of action under a contract of indemnity insurance accrues at the moment an insured loss takes place (e.g. at the moment a ship sinks, or a house burns down). This flows from the nature of the insurer's promise to hold harmless. All of this is well-established (although, surprisingly, the FCA appears to question whether an indemnity insurer's liability sounds in damages.[4])

10.3 The fundamental nature of an insurer's promise in indemnity insurance, and the consequences of its breach, were recently restated by the Court of Appeal in ***Endurance Corporate Capital v Sartex Quilts*** [2020] EWCA Civ 308 *per* Leggatt LJ at [35] {**K/184/8**}:

> "*in a case where (as here) an insurer has agreed to "indemnify" the insured against loss or damage caused by an insured peril, the nature of the insurer's promise is that the insured will not suffer the specified loss or damage. The occurrence of such loss or damage is therefore a breach of contract which gives rise to a claim for damages: see Firma C-Trade SA v Newcastle Protection and Indemnity Association ('The Fanti' and 'The Padre Island') [1991] 2 AC 1 , 35; Ventouris v Mountain (The Italia Express (No 2)) [1992] 2 Lloyd's Rep 281, 292; Sprung v Royal Insurance (UK) Ltd [1997] CLC 70.*"

10.4 A contract of indemnity insurance is in that respect (i.e. that breach sounds in damages) no different from any other contract.

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4 FCA Skeleton at [221] {**I/1/90**}: "*The payment under an indemnity policy is a primary obligation, not a secondary obligation to pay damages*". Insofar as this sentence draws a distinction between the primary liability of an indemnity insurer and the secondary liability of (e.g.) a guarantor, it is unobjectionable. But on any view, an indemnity insurer's liability sounds in damages, and the FCA is mistaken if it contends otherwise.

How are damages for breach of contract to be assessed?

11. **The purpose and intent of an award of damages for breach of contract is to put the claimant in the position it would have been in, if the contract had been properly performed.**

11.1 Damages for breach of contract are compensatory. They must do no more nor less than place the innocent party in the position in which it would have been had the contract been performed. The *locus classicus* is in ***Robinson v Harman*** (1848) 1 Exch. 850, at 855 *per* Parke B {**K/25/3**}:

> *"The rule of common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."*

11.2 This statement has been endorsed on many occasions at the highest level, including in ***Bunge SA v Nidera NV*** [2015] 3 All ER 1082, in which Lord Sumption at [14] {**K/156/8**} described it as the "*fundamental principle of the common law of damages*". It has also variously been described as the "*ruling principle"*,[5] the *"fundamental basis"* for assessing damages,[6] and the "*lodestar*".[7]

11.3 The corollary of the compensatory principle is that a claimant is not entitled, by an award of damages, to be placed in a superior position to that which it would have been in had the contract been performed.[8] As Ackner LJ said in ***C&P Haulage v Middleton*** [1983] 1 WLR 1461, 1467H-1468A {**K/68/7-8**}: "*It is not the function of the courts where there is a breach of contract knowingly ... to put a plaintiff in*

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5 ***Wertheim v Chicoutimi Pulp Company*** [1911] AC 301 at 307 (Lord Atkinson) {**K/39/7**}.

6 ***British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Company of London*** [1912] AC 673 at 689, Viscount Haldane LC {**K/40/17**}.

7 ***Golden Strait Corp v Nippon Yusen Kubishika Kaisha (The Golden Victory)*** [2007] 2 AC 353, *per* Lord Scott of Foscote at [36] {**K/130/30**}. See also ***Koufos v C Czarnikow Ltd* (*The Heron II)*** [1969] 1 AC 350, *per* Lord Pearce at 414 {**K/61/65**} and ***One Step (Support) ltd v Morris-Garner*** [2019] AC 649 at [31]-[32], Lord Reed {**K/181/24**}.

8 ***Commonwealth v Amann Aviation Pty Ltd*** (1991) 174 CLR 64, 28 per Mason CJ and Dawson J {**K/77/11**}.

a better position than if the contract had been properly performed". To similar effect, in ***Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*** [1998] AC 1 {**K/89/15**}, at 15H Lord Hoffmann said:

> "*the purpose of the law of contract is … to satisfy the expectations of the party entitled to performance. A remedy which enables him to secure, in money terms, more than the performance due to him is unjust.*"

11.4 The Court of Appeal has recently reiterated that the compensatory rule is equally applicable to a contract of indemnity insurance as to any other contract. Moreover, in the statement of principle below, Leggatt LJ rightly acknowledged that, reflecting its purpose, the object of the award is to compensate the claimant on the basis that, and as if, the breach of contract had not occurred. This indisputable corollary is the basis of the "but for" rule of causation in contract, which is as integral to the assessment of damages in contract as the compensatory principle itself. Thus, in ***Endurance Corporate Capital*** Leggatt LJ at [36] {**K/184/8**} said:

> *"The general object of an award of damages for breach of contract is to put the claimant in the same position so far as money can do it as if the breach had not occurred: see e.g. British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673, 689…"*[9]

12. **Damages are awarded only when, and (subject to certain limiting rules) to the extent that, the breach of contract was a cause of the insured's loss.**

12.1 In Parke B's classic statement from ***Robinson v Harman*** {**K/25/3**}, the words "*as if the contract had been performed*" lay down the usual 'but for' test, or *sine qua non* test, of factual causation. The FCA rightly accepts that the 'but for' test is "*a fundamental element of the common-sense factual causation principles*"[10] (save that the words "*the common-sense*" are an unnecessary gloss, apparently

[9] All emphasis by underlining in this Skeleton Argument is supplied, unless stated otherwise.

[10] FCA Skeleton at [233] {**I/1/94**}.

designed to permit the FCA to argue that common sense (as it sees it) may dictate a different course here).

12.2 The claimant must thus establish that but for the breach of contract, the claimant would not have suffered the loss.

12.3 Otherwise, the breach of contract was not the cause of the loss. The loss would have happened anyway, so the breach of contract made no difference.

12.4 This basic principle was re-affirmed by Lord Reed in ***One Step (Support)*** at [95(7) – [95(9)] {**K/181/42**}:

> "(7) *Where damages are sought at common law for breach of contract, it is for the claimant to establish that a loss has been incurred, in the sense that he is in a less favourable situation, either economically or in some other respect, than he would have been in if the contract had been performed. …*
>
> (9) *Where the claimant's interest in the performance of a contract is purely economic, and he cannot establish that any economic loss has resulted from its breach, the normal inference is that he has not suffered any loss. In that event, he cannot be awarded more than nominal damages*."

12.5 If the defendant is made to pay for loss which its breach of contract did not cause:

(a) The claimant is not being put in the same position as if the contract had been performed. Instead, the claimant is being put, at the defendant's expense, in a <u>better</u> position than if the contract had been performed. That, as explained above, is contrary to the compensatory basis of damages for breach of contract.

(b) Through the award of damages, the contract would be altered so as to impose on the defendant a different promise which, in the amount of damages awarded, the defendant is made liable for not having performed.

That, as Lord Hoffmann indicated in ***Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*** {**K/89/15**}, is unjust.

12.6 It is unsurprising, therefore, that 'but for' causation as an essential starting point is deeply embedded in the English law of obligations. Professor McGregor has recognised that the but for test "*has almost universal acceptance*". He describes it as the "*threshold which claimants must cross if their claim for damages is going to get anywhere*", and notes that satisfying the test "*is in the vast multitude of cases a necessary condition of the imposition of liability…*"[11]

13. **The law, by certain limiting principles, reduces the full amount of the loss caused by the breach of contract. To the extent of those principles, the claimant is not compensated in damages for all loss caused by the breach of contract.**

13.1 Principles of law have been developed which limit the amount of compensation provided by an award of damages.

13.2 The application of these principles takes, as its starting point, the full range of factual causes – i.e. the full range of facts and matters which satisfy the 'but for' test. The application of these principles then, to some extent, cuts back the compensation for the loss which, but for the breach of contract, the claimant would not have suffered.

13.3 One such key principle is remoteness, whereby a claimant cannot succeed if the loss is too remote from the breach of duty.

13.4 Another key principle is that of intervening cause, whereby a claimant cannot succeed if an intervening cause is so much more responsible than the defendant's breach of duty that it breaks the chain of causation between the breach of duty and the loss.

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11 ***McGregor on Damages*** (20th ed.) at 8-006 {**K/205/4**}.

13.5 A third key principle is that the consequences of the breach for which the contract breaker is held liable are restricted by the scope of the duty undertaken. A link is required between the nature of the duty and the extent of the liability for its breach: ***South Australia Asset Management Corp v York Montague Ltd*** [1997] AC 191 (***SAAMCO***) {**J/76**}.

13.6 Subject to the application of these (and the small number of other) legal principles, which have come to be known as legal causation, the aim of the law is to provide nothing less, and nothing more, than full compensation for the loss caused by a breach of contract.

The development of these principles in insurance law

14. As already noted in paragraph 8.1 above, an insurance policy is a contract. The fundamental principles applicable to claims under insurance policies are built on the foundation of the fundamental principles of contract law.

15. This reflects (i) the legal nature of an insurance policy as a contract of indemnity, (ii) the legal nature of the claim on an insurance policy as an action for unliquidated damages, and (iii) the analysis that, if loss occurs, the insurer is liable for breach of contract, the breach consisting in the failure to hold the insured harmless against the operation of the insured peril.

16. That this is the correct analytical framework in relation to insurance has recently been reiterated by the Court of Appeal in ***Sartex Quilts*** {**K/182**} (see paragraph 11.4 above).

17. Whilst the principles applicable to insurance are firmly anchored in the law of contract and whilst their roots must not be forgotten, the principles have been more fully articulated and developed in the specific context of insurance.

18. The relevant principles in the specific context of insurance may be summarised as follows.

Proximate cause

19. **Unless otherwise agreed, an insurer is liable for loss proximately caused by the peril insured against**.

19.1 This is the law, as set down in section 55(1) of the **Marine Insurance Act 1906** {**K/1/27**}:

> *"(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."*

19.2 The corollary is also true (and is also stated in section 55(1)), namely that an insurer is not liable for loss not proximately caused by the peril insured against.

19.3 That an insurer is liable only for loss proximately caused by the insured peril has been described by the editors of ***MacGillivray*** as a "*fundamental rule of insurance law*".[12]

19.4 In ***Reischer v Borwick*** [1894] 2 QB 548, Lindley LJ at 550 {**J/37/3**} described the need to show proximate cause as a "*cardinal rule*" which was "*based on the intention of the parties as expressed in the contract*", and that it must be applied with good sense in order to give effect to and not defeat the parties' intention.

19.5 In ***Becker Gray & Co v London Assurance Corp*** [1918] AC 101, Lord Sumner at 112 {**J/42/12**} said that the need to show proximate cause "*should be rigorously applied in insurance cases*" and that it was "*nothing more nor less than the real meaning of the parties to a contract of insurance*".

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12 Birds, Milnes & Lynch, ***MacGillivray on Insurance Law*** (14th ed.) at 21-001 {**K/191/1**} (cited with approval in ***Cultural Foundation v Beazley Furlonge Ltd*** [2019] Lloyd's Rep. I.R. 12 *per* Andrew Henshaw QC at [171] {**K/177/17**}).

19.6 The FCA accepts and indeed invokes these principles.[13] Surprisingly, it accuses the Defendants of seeking to ignore the contractual context.[14] This criticism is both misplaced and ironic. As will be seen in this document (e.g. at paragraph 22.4 below), and in the Defendants' individual submissions, the Defendants argue that the questions of causation which arise in this case absolutely require to be approached from the perspective of the contracts (including their content and context).

20. **The insured peril is the proximate cause of the loss if it is the efficient or dominant cause.**

20.1 The efficient or dominant cause is not necessarily the first in time, the last in time or the sole cause of the loss. The proximate cause is the dominant, effective or operative cause.[15]

20.2 The description derives from Lord Bacon's Maxims of the Law, *Regula* 1: "*in jure non remota causa sed proxima spectatur.*"[16] The commentary stated:[17]

> *"It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."*

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13 FCA Skeleton at [220] {**I/1/89**}.

14 FCA Skeleton at [215.1] {**I/1/86**}.

15 ***Leyland Shipping Co Ltd v. Norwich Union Fire Insurance Society Ltd*** [1981] AC 350, *per* Lord Shaw at 370 {**J/43/21**} (referring to the "*real effective*" cause) and at 368 {**J/43/19**} (referring to the "*proximate*" cause); Lord Dunedin at 363 {**J/43/14**} (referring to the "*dominant*" cause).

16 Cf. ***Montoya v. The London Assurance Company*** (1851) 6 Ex. 451 at 452 {**K/26/1**}, in which the maxim is stated as "*in jure causa proxima non remota spectatur.*"

17 The Works of Francis Bacon, Baron of Verulam, Viscount St Alban and Lord High Chancellor of England, New Ed. Vol IV (1826), p.16 {**K/209/4**}.

20.3 The law has subsequently moved away from identifying the last cause in time as the proximate cause. The distinction is between the dominant, effective or operative cause on the one hand, and a remote cause which lacks those qualities.

21. **The enquiry as to proximate cause is only for the purpose of answering one question: was the insured peril the (or a) proximate cause of the loss?**

21.1 The identification of the proximate cause does not involve an abstract search. The question is not: what was the proximate cause of the loss? The true question is: was the insured peril the (or a) proximate cause of the loss?[18]

21.2 The question arises in the latter form, because it is for the Insured to prove that the insured peril was the proximate cause of the loss, thereby proving that the insurer's breach of contract (in failing to hold harmless against the insured peril) caused the loss factually ('but for' – see below) and legally (*viz*. proximately).

21.3 In ***Becker, Gray & Co v London Assurance*** [1918] AC 101 at 113 {**J/42/13-14**}, Lord Sumner said:

> *"In a contract of indemnity… the insurer promises to pay in a certain event and in no other, namely, in case of loss caused in a certain way, and the question is whether the loss was caused in that way, and whether the event occurred, and the remoter causes of this state of things do not become material. If contracts of marine insurance were still regarded, as once they were, as aleatory bargains, this would be plain on the face of them. One need only ask, has the event, on which I put my premium, actually occurred? This is a matter of the meaning of the contract, and not, as seems sometimes to be supposed, of doing the liberal and reasonable thing by a reasonable assured. This is why,*

[18] It is open to the parties to contract on terms that the insured peril must be the sole cause of loss. If they do, and to that extent, it may also be necessary to inquire whether there is some other proximate cause of the loss.

as it seems to me, the causa proxima rule is not merely a rule of statute law, but is the meaning of the contract writ large."[19]

21.4 In the same case, Lord Atkinson explained as follows (at 112) {**J/42/12**}:

> *"Proximate cause is not a device to avoid the trouble of discovering the real cause or the 'common-sense cause', and, though it has been and always should be rigorously applied in insurance cases, it helps the one side no oftener than it helps the other. I believe it to be nothing more nor less than the real meaning of the parties to a contract of insurance…*

21.5 The causation enquiry is, therefore, not to be undertaken by analysing what happened in the abstract and seeking to identify its proximate cause, so as to bring the conclusion of the abstract enquiry back to the contract.

21.6 The trouble with an abstract enquiry is that it ignores the issue of the perspective from which, and the purpose for which, the causation enquiry is being made. Both the perspective and the purpose are essential.

22. **The correct characterisation or categorisation of potential causes depends upon the purpose for which the question is asked.**

22.1 In ***Environment Agency v Empress Car Co (Abertillery) Ltd*** [1999] 2 AC 22, at 29 {**K/90/8**} Lord Hoffmann said that the correct characterisation or categorisation of potential causes depends upon the purpose for which the question is asked:

> *"The first point to emphasise is that common sense answers to questions of causation will differ according to the purpose for which the question is asked. Questions of causation often arise for the purpose of attributing responsibility to someone, for example, so as to blame him for something which has happened or to make him guilty*

[19] FCA Skeleton at [220] {**I/1/89**} cites the question posited by Lord Sumner ("*has the event, on which I put my premium, actually occurred?")* in isolation, but to ensure that this is not misinterpreted it must be read in its full context, as presented here.

of an offence or liable in damages. In such cases, the answer will depend upon the rule by which responsibility is being attributed."

22.2 An historian approaches the issue of causation on a basis which is quite different from the perspective of a court seeking to establish whether an insurer is liable under a contract of insurance. The answer to the causation question will depend upon the context in which, and legal rule according to which, the question is being asked. Lord Hoffmann illustrated this point in ***Abertillery*** {**K/90/8**} with the following example:

> *"Take, for example, the case of the man who forgets to take the radio out of his car and during the night someone breaks the quarterlight, enters the car and steals it. What caused the damage? If the thief is on trial, so that the question is whether he is criminally responsible, then obviously the answer is that he caused the damage. It is no answer for him to say that it was caused by the owner carelessly leaving the radio inside. On the other hand, the owner's wife, irritated at the third such occurrence in a year, might well say that it was his fault. In the context of an inquiry into the owner's blameworthiness under a non-legal, common sense duty to take reasonable care of one's own possessions, one would say that his carelessness caused the loss of the radio."*

22.3 The starting point is to analyse the contract so as to identify, with care, the peril insured against. Once identified, the causation enquiry is undertaken with reference to the insurer's promise to hold harmless against <u>that insured peril</u> – nothing more and nothing else. This is one fundamental aspect of construing and enforcing the contract. As Lord Shaw said in ***Leyland Shipping Company v. Norwich Union Fire Insurance Society*** [1918] AC 350 at 369 {**J/43/20**}:

> *"The true and overruling principle is to look at a contract as a whole and to ascertain what the parties to it really meant. What was it which brought about the loss, the event, the calamity, the accident? And this is not in an artificial sense, but in that real sense which parties to a contract must have had in their minds when they spoke of cause at all."*

22.4 The contractual context for the causation exercise is therefore vital. It is in fact not just the starting point but the key determinant. It is precisely because the causation exercise is about enforcing the parties' bargain and intentions that it would not be right to undertake a different exercise from that which they intended.

22.5 This was expressly recognised by Lord Sumption in his dissenting judgment in ***International Energy Group Ltd v Zurich Insurance Plc UK Branch*** [2016] AC 509 (***IEG***), an insurance case arising from the ***Fairchild*** {**K/106**} exception discussed below. At [113]-[114] {**K/158/56-57**} he said that:

> *"113. The liabilities of an insurer are wholly contractual. The answer to the questions now before the court necessarily depend on the construction of the contract and on nothing else …*
>
> *114. …the incidents of liability in tort are the creation of rules of common law, whereas the extent of a contractual liability depends on the intentions of the parties. The scope for judicial inventiveness is therefore necessarily more limited in the latter context than in the former."*

22.6 The second stage of Lord Sumption's reasoning in [114] (just after side-letter E) echoes the statement of Lord Sumner in ***Becker Gray*** {**J/42/13**} quoted in paragraph 21.3 above: causation questions are "*… a matter of the meaning of the contract, and not, as seems sometimes to be supposed, of doing the liberal and reasonable thing by a reasonable assured*".

22.7 In the context of a contract of indemnity insurance, the Court is not seeking to do justice in some broader sense which may be appropriate in the law of tort, where responsibility for wrongful conduct must be attributed in the absence of a relevant agreement.

(a) In the case of a contract of indemnity insurance, the parties have pre-agreed the scope of the insurer's responsibility: it is circumscribed by the definition of the insured perils.

(b) The premium payable by the insured is calculated on the basis of the pre-agreed scope of cover – nothing more and nothing less.[20]

(c) Put another way, the "*rules*" by which responsibility is attributed (in Lord Hoffmann's words, in ***Abertillery*** {**K/90/9**}) are contained in the contract.

(d) The correct course is to consider what cover is provided under the contract. Having examined this, one next considers whether the losses claimed were caused by the right thing – i.e. that which is covered under the contract.

(e) If the insured perils have not, on an even-handed analysis, caused the loss, there is no scope for moving the goal-posts after the event. That would be to rewrite the contract. It would be contrary to principle.

22.8 The role of the Court, therefore, is to do justice in the sense of ascertaining and enforcing the parties' bargain and intentions – nothing more or less. The Court will do justice by asking and answering the question: <u>was the insured peril the (or a) proximate cause of the loss?</u>

22.9 The <u>purpose</u> of answering the question in paragraph 22.8 is to enable the Court to work out what loss the insured would have incurred anyway, if the insured peril had not occurred. What matters, therefore, are the <u>consequences</u> of the insured peril.

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[20] Note also the comments of the European Insurance and Occupational Pensions Authority (**EIOPA**) which, in a statement made in the context of the COVID-19 pandemic, spoke of the systemic dangers of paying out claims where, on proper analysis, no cover exists: *"as a general principle, imposing retroactive coverage of claims not envisaged within contracts could create material solvency risks and ultimately threaten policyholder protection and market stability, aggravating the financial and economic impacts of the current health crisis"*. See https://www.eiopa.europa.eu/content/call-action-insurers-and-intermediaries-mitigate-impact-coronaviruscovid-19-consumers_en {**K/231/4**}.

The 'but for' test

23. **The test of factual (*i.e.* 'but for') causation is the essential starting point for identifying whether the insured peril was the proximate cause of the loss.**

23.1 It is the necessary starting point because the insured peril cannot have been the proximate cause of the loss if it was not even a factual cause of the loss. On fundamental principles, if the insured peril was not a factual cause, the loss would have been suffered regardless of it, so it is impossible to conclude that the insured peril was the proximate cause.

23.2 The test of factual causation is as much the necessary starting point for insurance policies as for any other contract for the breach of which damages are claimed. The 'but for' test is inherent to policies of indemnity insurance. That is clear from ***Sartex Quilts*** [2020] EWCA Civ 308 at [36] {**K/184/8**}, referred to in paragraph 16 above. To the same effect is ***Callaghan v Dominion Insurance*** [1997] 2 Lloyd's Rep. 541, in which Sir Peter Webster said at 544 {**K/82.1/4**}:

> "*It seems to me that the best way to define an indemnity insurance is that it is an agreement by the insurer to confer on the insured a contractual right which, prima facie, comes into existence immediately when loss is suffered by the happening of an event insured against, to be put by the insurer into the same position in which the insured would have been had the event not occurred, but in no better position.*"

23.3 If the loss would have been suffered regardless, the insured peril is not to be regarded as a cause in any relevant sense, let alone as the dominant, effective or operative cause.

23.4 It makes no sense to describe something as the dominant, effective and operative cause of loss if the same loss would have occurred without it.

23.5 It makes no sense to talk about the insured peril being the cause of an occurrence, if the occurrence would have happened anyway regardless of the insured peril. It

makes no sense to say the insured peril produced an event or brought about a result, if the event or result would have happened anyway, regardless.

24. While the 'but for' test is a necessary hurdle, it is not the only test. If the peril insured against is shown to have been a factual cause, it remains to be determined whether it was the proximate cause. 'But for' causation and proximate cause are separate requirements.[21] To the extent that the FCA suggests that the 'but for' test may be circumvented or ousted by the test of proximate causation, or by resorting to "*common sense*" instead,[22] this is heretical.

24.1 This is no more and no less than the distinction between factual and legal causation which exists generally in the law of damages.

24.2 This determination of the proximate cause falls to be made by analysing all the 'but for' causes of the loss in order to ascertain whether the insured peril was the or a proximate cause of the insured's loss.

24.3 Only if the (or a) proximate cause was a peril insured against[23] can the insured recover.

24.4 ***Clarke, The Law of Insurance Contracts*** at 25-1 {**K/198/2**}, referring to Lord Bacon's maxim quoted in paragraph 20.2 above says:

> *"It [i.e. the maxim] is used to demonstrate that for legal purposes it is not enough to show that one event was a necessary condition (a cause in fact or sine qua non) of the other; a condition is distinct from a cause*

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21 Christopher Butcher QC in Mance, Goldrein and Merkin (eds) ***Insurance Disputes*** (3rd Ed.), at 7.14 {**K/204/8-9**}.

22 These points appear to be advanced, obliquely and without enthusiasm, in FCA Skeleton at [235]-[237] {**I/1/95**} and (on common sense) at [241] {**I/1/97**}. On the latter point, Lord Hoffmann's Lecture to the Chancery Bar Association on 15 June 1999, in particular his deprecation of recourse to common sense as a "*rhetorical device to divert attention from the absence of reasoning*", should be borne in mind.

23 And, if there is more than one proximate cause, only if the other proximate cause or causes are not excluded from cover under the Policy.

because the former but not the latter is usual or normal as a matter of generalisation for the particular factual context."

24.5 This passage recognises that it is necessary but insufficient that the factual causation test be passed. Thereafter, if the insured peril is a factual cause of the loss, the issue remains whether it was the proximate cause, or merely a remote cause or the occasion for the loss.[24] One cannot circumvent the 'but for' test, because a cause that fails the test cannot on any view be a proximate cause: see paragraph 23.1 above.

25. **The 'but for' test requires a counterfactual in which the insured peril does not operate – nothing more and nothing less than the insured peril is reversed.**

25.1 This proposition reflects the essential nature of the 'but for' test.

25.2 As Lord Nicholls said in ***Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)*** [2002] 2 AC 883 (***Kuwait Airways***) at [72] {**J/86/209**}:

> *"Expressed in its simplest form, the principle poses the question whether the plaintiff would have suffered the loss without ('but for') the defendant's wrongdoing. If he would not, the wrongful conduct was a cause of the loss. If the loss would have arisen even without the defendant's wrongdoing, normally it does not give rise to legal liability."*

25.3 The defendant's wrongdoing is the failure to hold harmless against the insured peril. In determining whether such failure caused loss, the question is whether the plaintiff (i.e. the insured) would have suffered the loss without ('but for') the

[24] Notably, the editor of ***Clarke*** goes on to consider the contrasting approach of courts in the USA that see insurance as an instrument of economic efficiency, thereby inclining the judges to apply different rules of causation, namely a test of identifying the causal factor that, if altered, would have imposed the lowest social cost on society. The point is then made that "*This results in 'causal minimalism', i.e. once there is a 'but for' link between the various possible 'causes' and loss, no further selection of the dominant or proximate cause need be made, for the role of the court is deterrence and the efficient distribution of cost.*" – Clarke at 25-2 {**K/198/3**}. It is notable that even in such a different context, the selection of the relevant causal factor is only within the category of possible causes which are linked to the loss through the 'but for' test.

insured peril. If he would not, the failure to hold harmless against it was a cause of the loss. If the loss would have arisen even if the Insured had been held harmless against the insured peril (i.e. even without the insurer's wrongdoing), then the breach of contract does not give rise to legal liability.

25.4 A counterfactual which considers what would have happened if event B had not occurred (i.e. which reverses event B) will serve to identify what loss was factually caused by event B.

25.5 If the policy insures against peril A, and event B is something different from the insured peril, a counterfactual reversing event B will not identify what, if any, loss was factually caused by peril A. It is therefore at best useless in answering the causation question which the contract requires to be posed. Or, at worst, it rewrites the contract because it makes the insurer against peril A liable, not for the loss caused by peril A, but for the loss caused by event B.

25.6 There is nothing artificial[25] about reversing the insured peril and nothing else. It is no answer to say that reversing of the insured peril sits uneasily with the events which actually occurred, or creates a scenario which is unlikely to have occurred in the real world.[26] The exercise of identifying and isolating only the loss factually caused by the insured peril is necessarily inherent in the insured's claim that it has suffered loss caused by the peril insured against (and therefore caused by the insurer's breach of its promise to hold harmless against that peril).

25.7 Thus the nature of the counterfactual is dictated by the nature and ambit of the insured peril. If the selection of what to reverse in the counterfactual is driven by something other than by the contract, the result of the exercise will not achieve compensation for the breach of the contractual promise, but some different and

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25 Cf. FCA Skeleton at [10.3] {**I/1/10**}.

26 Counterfactuals are frequently improbable in point of fact: the standard counterfactual "What would have happened if this auditor had conducted a competent audit?" may in a given case require an improbable assumption.

contractually irrelevant result. This would fall foul of the principles in paragraph 22 above.

25.8 There is no rule of law or fact (such as is pressed by the FCA[27]) that requires the counterfactual to pass a test of realism or non-artificiality, and it is difficult to see how any such test might be framed (not least where no such test has ever been framed as part of the law of contract). Artificiality does not enter into it. The exercise consists simply of applying the contract in accordance with the parties' intentions; there is no scope for striking down the contractual bargain as unreal or artificial. It may not have been realistic (in some abstract sense) to assume the existence of an undamaged hotel in a hurricane-damaged New Orleans in ***Orient-Express.*** It is unlikely that the participants in that decision (including Hamblen J, Sir Gordon Langley and Mr George Leggatt QC) overlooked the existence of the (non-existent) rule that counterfactuals must pass some test of realism or credibility. Counterfactuals are, by definition, hypothetical and artificial. They are an artifice because they require investigation into something that never happened and thus requires to be constructed for the single purpose of answering a legal question. They are a construction of what the position of the insured would have been if some contractually identified event (but only that contractual identified event) had not occurred.

25.9 The FCA identifies no authority which could support the existence of a requirement for counterfactuals to pass a test of realism.[28] ***Lavarack v Woods of Colchester*** [1967] 1 QB 278 {**J/56**}[29] arose in the different context of the minimum obligation rule of contract damages, and does not contain any general statement to support the proposition that the 'but for' counterfactual must be realistic. The only other case from which the FCA quotes in this connection is ***SAAMCO*** {**J/76**}**,** but this is a most unpromising choice.[30] The ***SAAMCO*** counterfactual is concerned

27 FCA Skeleton at [10.3] {**I/1/10**}, [215] {**I/1/86-88**}, [244] {**I/1/98**}, [245] {**I/1/98**}, [260] {**I/1/103**}.

28 FCA Skeleton at [245] {**I/1/98**}.

29 *Ibid.*

30 *Ibid.*

with scope of duty, and involves the court asking the decidedly unrealistic question of what would have happened if information which is known to have been incorrect (in that case, house valuations) had been correct.[31] This underlines that rules such as the 'but for' test and scope of duty are legal tools to give effect to fundamental principles of law, not time machines intended to recreate a realistic world which necessarily cannot exist.

25.10 The parties to a contract can, by their bargain, pre-agree that certain distinctions are required to be made for the purpose of determining private law rights between themselves, even though the contract then requires distinctions to be drawn which may appear artificial to strangers to their contract, to journalists, to historians or generally. It is not the role of the court to make value-judgments about what the parties agreed. No such judgment is appropriate, precisely because the role of the court is to enforce the parties' agreement, not to change it. In this respect, the law of contract may differ from the law of tort.

25.11 The distinctions which the parties pre-agreed may prove difficult to apply to unprecedented factual scenarios, when what was future at the date of contracting lies in the past at the date of the insured's claim. This is not a reason to re-write the contract to fit the facts, still less to rewrite it in terms favourable only to the insured and designed only to maximise cover. Rewriting the contract to fit the facts (or, more precisely, to fit some pre-conceived notion of the 'right' outcome on the facts) is neither law nor justice; it is politics and social-engineering.

25.12 In any event, in this case the counterfactuals which the insured perils require are neither unreal nor artificial. The counterfactuals will be developed by each insurer separately in relation to their wordings, but in general terms, there is no difficulty in imagining a world with COVID-19 but without mandatory restrictions causing an inability to use etc. The FCA is wrong to present the UK government's response

[31] *Per* Lord Hoffmann at [214]-[216] {**J/76/24-26**}, and see the negligent auditor example in footnote 26 above.

to COVID-19 as somehow inevitable, or to suggest that the counterfactual proposed by Insurers "*could never have happened*".[32] As to this:

(a) In earlier UK pandemics, the existence of a destructive pandemic met with little to no government intervention. Agreed Facts Document 7 {**C/12/1**} describes the (absence of) government intervention in three influenza pandemics in the UK during the Twentieth Century (the "Spanish Flu" in 1918-1919, the 1957-1958 "Asian Flu" pandemic and the "Hong Kong Flu" pandemic in 1968-1969).

(b) That agreed document refers to an Article in ***The Lancet*** by Mark Honigsbaum (a medical historian of infectious disease) {**C/13/158**}. The article states that with regard to the 1957-1958 pandemic that there were "*few hysterical tabloid newspaper headlines and no calls for social distancing. Instead the news cycle was dominated by the Soviet Union's launch of Sputnik and the aftermath of the fire at the Windscale nuclear reactor in the UK*". With regard to the 1968-1969 pandemic, the article states that "*while at the height of the outbreak in December, 1968, The New York Times described the pandemic as 'one of the worst in the nation's history', there were few school closures and businesses, for the most, continued to operate as normal*". The author also commented on the "*relative unconcern about two of the largest influenza pandemics of the 20th Century*" describing it as "*a marked contrast and, to some critics, a rebuke to today's response to COVID-19 and the heightened responses to outbreaks of other novel pathogens, such as avian and swine influenza*." He states that although "[n]*ot everyone was happy with the UK Government's passivity*" the "*only real strategy considered by health authorities in the UK…was vaccination, but the vaccinations arrived too late in both 1957 and 1968 influenza pandemics to make any difference*."

[32] FCA Skeleton at [302] {**I/1/119**}.

(c) The situation in the UK before 21 or 26 March 2020 was a real-life situation of COVID-19 without mandatory restrictions. As time goes on and assuming the restrictions continue to be relaxed, the UK will return to a situation of COVID-19 without mandatory restrictions.

(d) Powerful voices within the UK have argued that the government's reaction to COVID-19 has been excessively draconian. Whatever the merits or demerits of the government's measures, they were not individually or collectively pre-destined to occur in response to the pandemic.

(e) Sweden is a real-life example of a friendly neighbouring state in which there has been COVID-19, but very little government intervention. Agreed Facts Document 6 records the parties' agreement that the Swedish Government has not (i) imposed any mandatory closure of businesses, nor (ii) a general mandatory restriction confining Swedes to their homes (a 'lockdown'), nor (iii) issued any other general mandatory restrictions on citizens' freedom of movement {**C/10/2**}.

25.13 In short, there was nothing inevitable about the course which the UK took, such that it is impossible or logically incoherent to imagine the presence of COVID-19 without the actual (unprecedentedly stringent) measures which the UK government took.

25.14 There is also no difficulty in imagining a world without cases of illness in a contractually defined area, even though there were cases of illness outside that area: see the example of the Scilly Isles in Agreed Facts Document 10 {**C/16/1**}. Again, unreality or artificiality are irrelevant epithets. Such a world can be imagined and, by their definition of the insured peril, parties to disease clause wordings have agreed that, in the event of an insured peril occurring, it must be imagined.

25.15 The answer to the question 'what would have happened but for the insured peril?' is, broadly, that COVID-19 and its effects would still have had a substantial impact on the assureds. That is underlined by the experience of Sweden: as recorded in Agreed Facts Document 6, *"[m]any businesses in Sweden may have experienced business or trading losses, notwithstanding the absence of measures comparable to those imposed in the UK*." {**C/10/2**}

26. **The 'but for' test is an essential element of the causal enquiry, and the legal burden of proof rests at all times on the insured to establish that it would not have suffered any of the loss claimed but for the insured peril**.[33]

26.1 In ***Rhesa Shipping Co. SA v Edmunds (The Popi M)*** [1985] 1 WLR 948 {**K/71/2**}, Lord Brandon[34] said (in the context of the loss of a ship in the Mediterranean):

> *"…the burden of proving, on a balance of probabilities, that the ship was lost by perils of the sea, is and remains throughout on the shipowners. Although it is open to underwriters to suggest and seek to prove some other cause of loss, against which the ship was not insured, there is no obligation on them to do so. Moreover, if they chose to do so, there is no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case."*

26.2 This *dictum* has been widely applied.[35]

26.3 The FCA attempts to circumvent the burden of proving 'but for' cause through a novel burden-shifting argument, culminating in paragraphs 256-257 {**I/1/102**} of its Skeleton:

> *"256. If, contrary to the FCA's primary case, there is not for the purposes of these Wordings a single broad and/or indivisible cause*

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33 The FCA accepts this: see FCA Skeleton at [249] {**I/1/100**}, by reference to *MacGillivray on Insurance Law* (14th ed., 2018), para. 21-006 {**J/151**}. See also Kramer, *The Law of Contract Damages* (2nd Ed.) at 13-01 *ff*. and 18-01 to 18-03 {**K/201.1/2-4**}.

34 With whom Lords Fraser, Diplock, Roskill and Templeman agreed.

35 For example, in ***Thraves v Brouwer*** [2015] EWCA Civ 595, *per* Tomlinson LJ at [24] {**K/160/17-20**}.

that encompasses the underlying insured event (disease, emergency etc.), then the FCA nevertheless asserts that the relevant element of the insured peril was the 'but for' cause of the next element (e.g. the interruption was a result of the authority action or inability to use the premises, the loss was a result of the interruption, etc.). The FCA accepts that the burden is on the policyholder to prove that the insured peril was a 'but for' cause of the loss as regards normal events, i.e. as compared with pre-COVID-19 business performance. [Emphasis original]

257. However, the Defendants assert their own unusual 'but for' causes – that the loss was co-caused by disease related causes such as other public authority action, public self-preservatory behaviour etc…the burden of proof must fall on the Defendants to prove their independent concurrent causes."

26.4 The FCA rightly accepts that the burden of proving 'but for' causation is on the insured. The gloss to the 'but for' test in paragraph 256 {**I/1/102**} ("*as regards normal events*") is vague and unjustified. In order to succeed in its claim, the insured must prove that the entirety of the loss claimed was caused by an insured peril, and if it cannot do so, its claim must fail (as in ***The Popi M***).[36]

26.5 The FCA seeks to derive support from a deceit case, ***BHP Billiton Petroleum Ltd v Dalmine SpA*** [2003] EWCA Civ 170 {**J/89**}. As to this:

(a) Unsurprisingly, being a deceit case, ***Dalmine*** does not establish any general legal principle about the burden of proof in indemnity insurance, which is as stated by Lord Brandon in the ***Popi M*** {**K/71/2**}. Whilst an insurer may raise the prospect that the loss was caused by some other (non-insured) peril, there is *"no obligation on them to prove, even on a balance of probabilities, the truth of their alternative case."* ***Dalmine*** does not gainsay that position. It has never been mentioned, let alone applied, in an insurance case.

[36] See also ***PMB Australia v MMI General Insurance*** [2002] QCA 361, in which the Queensland Court of Appeal held (at [17] {**K/102/7**} *per* de Jersey CJ that the burden lay on the policyholder *"to identify the loss relating only to the [insured peril]"*.

(b) In any event, the case does not assist the FCA. In ***Dalmine***, the claimant successfully discharged the burden of proving 'but for' cause. At first instance, after hearing extensive expert evidence about the reasons for failure of the pipe, Cresswell J held at [280] {**K/100.1/46**} that the incorporation of non-compliant pipes caused the pipeline to fail.[37] In the Court of Appeal, Rix LJ acknowledged this at [36] {**J/89/12**}: "*So in this case… causation is proved once BHP has shown that the reason why the pipeline failed when it did was because of the non-compliant pipe which but for Dalmine's deceit would have been rejected*. *BHP has shown that the pipeline failed only where one or both of the pipes was non-compliant and at no other welded joint.*"[38] It was only "*in such circumstances*",[39] i.e. where the claimant had discharged its burden of proof under the 'but for' test, that there was a burden on the defendant to prove its own averment that even if compliant pipes had been used, the pipeline would have failed anyway. This does not mean that the primary burden on the claimant to discharge its burden of proof under the 'but for' test is shifted or diluted in any way. It must still show that the entirety of its loss was caused by (including 'but for') an insured peril, and the burden is a positive one on the insured, not the insurer. This requirement was underlined by Eder J in ***Ted Baker plc v Axa Insurance UK plc*** *(No.2)* [2014] EWHC 3548 (Comm), at [137] {**J/125/41-42**}:[40]

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37 [2002] EWHC 970 (Comm), cited by Rix LJ at [11] {**J/89/4**}.

38 See also Rix LJ at [30] and [31] {**J/89/10-11**}: "*the plain facts were that the pipeline had not failed at any point other than where the pipe on one or both sides of the weld had been non-compliant… If the pipeline had failed at some welded joint adjacent to a pair of compliant pipes, then we think that BHP may well have borne the burden of showing that the cause of the pipeline's failure was non-compliant pipe rather than the welding procedure and/or SSCC, for both of which Dalmine was of course not responsible. In the present case, however, the issue under discussion is not whether the welding procedure and/or SSCC as distinct from non-compliant pipe caused the loss of the actual pipeline, but whether they would have caused the loss of another pipeline, a hypothetical pipeline, even if that had been constructed solely out of compliant pipes. Dalmine's plea is that a pipeline built of compliant pipes would have failed in any event. It is not said when a pipeline built only of compliant pipes would have failed, but it seems to us that on the facts it must necessarily be at some time subsequent to the failure of the actual pipeline …*"

39 *Per* Rix LJ at [36] {**J/89/12**}.

40 The FCA refers to this case in its skeleton at [261] {**I/1/103**}.

> "*As it seems to me, the burden always remains on a claimant in an insurance claim to establish on a balance of probabilities a relevant event caused by one or more insured perils. Nothing less will do… Notwithstanding, in my view, the difficulty which a claimant may face in proving on a balance of probability that an event has in fact occurred as a result of an insured peril provides no justification for watering down the legal burden and standard of proof*."

(c) In any event, even if there was a burden on the insurer to show that loss was caused by matters other than the insured peril, this would not be difficult to discharge in practice. Assuming that the insured peril is (broadly) restrictions imposed, the experience of Sweden teaches that some/most/all of the loss would be incurred in any event, even in the absence of government restrictions (see paragraph 25.15 above). The fact is that Swedish businesses have incurred losses on a comparable scale to those seen in the UK, despite the absence of restrictions like those seen in the UK.

26.6 Whilst addressing the burden of proof, the FCA argues that the Defendants' approach to 'but for' causation sets the insured a very burdensome task of proof which cannot have been intended.[41] That, of course, is a good reason the Defendants are right to say that the wordings in this test case were never intended to provide the type of cover for which the FCA contends. The premise of the FCA's objection is founded upon cover which the Defendants say does not exist. In any event, BI insurance losses are often difficult to assess. Hence, BI policies often adopt formulae for measuring the indemnity, which are necessarily imperfect and incomplete. For example, the enquiry which even on the FCA's case might on different facts need to be undertaken under the Trends clause, i.e. gauging the effect of trends and extraneous circumstances, is a difficult one.[42] This might well require expert evidence. None of this can justify the FCA's approach to causation.

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41 For example, FCA Skeleton at [246] {**I/1/99**}.

42 FCA skeleton at [271] {**I/1/106**}.

27. **There are exceptions to the 'but for' test, but they are narrow, rare and exceptional. None is relevant to the present case.**

27.1 Exceptions to the requirement for 'but for' causation are extremely limited. Such exceptions have been identified in cases where there was a need to address an incontestable anomaly which would otherwise arise from the application of the 'but for' test. These are tort cases[43] where courts have held (often controversially) that there is no alternative to suspending the usual rule, because the alternative is unacceptable in any system of justice. Before considering the rare exceptions in detail, it is important to appreciate the many authoritative statements to the effect that the 'but for' test should only be modified in exceptional cases, and that courts should exercise great restraint before tampering with the test. For example:

(a) ***Fairchild v Glenhaven Funeral Services*** [2003] 1 AC 32 (***Fairchild***) - a leading case in which the test was relaxed (see paragraph 40 below), Lord Nicholls at [43] {**K/106/39**} said that:

> "*considerable restraint is called for in any relaxation of the threshold "but for" test of causal connection. The principle applied on these appeals is emphatically not intended to lead to such a relaxation whenever a plaintiff has difficulty, perhaps understandable difficulty, in discharging the burden of proof resting on him. Unless closely confined in its application this principle could become a source of injustice to defendants. There must be good reason for departing from the normal threshold "but for" test. The reason must be sufficiently weighty to justify depriving the defendant of the protection this test normally and*

[43] With only one exception, discussed in paragraph 38 below.

*rightly affords him, and it must be plain and obvious that this is so***.**"[44]

(b) In ***Barker v Corus UK Ltd*** [2006] AC 572 (***Barker***), when the House of Lords came to consider ***Fairchild*** again, Lord Hoffmann at [7] {**K/126/11**} cited the cautionary words from Lord Nicholls in ***Fairchild*** (above), and reiterated the concern that the exception "*should not be allowed to swallow up the* [but for] *rule*" at [5] {**K/126/10**}. He described the relaxed standard of causation applied in ***Fairchild*** as exceptional at [1] {**K/126/8**}.

(c) In ***Sienkiewicz v Greif (UK) Limited*** [2011] 2 AC 229, another mesothelioma/***Fairchild*** case, Lord Browne at [186] {**K/144/66**} (criticising ***Fairchild***) said that to apply the ***Fairchild*** exception to the ordinary 'but for' causation rule on a routine basis would "*turn our law upside down and dramatically increase the scope for what hitherto have been rejected as purely speculative compensation claims. Although, therefore, mesothelioma claims must now be considered from the defendant's standpoint a lost cause, there is to my mind a lesson to be learned from losing it: the law tampers with the "but for" test of causation at its peril***.**" Lord Mance agreed with this specific point at [189] {**K/144/67**}.

(d) In ***Equitas Insurance Ltd v Municipal Mutual Insurance Ltd*** [2020] QB 418 (a reinsurance dispute arising from the ***Fairchild*** exception), Males LJ spoke of the ***Fairchild*** exception having given rise to significant anomalies when judged by reference to fundamental principles of tort and liability insurance law at [90] {**K/178/39**}. At [91] {**K/178/39**}, he favoured a return to orthodoxy: "*once the courts can be confident that the objective of ensuring victim protection has been achieved, it is desirable that the anomalies should be corrected and that the law should return to the fundamental principles of*

[44] See also Lord Nicholls at [38] and [40] {**K/106/38**} – which are in terms that cases departing from the 'but for' test are exceptional. This point – i.e. the exceptional nature of departures from 'but for' causation, is reflected elsewhere, for example: ***Charlesworth & Percy on Negligence*** (14th ed.) at 5.09 {**K/193/4**}.

the common law. Put shortly, once unorthodoxy has served its purpose, we should revert to orthodoxy."

(e) Specifically in the insurance context, the editors of ***MacGillivray*** consider that "*there may be exceptional cases in which "but for causation" is not required*", citing ***Orient-Express***.[45] (As explained in paragraph 46 below, ***Orient-Express*** is not an authority which supports any relaxation of the rule; quite the contrary). They continue: *"[c]ases in which "but for" causation is not required will be truly exceptional, and absent clear indications of contrary intention[,]…the requirement for proximate causation remains a fundamental principle*."[46] One cannot possibly dispense with 'but for' causation if there is any "*contrary intention*" expressed in the contract: see paragraphs 57 to 58.5 below.

The limited exceptions to 'but for' causation

28. **Departures from the 'but for' test are rare and exceptional.**

29. This is clear from those few cases in which departure from the test has been permitted, which are considered below.

30. The 'but for' rule was relaxed in ***Kuwait Airways*** – a conversion case.

30.1 The state of Iraq seized aircraft from the claimant, then handed them over to the defendant for its use. Both the Iraqi state and the defendant had committed the tort of conversion. On the facts, the claimant could not show that but for the defendant's tortious act of conversion it would have been kept out of possession of the aircraft, because the Iraqi government would have retained the aircraft

45 ***MacGillivray***, chapter 21, fn. 1 {**K/191/1**}.

46 *Ibid.*

itself or given them to somebody else. In the circumstances, the claimant could not satisfy the 'but for' test.

30.2 On those facts, the House of Lords treated the defendant's wrongful conduct as having a sufficient causal connection with the loss for the purpose of attracting responsibility, even though the 'but for' test was not satisfied. It will suffice if each wrongdoer's conduct on its own would have caused the loss. If so, then both are liable in full for the loss. This approach involved the court "*making a value judgment on responsibility*".[47] In so doing, it had regard to the purpose sought to be achieved by the relevant tort, as applied to the particular circumstances.[48]

30.3 At [74] {**J/86/210**}, Lord Nicholls illustrated the need to relax the test by reference to the parable of two men negligently searching for the source of a gas leak using lighted candles, resulting in an explosion (on which the FCA also relies[49]). Ordinary application of the 'but for' test produces an outcome that neither wrongdoer is liable for the loss, which was considered absurd and unjust. The rule therefore had to be relaxed, in those specific circumstances. A similar situation arises where two sportsmen simultaneously but independently shoot a rambler dead, each contending that but for their wrongdoing, the death would have occurred anyway.[50]

31. In ***Kuwait Airways***, as the FCA rightly acknowledges,[51] it was of decisive importance that there were two separate tortfeasors who had both committed the tort of conversion, giving rise to the unusual problem in which literal application of the 'but for' test meant cause A effectively cancelled out cause B and *vice versa*. That problem is special to the situation of multiple wrongdoers. The same problem arises with the two men searching for a gas leak, and the two sportsmen shooting the rambler. It is

47 *Per* Lord Nicholls at [74] {**J/86/210**}.

48 *Ibid* at [77] {**J/86/210-211**}.

49 FCA Skeleton at [238] {**I/1/95**}.

50 *Ibid.*

51 *Ibid*: "*In this type of case, involving multiple wrongdoers…*"

considered absurd and demonstrably unjust to allow both wrongdoers to escape scot-free on the basis that neither is a 'but for' cause of the loss.

32. Self-evidently, the present case is not a case of multiple wrongdoers, so there can be no question of modifying the 'but for' test on that basis. The FCA's attempt to rely upon this line of authority is misplaced:[52] ***Kuwait Airways*** is emphatically not a case which justifies substitution of the 'but for' test with a value judgment whenever the claimant faces difficulty with factual causation (as Lord Nicholls spelt out in ***Fairchild***): see paragraph 27.1(a) above).[53]

33. Suppose a situation in which there are two insurers, both providing different cover. Peril A is insured by insurer X, and peril B is insured by insurer Y. Both perils operate concurrently and each is a 'but for' cause of the loss. In such a case, it might be theoretically possible to draw an analogy with the situation of joint tortfeasors so as to avoid a potentially unjust/absurd result where neither insurer is liable.

34. A comparable situation arises in a case where one has two policies both insuring the same risk, each providing that if there is other insurance for the same risk, that other insurance must pay first.[54] The courts tend to construe such provisions in a way to avoid the absurdity of neither policy responding.[55] This is a matter of contractual construction, albeit motivated by the desire to avoid an absurd result which is similar to the exceptional cases in which the 'but for' test has been modified. However, these situations are to be distinguished from one in which an insurer insures against peril A, but perils B, C, D and E are simply not insured at all. There can be no possible justification for relaxing the 'but for' test. If, 'but for' the insured peril, the loss would have occurred in any event by reason of an independent peril which the insurer did not agree to cover,

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52 FCA Skeleton at [238] {**I/1/95-96**}.

53 A very recent attempt to argue the contrary, in ***Morrow v Shrewsbury RUFC*** [2020] EWHC 379 (QB), failed. Farbey J was asked to relax the 'but for' test and instead make a value judgment as in ***Kuwait Airways,*** but had no difficulty in holding that the 'but for' test should apply in the ordinary way (see [216]-[218] {**K/185/35**}).

54 ***National Farmers Union Mutual Insurance Society Ltd v HSBC Insurance (UK) Ltd*** [2011] Lloyd's Rep IR 86 {**K/143**}, (Gavin Kealey QC (sitting as a Deputy High Court Judge)).

55 *Ibid.* See also ***MacGillivray*** at 22-022 to 22-023 {**K/191/23-24**}.

proper application of the 'but for' test results in the insurer not being liable. This follows from the application of the basic principles already outlined.

35. That is not a sign that something has gone wrong, so that the 'but for' test must be modified or rejected to avoid injustice. It is not unjust. It is simply a product of the assured having paid for (narrow) cover against peril A alone, but not against perils B, C and D etc. The 'but for' test must not be dispensed with, in this situation. If it is, the insurer would be liable where a proximate and independent cause of the loss is something it did not agree to insure. That would be contrary to the intention of the parties as expressed in the contract of insurance. Far from avoiding injustice, it would create it.

36. In ***Kuwait Airways***, it was also relevant that if the 'but for' test had not been modified, the tort of conversion would have been emptied of content. Questions of factual causation can be linked to questions about a defendant's responsibility for loss, which may involve value judgments about the purpose sought to be achieved by the relevant tort. The tort of conversion is a tort of strict liability which exists to protect proprietary or possessory rights in property. Literal application of the 'but for' test in a case of conversion by multiple tortfeasors would have denuded the tort of substance. In that case, the causal question was answered by reference to the nature of the liability.

37. The present context is different. The purpose of the causation enquiry here is to determine whether and if so to what extent insurers are liable under contracts of insurance. The rules by which responsibility is attributed are contained in the insurance contracts. They must be the sole determinant of what is covered. There is no place for value judgments. If, having determined what is the insured peril, one concludes that it did not cause the loss because the loss would have been suffered anyway, there is no cover for that loss.

38. The FCA relies upon the first instance decision in ***Greenwich Millennium Village Ltd v Essex Services Group Plc*** [2013] EWHC 3059 (TCC) {**K/152**}.[56] Like ***Kuwait Airways***, this was a case involving two wrongdoers (here sub-contractors on a building project) both of whom committed acts which were concurrent independent causes of a flood. Coulson J was rightly circumspect about dispensing with the 'but for' test. At [171] {**K/152/41-42**}, he cited with approval Hamblen J in ***Orient-Express*** at [33] {**J/106/8**} ("*[a]s a general rule the "but for" test is a necessary condition for establishing causation in fact*.") At [172] {**K/152/42**}, Coulson J sounded familiar notes of caution about departure from the 'but for' test:

> *"It is important that the court does not depart from the 'but for' test without clear and proper reasoning. In Fairchild v Glenhaven Funeral Services Limited and Others [2002] UKHL 22, at paragraph 53, Lord Hoffmann warned against the tendency to deal with causation by appealing to commonsense "in order to avoid having to explain one's reasons. It suggests that causal requirements are a matter of incommunicable judicial instinct. I do not think that this is right." In the subsequent case of Sienkiewicz v Greif (UK) Limited [2011] UKSC 10 , this was put in even starker terms by Lord Browne of Eaton under- Haywood when at paragraph 186 he said, in relation to Fairchild :*
>
> > *"Although, therefore, mesothelioma claims must now be considered from the defendant's standpoint a lost cause, there is to my mind a lesson to be learned from losing it: the law tampers with the "but for" test of causation at its peril."*
>
> *Lord Mance expressly agreed with that "lesson of caution"."*

39. At [174] {**K/152/43**}, Coulson J cited Lord Nicholls' example of the two men searching for a gas leak with lighted candles from ***Kuwait Airways***. Having considered the evidence, he concluded at [192] {**K/152/49**} that there were two "*equally efficacious causes*" of the flood: a closed "*isolation valve*" (for which one sub-contractor was responsible) and the incorrect positioning of a "*non-return valve*" (for which another sub-contractor was responsible). As in ***Kuwait Airways,*** one was there dealing with two wrongdoers, both of whose actions were concurrent independent causes of the flood. Only on that basis could departure from the 'but for' test be justified, since (as the FCA

[56] FCA Skeleton at [239] {**I/1/96**}.

puts it) literal application of the test "*would indicate that neither sub-contractor is liable*."[57] Accordingly, ***Greenwich*** cannot assist the FCA any more than ***Kuwait Airways*** because, in the absence of multiple wrongdoers, there is no justification for departure from the 'but for' test in this case (see paragraphs 31-35 above).

40. The second situation in which the 'but for' test has been relaxed is in a narrow and specific category of industrial disease cases known as the "***Fairchild*** *enclave*",[58] after ***Fairchild v Glenhaven Funeral Services*** [2003] 1 AC 32 {**K/106**}. In that case, it was impossible as a matter of science for claimants to show which of their former employers had negligently exposed them to the single particle of asbestos dust that later caused mesothelioma.[59] Literal application of the 'but for' test would have defeated the claims, an outcome which was considered unjust. The House of Lords held that a relaxed standard of factual causation applied: if the claimant proved that an employer was responsible for exposing him to a significant (i.e. not *de minimis*) quantity of asbestos dust and thus creating a material increase in the risk of the victim contracting the disease, the employer would be jointly and severally liable for the loss.

41. The ratio for the decision was the impossibility[60] of proving the source of the disease, which would otherwise have stymied claims against wrongdoers in a way that was regarded as unfair.[61] Thus:

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57 FCA Skeleton at [239] {**I/1/96**}.

58 This term is used in many of the authorities, including (most recently) ***Equitas*** *per* Males LJ at [1]-[6] {**K/178/17-19**} and in ***IEG v Zurich*** *per* Lord Mance at [1] {**K/158/19**}.

59 Earlier cases had involved impossibility of identifying which of multiple sources of harm, for some of which the employer was liable and for others not, was the source of illness (such as silica dust in ***Bonnington Castings Ltd v Wardlaw*** [1956] AC 613 {**K/56**}, and brick dust in ***McGhee v National Coal Board*** [1973] 1 WLR 1) {**K/63**}.

60 See ***Fairchild*** at [2] {**K/106/9**}, [23] {**K/106/27**} (Lord Bingham), [38] to [41] {**K/106/38-39**} Lord Nicholls, [61] {**K/106/43**} (Lord Hoffmann), [108] {**K/106/60**} (Lord Hutton), [124], [160] [168] {**K/106/66}** {**K/106/83-84**} {**K/106/87**} (Lord Rodger). That this was the motive for relaxation of the rule has been recognised in many subsequent authorities – including (recently) in ***International Energy Group Ltd v Zurich Insurance plc UK Branch*** [2015] UKSC 33, *per* Lord Mance at [1] {**K/158/19**}, and ***Equitas Insurance Ltd v Municipal Mutual Insurance Ltd*** [2019] EWCA Civ 718, *per* Males LJ at [25] {**K/178/22**}.

61 See [13] {**K/106/15**} and [32] {**K/106/35**} (Lord Bingham), [36] {**K/106/37-38**}, [39] and [41] {**K/106/38**} (Lord Nicholls), [56] {**K/106/42**} (Lord Hoffmann).

41.1 At [33] {**K/106/36**}, Lord Bingham referred to "*strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered.*"

41.2 At [41] {**K/106/39**} Lord Nicholls said that a "*former employee's inability to identify which particular period of wrongful exposure brought about the onset of his disease ought not, in all justice, to preclude recovery of compensation*".

42. The decision has created many unforeseen problems, is controversial, and has been criticised by high authority (see paragraph 27.1 above). In ***IEG,*** Lord Sumption at [114] {**K/158/57**} described the history of the ***Fairchild*** enclave as one in which the law has moved from "*each one-off expedient to the next*", generating "*knock-on consequences which we are not in a position to predict or take into account*".

43. The Supreme Court and the Court of Appeal have repeatedly held that the special rule of causation in ***Fairchild*** is confined to the peculiar situation that arose in ***Fairchild*** itself – i.e. where it is impossible as a matter of science to prove the cause of industrial disease. This is strongly suggested by the "***Fairchild*** *enclave*" soubriquet, and supported by the *dicta* summarised in paragraph 27.1 above. The point is underlined by the following further *dicta* from cases within the ***Fairchild*** enclave:

43.1 In ***Fairchild*** itself, Lords Bingham, Hoffmann and Rodger all said that the exception should only be applied if precise conditions which they identified (which differed subtly) were present.[62] All three lists included a requirement that it was (in effect) impossible – because of scientific limitations – to prove who was the source of the asbestos dust which caused the mesothelioma.

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62 Lord Bingham at [34] {**K/106/37**}, Lord Hoffmann at [61] {**K/106/43**}, Lord Rodger at [170] {**K/106/87-88**}.

43.2 In ***Sanderson v Hull*** [2008] EWCA Civ 1211 , the first instance decision applied ***Fairchild*** and liability was established, but it was overturned by the Court of Appeal on the basis that ***Fairchild*** could only be relied on where "*it was scientifically impossible for C to show which exposure out of multiple potential harmful exposures to disease caused the injury*", and in that case it was not.[63]

43.3 In ***Gregg v Scott*** [2005] 2 AC 176 (not a mesothelioma case), Lord Hoffmann at [78] {**K/121/20-21**} said that in ***Fairchild***, "*The House of Lords accepted that [mesothelioma] had a determinate cause in one fibre or other but constructed a special rule imposing liability for conduct which only increased the chances of the employee contracting the disease. That rule was restrictively defined in terms which make it inapplicable in this case*."

43.4 In ***Barker v Corus UK Ltd*** [2006] 2 AC 572 {**K/126**}, Lord Scott said that ***Fairchild*** had not created an overarching principle in the law of tort, and that its narrow scope was rightly recognised by Lord Hoffmann in ***Gregg v Scott***.

43.5 In ***IEG***, a case considering the implications of ***Fairchild*** for the purposes of employers' liability insurance cover, Lord Mance at [1] {**K/158/19**} was at pains to confine the scope of his decision "*exclusively*" to "*situations falling within the special rule*" of the ***Fairchild*** enclave. Lord Hodge at [109] {**K/158/55**} echoed this, saying that "*the special rules [of causation] apply only to cases within the Fairchild enclave. The House of Lords in Gregg v Scott [2005] 2 AC 176 has been careful not to allow the relaxation of the established rules of causation more widely by applying a weak rule of causation outside the Fairchild enclave*."

44. In view of these authorities, it is unsurprising that the FCA does not invite the Court to extend the ***Fairchild*** exception to the 'but for' test in this case. (Its Skeleton does not mention the case.) The whole history of the ***Fairchild*** enclave is a salutary warning about the profound difficulties that can be created if the 'but for' test is abandoned. The

63 ***Sanderson v Hull*** [2008] EWCA Civ 1211, [52] {**K/134/15**}.

shockwaves from ***Fairchild*** continue to be felt: only last week the Supreme Court would (but for a last-minute settlement) have been asked yet again asked to consider an aspect of the fallout, in ***Equitas Insurance Ltd v Municipal Mutual Insurance Ltd***. This troubled history more than justifies Lord Brown's remark in ***Sienkiewicz*** that "*the law tampers with the "but for" test of causation at its peril***."**[64] The Court should not do so here.

45. The FCA has not identified any justification for introducing a new exception to the requirement of 'but for' causation in indemnity insurance. Particular scepticism should be applied to a submission that the 'but for' rule should be disapplied, in support of an argument for wider insurance cover in what is, despite the importance of the present case, an orthodox insurance dispute.

46. The existence of a new exception to the requirement for 'but for' causation in indemnity insurance finds no support in the judgment of Hamblen J in ***Orient-Express Hotels Ltd v Assicurazioni Generali*** [2010] Lloyd's Rep IR 531 {**J/106**}. This authority is addressed in detail in paragraph 59 below. For the moment, it suffices to note that Hamblen J's qualified concession of "*considerable force in much of [the insured]'s argument*" goes on to contain further qualifiers "*potentially … particularly where two wrongdoers are involved*". Hamblen J decided (at [34]-[35]) {**J/106/8-9**} that there was no error of law in the tribunal having rejected the argument, because the parties had, most clearly in the trends clause, plainly agreed that the 'but for' test should apply.

47. However, Hamblen J's decision is not merely a narrow decision that the award contained no error of law[65] . He also said (at [38] {**J/106/9**}) that there was nothing unfair in applying the 'but for' test on the facts of the case, since otherwise the insured would be compensated for loss caused by the hurricanes themselves, and thus for loss not caused by damage to the hotel, which was the insured peril against which the insured was to be indemnified. In other words, disapplying the 'but for' test would

64 ***Sienkiewicz v Greif (UK) Limited*** [2011] 2 AC 229, *per* Lord Browne at [186] {**K/144/66**}.

65 FCA Skeleton [84] {**I/1/37**} and [215.4] {**I/1/87**}.

unfairly make the insurers liable for the consequences of something which they did not agree to insure.

48. Finally, the FCA asserts that in ***The B Atlantic*** [2017] 1 WLR 1303, Christopher Clarke LJ at [26] {**J/130/10-11**} was "*expressly anticipating the disapplication of the but for test in an insurance context where there were concurrent independent causes*."[66] This is tenuous at best, for the words quoted by the FCA do not support the assertion, and the case involved interdependent causes (as the passage quoted by the FCA makes clear ("*if, as here, both causes need to operate if the loss is to occur*")). In any event, the ***B Atlantic*** was appealed to the Supreme Court and no support whatever can be found in the judgment of Lord Mance (with whom the rest of the Court agreed) for any disapplication of the 'but for' test where there are concurrent independent causes of loss (see paragraph 54.1 below). Neither Christopher Clarke LJ in the ***B Atlantic***, nor Hamblen J in ***Orient-Express***, nor any other judge in the history of English insurance law, which the parties have no doubt mined to the point of exhaustion, has done so.

49. In all the circumstances, it is fanciful even to suggest that the present is one of those rare and exceptional cases in which the Court could justifiably jettison the 'but for' test. This case is not in that territory.

Concurrent interdependent causes

50. **The so-called *Wayne Tank* principle or *Miss Jay Jay* rule is not an exception to the application of the 'but for' test, because it only applies to concurrent interdependent causes, not to concurrent independent causes.**

51. If the loss which is the subject of the claim is caused by concurrent interdependent causes, one of which is covered by the policy and the other is excluded, and the excluded cause is the dominant cause of the loss or a cause of approximately equal

[66] FCA Skeleton at [240] {**I/1/96-97**}. The specific *dictum* of Christopher Clarke LJ on which the FCA relies appears to be: "*Or it may be that the event would have happened if either A or B had occurred but, on the facts, both of them can be said to have caused it*." It is hardly a ringing endorsement for the FCA's plunge into unorthodoxy.

efficacy or potency to the cause which is covered, the insured is not entitled to an indemnity under the policy (the exclusion prevails). But if one of the causes is insured, and the other is simply not covered, then the insured is entitled to an indemnity: see the contrasting decisions of the Court of Appeal in ***Wayne Tank & Pump v Employers' Liability Assurance*** [1973] 2 Lloyd's Rep 237 {**K/64**} and ***JJ Lloyd Instruments v Northern Star Insurance Co (The Miss Jay Jay)*** [1987] 1 Lloyds Rep 32 {**J/36**}.

52. Both were cases of interdependent concurrent causes of loss: in the former, Lord Denning MR referred to "*two causes which were equal or nearly equal in their efficiency*" in bringing about the damage[67]; and in the latter, Lawton LJ indicated that "*one [alleged cause] without the other would not have caused the loss*…"[68]

53. The cases are consistent with contract law generally. See, for example, ***Heskell v Continental Express Ltd*** (1950) 83 LLR 438 at 458 {**K/53/21**}, in which Devlin J (as he then was) held that if a breach of contract was one of two separate causes of the loss which were "*both co-operating and both of equal efficacy*," that was sufficient to establish liability.

54. The principles in ***Wayne Tank*** and in ***The Miss Jay Jay*** and similar cases only apply where there are two causes (i) each of which is a 'but for' cause (*i.e.* without it, the loss would not have occurred), and therefore (ii) both of which combine to bring about the loss. Point (ii) is merely an expression of point (i).[69]

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67 See [1973] 2 Lloyd's Rep 237, 240 col 2 {**K/64/4**}.

68 See [1987] 1 Lloyd's Rep 32, 37 col 2 {**J/66/6**}.

69 In this respect, there is a distinction between cases where there are two or more concurrent causes, whether 'proximate' or not, and cases where there is a sole cause, albeit one which may give rise to a number of different legal causes of action or insured perils. That is the perfectly orthodox principle expressed by Potter J in ***Capel-Cure Myers v McCarthy*** [1995] LRLR 498 {**J/73**}, which the FCA cites in its skeleton at [232.2] {**I/1/94**}. There, the judge said, at 503 {**J/73/6**} col 1: "*... loss by a combination of causes must be distinguished from loss by a single cause, which can nevertheless be properly described as amounting to a number of causes of action, one or more of which may be outside the terms of the policy, but one of which is plainly within its terms.*"

54.1 This point is clear from the recent endorsement of the principle in the Supreme Court in ***The B Atlantic*** [2019] AC 136 {**J/139**}. At 158C-D {**J/139/23**}, Lord Mance said:

> *"Subsequent authority [to **John Cory & Sons v Burr** 8 App Cas 393] confirms Lord Blackburn's conclusion that, where an insured loss arises from the combination of two causes, one insured, the other excluded, the exclusion prevents recovery: see e g P Samuel & Co Ltd v. Dumas [1924] AC 431, 467 per Lord Sumner; Wayne Tank and Pump Co Ltd v. Employers Liability Assurance Corpn Ltd [1974] QB 57, per Lord Denning MR at p 67B-F, per Cairns LJ at p 69B-D and per Roskill LJ at pp 74E-75D. Here, the two potential causes were the malicious act and the seizure and detainment. The malicious act would not have caused the loss, without the seizure and detainment. It was the combination of the two that was fatal. The seizure and detainment arose from the excluded peril of infringement of customs regulations, and the owners' claim fails."*

54.2 Every authority referred to in ***Wayne Tank*** {**K/64**} and on which it was based was a case involving concurrent interdependent causes. A case of concurrent interdependent causes is not a situation merely involving two or more causes operating at the same time. It is only a situation involving two causes which combine to bring about a loss, where (i) the loss would not have occurred if either cause had not operated (i.e. each satisfies the 'but for' test) and (ii) each cause is properly to be regarded as a proximate cause rather than a remote cause. The ***Miss Jay Jay*** {**J/36**} is a paradigm case: damage to the yacht during the Channel crossing would not have occurred without both the rough sea and the defective design of the yacht.

54.3 There can however be situations in which two independent causes operate at the same time. This situation does not engage the ***Wayne Tank*** principle and is not a

situation of concurrent interdependent causes. The FCA rightly accepts this distinction,[70] which is recognised in the authorities:

(a) In ***Orient-Express***, Hamblen at [33] {**J/106/8**} recognised that "*there is an important difference between a case involving two concurrent interdependent causes and one involving two concurrent independent causes. In the former case the "but for" test will be satisfied; in the latter it will not.*"

(b) ***MacGillivray*** at ch. 21 fn. 27 {**K/203/7**}; says that a case of concurrent interdependent causes "*must be distinguished from the situation in which there are two concurrent but independent causes, each of which would alone have been sufficient to cause the loss. In that situation, the "but for" test for causation will not be met in respect of either cause*" (citing ***Orient-Express***). This passage was cited in ***Cultural Foundation v Beazley Furlonge Ltd*** [2019] Lloyd's Rep. I.R. 12 {**K/177**}, *per* Andrew Henshaw QC at [173] {**K/177/17**}.

55. **As a matter of general contract law, it is well-established that damages are not recoverable from a defendant at common law where there is a concurrent independent cause of the same loss for which the defendant is not liable.**

55.1 This is established by ***Carslogie Steamship Co v Royal Norwegian Government*** [1952] AC 292 {**K/55**}. In that case, a ship damaged in a collision through the fault of another ship received temporary repairs which rendered her seaworthy. On the way to a port where permanent repairs were to be effected, she encountered heavy weather and thereby suffered damage rendering her unseaworthy and requiring immediate repair. At her destination both sets of repairs were effected concurrently, the work taking 30 days. Ten days would have been required for the collision damage if executed separately.

[70] FCA Skeleton at [230.2] {**I/1/93**}.

55.2 The owners of the ship at fault in the collision were not liable for damages in respect of the 10 days' detention, since the heavy weather damage was not a consequence of the collision and the owners of the damaged ship sustained no loss of profitable time by reason of the fact that for 10 out of the 30 days occupied in repairing that damage she was also undergoing repairs necessitated by the collision.

55.3 Lord Jowitt at 306 {**K/55/15**} said that *"the damage brought about by the collision did not in the events which happened cause any loss of profitable time to the owners of [the vessel] because when she entered dry docks she was not a profit-earning machine*" due to the subsequent heavy weather damage which, of itself, necessitated the repairs.

55.4 In other words, but for the collision, the vessel would still have suffered the loss of profitable time as a result of the bad weather damage:

> "*[I]f there had been no collision she would have been detained in dock for 30 days to repair this damage. I cannot see that her owners sustained any damages in the nature of demurrage by reason of the fact that for ten days out of the 30 she was also undergoing repairs in respect of the collision.*"

55.5 Lord Jowitt continued:

> "*A similar question arose in the Hauk (30 Lloyds List Law Reports, p. 32). In that case the Cameronia had sustained damages in a collision for which the Hauk was to blame, but her seaworthiness was not affected, and after temporary repairs she continued her trading. Subsequently she sustained sea damage to her rudder which rendered her unseaworthy and necessitated immediate repair. The question arose whether the wrong-doing vessel was responsible for any loss of profitable time occasioned during the time the collision repairs were being carried out. Lord Constable at p. 36 states his view in the following words:*
>
> > *"I think it would be difficult to affirm that the collision was not a cause of the detention, though the detention was immediately*

> *brought about by the accident to the rudder. But the present question does not seem to me to depend upon whether in strictness the collision or the accident to the rudder was the true cause of the detention. Even on the assumption that the repair of the collision damage was the true cause, the pursuers must also show that the detention of the Cameronia for such repair resulted in a loss of profit, and they cannot do so when in fact the Cameronia was by reason of the accident to the rudder disabled from earning any profit before she was laid up. The loss of profit was not the direct and natural consequence of the defenders' wrongful act, nor did it represent what but for the collision the owners would have earned by the use of their ship.*"

55.6 ***Carslogie*** is therefore a case which meets the FCA's ambitious contention that "*[t]he Defendants cannot simply assert in general terms that the 'but for test is a necessary part of the proximate cause test as a matter of law; they must also identify decisions in which the 'but for' test was applied in the way they suggest to concurrent independent causes*."[71] ***Carslogie*** was such a case. In any event, it is for the FCA to justify its unorthodox submission that the 'but for' test should be jettisoned, by reference to authority, given that it is incontestably clear that it applies in at least the vast majority of cases. For reasons explained from paragraph 28 above, it cannot do so. Nor can it do so as a matter of principle. In view of the clear principles already identified in these submissions, it would be surprising if it could.

55.7 Similarly, the but for test is routinely applied to claims for loss and expense in construction cases where a delay to the completion date is caused by two independent concurrent causes (where the employer bears the risk of one such cause and the contractor bears the risk of the other). Although, subject to the terms of the extension of time provision, the contractor is usually entitled to an extension of time (on the basis that it is entitled to a reasonable time within which to carry out the work), thereby depriving the employer of any entitlement to liquidated damages, it is not entitled to recover loss and expense under the

[71] FCA Skeleton at [238] {**I/1/95-96**}.

relevant clause (or, as the case may be, as damages), because it would have suffered such loss and expense anyway (as a result of the delay for which it was responsible), regardless of the delay for which the employer was responsible.[72]

55.8 In ***De Beers v Atos Origin*** [2011] BLR 271 {**K/142**}, Edwards-Stuart J at [177] {**K/142/5**} held that although the contractor is entitled to an extension of time, it "c*annot recover loss and expense caused by the delay*" and at [178] he explained that the contractor cannot recover loss and expense "where he would have suffered exactly the same loss as a result of causes within his control or for which he is contractually responsible…" This decision was referred to with approval by Akenhead J in ***Walter Lilly & Co Ltd v Mackay*** [2012] BLR 503 at [368]-[369] {**K/150/11**} and is cited for this proposition in ***Keating on Construction Contracts*** (10th Ed.).[73]

56. **Where the insured's loss is caused by two so-called concurrent independent causes, only one of which is an insured peril, the insured cannot recover.**

56.1 Far from being an exception to the 'but for' test, this is a situation in which the 'but for' test is generally applied (subject only to one very narrow potential exception).

56.2 Care in terminology needs to be taken at this point, lest it be thought that the use of the label 'concurrent independent causes' implies that there can be proximate causes which do not satisfy the 'but for' test.[74] In fact, the label 'concurrent

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72 See ***Keating on Construction Contracts***, 10th Ed at [8-026] {**K/201/3**}, [9-089] {**K/201/10-11**}, [9-092] {**K/201/12-13**} and [9-097] {**K/201/14-15**}, ***Hudson's Building and Engineering Contracts,*** 13th Ed {**K/199**}, ***Henry Boot v Malmaison Hotel (Manchester) Ltd*** [1999] 70 Con LR 32 {**K/87**}, ***De Beers UK Ltd v Atos Origin IT Services UK Ltd*** [2011] BLR 271 at [177]-[178] {**K/142/5**}, ***Adyard Abu Dhabi v SD Marine Services*** [2011] BLR 384 at [277] {**K/140/38**} and ***Walter Lilly & Co Ltd v Mackay*** [2012] BLR 503 at [368]-[369] {**K/150/10-11**}.

73 At [8-029] {**K/201/4-5**} and footnote 113 {**K/201/4**}, and [9-029] {**K/201/8-9**} and footnote 284 {**K/201/13**}.

74 See FCA Skeleton at [231] {**I/1/93-94**}, which states that even where concurrent causes are independent causes they are "*proximate causes… of equal or nearly equal efficiency in bringing about the damage.*" This is not correct. Concurrent independent causes are neither 'but for' nor, therefore, proximate causes of loss.

independent cause' is a shorthand, in which 'independent cause' is used to mean something that would have caused the loss in the absence of the other concurrent 'independent cause' – in other words, something sufficient to have caused the loss, had it operated on its own.

56.3 If (i) two such events happen to coincide so as both to operate together, and (ii) only one is an insured peril, the fundamental question is unchanged: did the insured peril cause the loss, factually and legally?[75]

56.4 The question is not answered merely because, had it occurred on its own, the insured peril would have been sufficiently dominant to amount to the proximate cause. The insured peril might in those circumstances have been the proximate cause, but given that there were two relevant events, the anterior question is whether the insured peril was a cause at all. Specifically, was it a factual cause?

56.5 The answer to that question is no: the insured peril was not a factual cause, because the loss would have occurred but for the operation of the insured peril, due to the independent operation of the other concurrent cause.

56.6 The casuist may then object that this leaves the loss without any cause, because if A and B are independent causes, in the sense that either would have caused the loss on its own, and they coincide so as to operate concurrently, the loss has occurred, but on the application of the 'but for' test, the conclusion is reached that the loss had no cause. Of course, the ordinary observer is not likely to come to this conclusion, any more than is the philosopher. More relevantly, a court will not be troubled by this point either: see Lord Constable's statement cited in paragraph 55.5 above.[76]

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[75] Again, and subject to footnote 18 above, the question is <u>not</u> what was the proximate cause of the loss? The two parties to a private contract are not interested in such broad questions; rather the contracting parties are interested only in the narrower question focused on their bargain – namely, did the insured peril cause the loss?

[76] *"I think it would be difficult to affirm that the collision was not a cause of the detention, though the detention was immediately brought about by the accident to the rudder. But the present question does*

56.7 Two further points are made in relation to this objection:

(a) First, as between insured and insurer, the objection is irrelevant. The only relevant question as between insured and insurer is: did the insured peril cause the loss? If the answer to that question is no, it is irrelevant and remains so even if there were force in the casuistical conclusion that the loss had no cause. The objection which is raised goes beyond the scope of the enquiry which is required to be made for the purpose of enforcing the insurance policy as between insured and insurer. This is, as Lord Constable said, simply to ask whether the insured peril caused the loss.

(b) Secondly, the objection may be relevant if, but only if, the two so-called concurrent independent causes were each separately insured, such that to hold that neither insurance responded would be as absurd and unjust as the two tortfeasors cases considered above and would exceptionally, therefore, justify a departure from the principled 'but for' test.

(i) If the insured is covered by insurer A in respect of peril X and by insurer B in respect of peril Y, and if there is a loss for which events X and Y are so-called concurrent independent causes, both insurer A and insurer B are in breach of their respective promises to hold harmless.

(ii) In that situation, it would be a defensible conclusion (although no case has as yet so held) to say that insurer A cannot escape liability because of insurer B's breach of promise and *vice versa*. The conclusion would be defensible (as stated) by analogy with the principle applicable to two tortfeasors each causing the same loss, but also by analogy with the principle which applies where two insurers cover the same loss, but each insurer's policy says that the other policy should pay first. These are cases where two defendants who are equally responsible

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not seem to me to depend upon whether in strictness the collision or the accident to the rudder was the true cause of the detention."

can each point to the other's responsibility as an excuse for avoiding their own.

(iii) If this is the right analysis, any exception to the 'but for' rule would be very limited. It could not apply where insurer A insured peril X, but Y was uninsured. In that case, insurer A can simply be heard to say that peril X did not cause the loss, because the loss would have occurred anyway regardless of peril X. This is not a case where two defendants equally responsible can each point to the other's responsibility as an excuse for avoiding their own.

(iv) Whatever the position in tort where there are two wrongdoers, or where there are two insurers, or even more broadly in the law of obligations, there is no recovery in indemnity insurance, where there is a single insurer and the loss would have occurred anyway by the operation of an independent cause. The reason is because the insurer has not agreed to hold the insured harmless against loss that would have occurred anyway.

57. **In order to justify a departure from the 'but for' rule in this instance, there would have to be a clear indication in the contract that the parties objectively intended such a departure.**

57.1 Such an indication would be highly unusual, because it would amount to the insurer agreeing to hold the insured harmless where an insured peril operated, and to do so for any loss suffered by the insured where the insured peril operated, regardless of whether the insured peril (factually, let alone legally) caused such loss or not.

57.2 In any event, no such indication appears in any contract in this case.

57.3 To the contrary, the terms of the contracts in this case generally reiterate and reinforce the application of the 'but for' test.

57.4 The alternative approach proposed by the FCA is more unjust because, as set out more fully below, it would greatly enlarge the contractual undertaking into which the insurers entered. It would make them liable for the consequences of things which were not caused in the 'but for' sense by an insured peril, but would have occurred anyway.

57.5 These insurers did not agree to pay for losses which would have occurred anyway. The argument that they did presupposes that insurers should be liable for the consequences of the pandemic – even though no such insured peril was agreed by any insurer before the Court.

58. **The requirement for 'but for' causation is reaffirmed for those policies with a trends clause**

58.1 Where the policy in question contains a typical trends clause, the 'but for' test is enshrined in the agreement of the parties as the basis for identifying the loss which is the subject of the indemnity. However, the above discussion makes clear that the typical trends clause confirms what would be the case in any event, as a matter of principle.

58.2 The inclusion of a trends clause as an express part of the parties' bargain is a reflection and a confirmation of their common intention, in order to arrive at the measure of indemnity upon which they have agreed. It follows that, as a matter of contract, there is simply no scope for avoiding or ignoring the 'but for' test.

58.3 In ***Orient-Express*** (which is discussed in further detail in paragraph 59 below), Hamblen J analysed the effect of the trends clause at [42] to [61] {**J/106/9-12**} in the context of the question whether, on the true construction of the policy, the same events which caused the damage giving rise to the business interruption were capable of giving rise to "*special circumstances*" for the purposes of adjusting the loss within the scope of the trends clause. The insured's case was that, on a proper construction, the clause did not permit an adjustment for the consequences of the very same peril as the peril which caused the insured

damage, which (in turn) gave rise to the business interruption losses. The FCA makes the same argument here.[77] At [45] {**J/106/10**}, Hamblen J held that the purpose of a Trends clause is to:

> *"…allow for an appropriate adjustment to be made to the components of the standard formula so as to give effect to the requirement that the insured be indemnified in respect of the loss caused by the insured damage, not more and not less…"*

58.4 The insured contended (amongst other things) that: (i) for the purposes of identifying the relevant the counterfactual, the clause did not permit the damage to the hotel to be ignored and yet the pretence to be maintained that the events which caused it (the hurricanes) still happened; (ii) the trends clause was concerned with trends which affected the business or would have done if the damage had not occurred; (iii) the trends clause was concerned only with circumstances which were independent of and external to the insured damage; (iv) the counterfactual adopted by the tribunal involved the possibility of windfall whereby the undamaged hotel in a damaged city was better off than its rivals and would have been able to monopolise any remaining trade, but any such possibility had been rejected in the United States in ***Prudential LMI Commercial Insurance v Colleton Enterprises*** 976 F.2d 727 (1992) {**J/69**}; and (v) insurers' argument had the "*remarkable*" result that the more widespread the impact of a natural peril, the less cover was afforded by the policy. All of these arguments are made by the FCA in the present case.

58.5 Hamblen J rejected these arguments. As to (i), he held that the only assumption required by the clause was that "*the damage has not occurred. It does not require any assumption to be made as to the causes of that damage…*"[78] In relation to (ii), he observed that the only permissible counterfactual was to assume no insured damage and examine what consequences the relevant trends, variations or circumstances would have had (a hypothetical hurricane which caused damage

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77 FCA Skeleton at [271] {**I/1/106**}.

78 Hamblen J [46] {**J/106/10**}.

only to the hotel was not a "*special circumstance*"), and he made the point that the clause required a single assumption to be made (no damage to the hotel), and for the "*actual facts to be considered on the basis of that assumption*".[79] So far as (iii) was concerned, Hamblen J noted that "*the trends, variations and circumstances considered by the Tribunal were independent of the insured Damage, albeit not independent of the cause of that Damage….*"[80] In relation to (iv), Hamblen J (like the tribunal[81]) agreed with the dissenting judge in ***Colleton***, who saw no "*intuitively-sensed logical flaw*" in the notion of a windfall where that possibility was admitted by the words of the Policy.[82] Finally, in relation to (v), the amount recoverable under the main insuring clause "w*ill always depend on the extent to which the business interruption losses claimed are caused by damage*…".[83] At [57] {**J/106/11**}, the learned Judge re-emphasised that the clause was only concerned with "*damage*, not with the *causes of the damage*…"

59. **The decision in *Orient Express* was correct and the trends clause in that case (as in the policies before this Court) only make more explicit what was unmistakably implicit anyway.**

59.1 The FCA's case involves an outright challenge to the correctness of the ***Orient-Express*** award and decision,[84] or at least an attempt to distinguish them out of existence.

59.2 On analysis, however, the decision of Hamblen J in ***Orient-Express*** and the award of the tribunal were unquestionably correct. This is unsurprising given the

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79 Hamblen J at [47] {**J/106/10**}.

80 Hamblen J at [48] {**J/106/10**}.

81 See Award at paragraph 21 (quoted by Hamblen J at [17]) {**J/106/4**}.

82 For this reason, there is no force in the FCA's objection (at [215.4(e)] {**I/1/88**} to ***Orient-Express*** on the basis of the possibility of "*windfall profits*". Such a situation is most unlikely to arise, and insofar as it does, that would be an incident of coverage that cuts both ways. It does not justify rewriting the scope of cover. Notably, it is stated in ***Roberts, Riley on Business Interruption*** (10th Ed., 2016) at paragraph 15.18 {**K/206/42-43**} that insurers in the UK have acceded to claims presented on a windfall profit basis.

83 Hamblen J at [51] {**J/106/11**}.

84 See, for example, the Reply at [40]: "…*incorrect as a matter of legal principle*" {**A/14/21**}

distinguished cast list (see paragraph 25.8 above). The authority is now over 10 years old, and, far from being over-ruled or ever not followed, (or even judicially doubted), it is referred to in every major insurance law textbook.[85] Indeed in ***The Kos*** [2012] 2 AC 164 at 192C, [74] {**J/115/28-29**}, Lord Clarke cited Hamblen J's judgment in ***Orient-Express*** with approval, even if only *en passant*.

59.3 The facts of ***Orient-Express*** are well-known and are set out at paragraphs 3 to 5 of Hamblen J's judgment. The relevant policy terms are at paragraph 12.

59.4 The essential issue was how the policy would respond where the hurricanes had not only damaged the hotel, but had devastated the wider area surrounding the hotel. What losses could the insured recover in such circumstances?

59.5 The insured contended that it was entitled to an indemnity for losses which were concurrently and independently caused both by damage to the hotel and damage to the vicinity, both of which had themselves been caused by the hurricanes. In that context, it argued that the 'but for' test was not the causal test to be applied.[86]

59.6 The FCA's claim in this test case echoes the arguments made (and rejected) in ***Orient-Express***.[87]

59.7 Neither the tribunal nor Hamblen J had any difficulty in dismissing the insured's arguments.[88] Each of their reasons for doing so is indisputably right and consistent with the established principles of causation set out above.

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85 The FCA's assertion that the decision is not "*longstanding, established and authoritative*" in paragraph 40 of the Reply is therefore incorrect {**A/14/21**}.

86 Hamblen J described the appropriateness of applying the 'but for' test as "*the crucial issue of law dividing the parties*": see his judgment at [20] {**J/106/5**}.

87 See the insured's arguments summarised by Hamblen J at [7]-[11] {**J/106/3**}.

88 Indeed, the tribunal did so in just eight paragraphs: Hamblen J at [17] {**J/106/4**}.

59.8 First, both the tribunal and Hamblen J focussed the causation enquiry on the policy wording, and the scope of the insurer's indemnity as defined and delimited in that wording. This is plainly the correct approach to causation in the insurance context: see paragraph 22 above.

59.9 The tribunal and Hamblen J rightly resisted the insured's attempt to ignore the policy language and regress to the underlying causes of the damage.

(a) The award at [20][89] records the insured's attempts to paint the insured peril in the broadest terms and to suggest that otherwise the counterfactual would be "*artificial*" (both of which create here a sense of *déjà vu*), and the tribunal's insistence on focussing instead on "*the language used in the provisions*" of the policy which required "*OEH to establish that the cause of the loss claimed is the Damage to the Hotel*."

(b) Hamblen J plainly agreed in the most explicit terms: paragraphs 52 ("*the relevant peril is the Damage, not the cause of the Damage*"), 56-57 and 58 ("*[allowing] OEH to recover for the loss in gross operating profit suffered as a result of the occurrence of the insured event (ie the hurricanes) as opposed to the loss suffered as a result of the damage to the hotel, is inconsistent with the causation requirement of the main insuring clause which OEH accepts requires proof that the losses claimed were caused by damage to the hotel*").[90]

59.10 Secondly, the approach to 'but for' causation in the award and in Hamblen J's judgment was entirely orthodox and consistent with legal principle.

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89 Hamblen J at [17] {**J/106/4**}.

90 It is significant that Hamblen J at [58] {**J/106/12**} described the hurricane as "*the insured event*". The FCA adopts this description of the pandemic in the present case (e.g. in [277] of its Skeleton {**I/1/109**}). This borrowing is unhelpful to the FCA, since the fact that the hurricane was the insured event did not address what Hamblen J called the "*causation requirement of the main insuring clause*". Notably, Hamblen J used "*insured event*" (e.g. at [45] {**J/106/10**}, [58] {**J/106/12**}) in contradistinction to "*insured peril*", which he identified to be the "*the damage; not the cause of that damage*" (at [52] {**J/106/11**}). There was cover for the "*insured peril*" but not for the "*insured event*".

(a) The starting point was that the normal rule for determining causation in fact, including in the insurance context, is the 'but for' test.[91] This is obviously correct: see paragraph 23 above.

(b) The 'but for' test was inherent in the insuring clauses and the insurer's basic engagements. The trends clause (which required business interruption losses to be assessed by reference to the results which "*but for the Damage*" would have obtained during the indemnity period) only made explicit what was unmistakably implicit anyway.[92] It is quite wrong to say that the decision "*was based almost entirely on the words of the trends clause*";[93] it was at its heart an orthodox application of the 'but for' test.

(c) Hamblen J rightly held (at [38] {**J/106/9**}) that there was nothing unfair in applying the 'but for' test, since otherwise the insured would be compensated for loss caused by the hurricanes themselves, and thus for loss not caused by damage to the hotel. In other words, the unfairness lay in the insured's proposed outcome in that case.

(d) Further, where the parties had agreed that a 'but for' approach to causation should be adopted in the policy – something that was made clear in the trends clause but was also reflected the causation requirement in the insuring clauses – "*it is difficult to see how it could ever be appropriate to disregard that causal test, or how the policy would work if one did.*"[94]

(e) ***Orient-Express*** therefore stands as strong authority against any extension of those exceptional cases, where the dictates of justice imperatively require a relaxation of the 'but for' standard. Again, this is absolutely

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91 Hamblen J at [21] {**J/106/6**}, [33] {**J/106/8**}.

92 Award, paragraphs 17, 20 (quoted by Hamblen J at [17] {**J/106/4**}); Hamblen J at [58] {**J/106/10**}.

93 FCA Skeleton at 296.1 {**I/1/116**} – albeit in the context of the tribunal's decision, rather than that of Hamblen J.

94 Hamblen J at [34] {**J/106/8**}.

correct given that the exceptions to the 'but for' rule are limited in number and narrow in application, and none was relevant on the facts in ***Orient-Express***: see paragraph 26 above.

59.11 Thirdly, Hamblen J's analysis of concurrent causes was beyond reproach.

(a) Hamblen J accurately recognised that what he described as "*the generally accepted principle that where there are two proximate causes of a loss an insured can recover on the basis that it is sufficient that one of the causes was a peril insured provided that the other cause is not excluded*"[95] was a principle that had been applied only to concurrent interdependent causes.[96]

(b) The critical difference, however, between concurrent interdependent causes and concurrent independent causes was that "[i]*n the former case the "but for" test will be satisfied; in the latter it will not.*"[97]

(c) Thus "*the generally accepted principle*" had no application to concurrent independent causes, particularly where the policy required the application of a 'but for' test.[98]

(d) In this context, Hamblen J also addressed ***IF P&C Insurance Ltd v Silversea Cruises Ltd*** [2004] Lloyd's Rep IR 217 (Tomlinson J) {**K/116**}, [2004] Lloyd's Rep IR 696 (CA) ***(The Silver Cloud)*** {**J/91**}.[99]

(i) Hamblen J was right that no assistance could be derived from ***Silversea*****,** which moreover he rightly regarded as a decision on its own facts, and based on its own findings: it does not identify, and is no

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95 In relation to which Hamblen J cited ***JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)*** [1987] 1 Lloyd's Rep 32 {**J/66**}.

96 Hamblen J at [29] {**J/106/8**}.

97 Hamblen at [32] {**J/106/8**}.

98 See *MacGillvray on Insurance Law* (14th Ed. 2018) {**K/203**}, cited in paragraph 54.3(b) above.

99 Hamblen J at [32] {**J/106/8**}.

authority, for some rule of law in relation to concurrent independent causes.

(ii) Moreover, as Hamblen J pointed out, ***Silversea*** does not discuss several of the issues which arose in ***Orient-Express***, specifically in relation to concurrent independent causes and the applicability of the 'but for' test.

(iii) In spite of this, the FCA accords ***The Silver Cloud*** something approaching totemic status. It is presented not as a case which turned on its own facts and findings, but one which established binding principles which the Court should apply in this case.[100] In view of the FCA's over-elevation of the case, it is addressed in more detail from paragraph 60 below. For the moment, it is sufficient to note that Hamblen J's treatment of the case was entirely right, and should be adopted here.

59.12 Fourthly, the application of the 'but for' test both by the tribunal and Hamblen J – reversing only the insured peril of physical damage to the hotel and nothing else (in particular, not the "*insured event*" of the hurricane) – was plainly correct.

(a) The tribunal (inevitably) accepted the argument (award paragraph 19)[101] that the loss had to result from damage to the hotel and not damage to the city. The award at paragraph 20 stated: "*the fact that there was other damage which resulted from the same cause does not bring the consequences of such damage within the scope of the cover*".

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100 FCA Skeleton, particularly at [215.3] {**I/1/87**} and [282]-[286] {**I/1/110-113**}, especially at [286] {**I/1/113**}, where the case is said to be "*important and binding authority in the present case*" – an inaccurate and question-begging assertion (binding as to what?).

101 Quoted by Hamblen J at [17] {**J/106/4**}.

(b) Hamblen J expressly agreed with the tribunal on this (see paragraphs 56-57).

(c) Thus, what was to be reversed in the counterfactual was not the cause of damage (i.e. the hurricanes), albeit the "*insured event*", but the damage itself. This is clearly correct reflecting, as it does, the essential nature of the 'but for' test, the nature and ambit of the insured peril and the scope of the parties' bargain.

(d) The same arguments made by the FCA as to realism and artificiality of the counterfactual were made by the insured in ***Orient-Express***. They, however, did not find any favour with either the tribunal[102] or Hamblen J.

(i) Hamblen J did not recognise any rule of law that the counterfactual must pass a test of realism or non-artificiality: see the approach at paragraphs 46-48 {**J/106/10**}, 51-53 {**J/106/11**}.

(ii) Hamblen J met each of the insured's arguments by returning to the nature of the 'but for' test and the wording of the policy. He emphasised that the only assumption that had to be made as part of the counterfactual was that "*the damage has not occurred*."[103] By contrast, the counterfactual "*does not require any assumption to be made as to the causes of that damage.*"[104] This was because "*the relevant insured peril is the damage; not the cause of that damage.*"[105]

(iii) Hamblen J was also unreceptive to a submission that losses caused by damage to the hotel could not sensibly be separated out from those caused by damage to the city. While this may not always be "*a*

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102 See award, paragraph 20 (quoted by Hamblen J at [17]) {**J/106/4**}.

103 Hamblen J at [46] {**J/106/10**}.

104 Hamblen J at [46] {**J/106/10**}.

105 Hamblen J at [51] {**J/106/11**}.

straightforward exercise", it can be done and was done by the tribunal in ***Orient-Express***.[106]

(e) This approach to the counterfactual, based on the proper identification of the insured peril by close reference to the policy language, was unquestionably right. It gave effect to the requirement "*that the insured be indemnified in respect of the loss caused by the insured damage, not more and not less.*"[107]

59.13 Fifthly, and finally, the approach of the tribunal and Hamblen J to the proper construction of the trends clause was also correct: see paragraphs 58.3 to 58.5 above. They rejected the insured's argument that "*the clause should be construed as not permitting an adjustment for the consequences of the very same insured peril which caused the insured damage which gave rise to the… business interruption loss.*"[108] There was nothing in the trends clause that required the "*variations or special circumstances affecting the Business*" to be "*something completely unconnected with the damage in the sense that it had an independent cause to the cause of the damage.*"[109] Such a construction, advocated by the insured, required words to be read into the trends clause or for it to be re-drafted.[110]

59.14 While there has been limited textbook criticism of the decision in ***Orient-Express***, it has no persuasive force:

106 Hamblen J at [53] {**J/106/11**}.

107 Hamblen J at [45] {**J/106/10**}.

108 Hamblen J at [42] {**J/106/9**}.

109 Hamblen J at [57] {**J/106/11**}.

110 Hamblen J at [58] {**J/106/12**}.

(a) The criticism at paragraph B-0780/5[111] of *Colinvaux and Merkin's Insurance Contract Law* {**K/195/14-15**} proceeds on the implicit assumption that there ought to have been cover as argued by the insured. If that is to be the correct premise, there is no point in having the argument. It obviously is not the correct premise. The same is true for the observation in *Riley* quoted at paragraph 306 of the FCA Skeleton {**I/1/120**}.

(b) As for what is said at paragraph B-0780/7 {**K/195/17-19**}, it is entirely incorrect that ***Orient-Express*** is "*weak precedent*".

(i) This conclusion is reached by selectively quoting from four paragraphs of Hamblen J's judgment and ignoring the rest that is authority (and has been recognised in subsequent cases to be authority[112]) in relation to the proper application of the 'but for' test in the insurance context and the law in relation to concurrent independent causes of loss.

(ii) Moreover, to the extent that Hamblen J's comments were directed at the trends clause wording in that case and/or the factual circumstances that meant it was neither fair nor reasonable to disapply the 'but for' test, that reasoning applies *mutatis mutandis* in this case where the policies before the Court contain trends clauses in very similar terms and where the FCA pursues arguments on 'but for' causation that are virtually identical to those of the insured in ***Orient-Express***.

(c) Notably, a number of other leading insurance textbooks regard the decision as according with orthodox principles of causation: see Christopher Butcher

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111 That Hamblen J's interpretation of the trends clause "*reinforces the curious outcome that the greater the damage to the vicinity and thus of the risk of depopulation, the lesser the prospect of any recovery by the assured.*"

112 For example, ***Cultural Foundation v Beazley Furlonge Ltd*** [2019] Lloyd's Rep. I.R. 12, *per* Andrew Henshaw QC at [173] {**K/177**}.

QC in ***Insurance Disputes*** (3rd Ed. 2011), Mance, Goldrein and Merkin (eds) at paragraphs 7.14 {**K/204/8-9**}, 7.20 {**K/204/10**}; ***MacGillivray on Insurance Law*** (14th Ed. 2018) at paragraphs 21-001 {**K/203/3**}, 21-005 {**K/203/4**}; and ***Arnould: Law of Marine Insurance and Average*** (19th Ed.) at paragraph 22-05 {**K/189/5-6**}.

59.15 As for the FCA's attempts to distinguish ***Orient-Express***, these are hopeless.[113] While ***Orient-Express*** was concerned with material damage business interruption cover, rather than non-damage extensions to such cover, the principles of law addressed by Hamblen J, specifically in relation to 'but for' causation, the treatment of concurrent independent causes of loss and the correct construction of trends clauses are of general application to business interruption policies (and indeed even outside that context[114]).

60. ***The Silver Cloud*** **is not binding on this Court as to any general principle of law relating to concurrent causes. It enunciates none.**

60.1 The FCA seeks to rely upon the decision of Tomlinson J and the Court of Appeal in ***The Silver Cloud*** in support of some general proposition that an underlying cause of the insured peril was part of the insured event; and secondly, that for the purposes of causation, the counterfactual must reverse not only the insured peril but the underlying cause of the insured peril.

60.2 Neither proposition is, however, supported by the actual decision in ***The Silver Cloud*** which is not binding as to any general principle of law. The FCA has grossly exaggerated the significance of the case. It is most unlikely that Hamblen J overlooked in ***Orient-Express*** the supposed fact that ***The Silver Cloud*** contained such a general proposition of law.

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113 FCA Skeleton at [215.4] {**I/1/87**} and [299] {**I/1/118**}.

114 See, for example, the citation of ***Orient-Express*** in ***The Kos*** (at [74] {**J/116/16**}) in the context of a charterparty dispute; and in ***Greenwich*** in a construction dispute.

60.3 ***The Silver Cloud*** is a case with very different fact patterns to the present case and different coverage (and exclusion) clauses leading to different results. It is not proposition for any general principle of insurance law, and to say otherwise is a misuse of authority.

60.4 Even the briefest consideration of the decisions of Tomlinson J and the Court of Appeal make this clear. As Hamblen J rightly identified in ***Orient-Express*** **at** [32] {**J/106/8**}, there is no mention in the judgments of (i) 'but for' causation, (ii) applicable counterfactuals, or (iii) the correct approach to causation where there are concurrent independent causes of loss. If any of these issues had been considered by the courts in that case, one might have expected citation by the eminent counsel in that case of at least some of the numerous authorities that have been put before this Court on these issues, such as ***Kuwait Airways***, and a more extensive consideration of the issues. Instead the issue of concurrent causes is addressed by Tomlinson J in three paragraphs[115] and by Rix LJ in eight paragraphs.[116]

60.5 Tomlinson J's rejection of the insurers' case that any diminution in business was attributable in whole or in overwhelming part to the reaction to the 11 September attacks themselves, rather than to the official warnings issued in the aftermath of the attacks, was based on findings of fact, rather than any general proposition of law.

(a) Tomlinson J heard expert evidence on whether Silversea's losses were in fact largely due to the terrorist attacks themselves, rather than the State Department Warnings. The expert for insurers, Dr Gibbs of Massachusetts Institute of Technology, said that 80-90% of the deterioration in demand for cruises was due to the attacks themselves, and only 10-20% due to the State Department Warnings.[117] For Silversea, Dr Reddy (a clinical and

115 [67]-[69] {**J/90/29**}.

116 [97]-[104] {**J/91/21-22**}.

117 *Per* Tomlinson J at [68] {**J/90/29**}.

occupational psychologist) said that it was not possible to separate anxiety derived from the attacks themselves from the warnings that followed them. Tomlinson J preferred the evidence of Dr Reddy (at [68] {**J/90/29**}).

(b) This led him to make factual findings in the following terms at [68] {**J/90/29**}:

> "*It is simply impossible to divorce anxiety derived from the attacks themselves from anxiety derived from the stark warnings issued in the immediate aftermath thereof. In relative terms very few people will have had any knowledge of the attacks apart from what they learned of them from media reporting. Of course, images of the aircraft flying into the twin towers will have had a profound impact, but few people will have watched coverage of that sort without also being exposed to the warnings and the media exposition of the warnings which swiftly followed. Part of the media coverage of 11 September was the dissemination to the American public of warnings from the United States Government and other responsible authorities… it is impossible to divorce the effect of the warnings from the effect of the events which they so swiftly followed…*"

(c) Tomlinson J did not refer to any authorities in reaching the above conclusions. He only referred to *Wayne Tank* at [69] {**J/90/29**} "*in passing*", having already reached the findings set out above in the previous paragraph.

(d) That Tomlinson J's decision was one based on findings of fact was confirmed by Rix LJ in the Court of Appeal (at [100] {**J/91/21**}): "*On this appeal the underwriters do not seek to go behind the judge's rejection of their factual case on causation.*"

(e) Such factual findings reached on the basis of particular evidence on particular facts are plainly not binding on this Court. Nowhere can one find in Tomlinson J's judgment propositions of law that the FCA seeks to derive from ***The Silver Cloud***: see paragraph 60.1 above. Hamblen J was therefore entirely right when he said that "*no great assistance can be derived from*

this case, which largely turned on the court's factual conclusions" (see ***Orient-Express*** at [32] {**J/106/8**}).[118] The FCA Skeleton at [286.1] {**I/1/112**} – which refers to the decision as "*important and binding authority*", goes much too far, and invites the obvious (unanswered) question: binding as to what principle of law?

60.6 The decision of the Court of Appeal does not assist the FCA either. It is not binding authority for any of the principles of law relied upon by the FCA:

(a) In the Court of Appeal, the insurers relied on an exclusion, which they had not done at first instance. This excluded cover for any loss arising from:

> "*Deterioration of market and/or loss of market and/or lack of support for any scheduled cruise unless as a direct result of an insured event.*"

(b) It was common ground between the parties in that case that the law on concurrent causes to be applied was as set out in ***The Demetra K*** [2002] 2 Lloyd's Rep 581 {**K/103**} and ***Wayne Tank*** (see Rix LJ at [102]{**J/91/21-22**}). The court did not, therefore, decide any issue as to the principles of law to be applied where, for example, there are concurrent independent causes of loss.

(c) Instead, the court was only concerned with the construction and application of the specific exclusion in that case, and particularly the meaning of the words "*as a direct result of an insured event*".

(d) At [103] {**J/91/22**}, the court accepted the submission of counsel for Silversea that because terrorism was a "[peril] *covered elsewhere within the policy and* [is] *a necessary precondition, actual or threatened, of the warnings within cover Aii itself*" it should be regarded as an "*insured event*" for the purposes of the exclusion (see [104] {**J/91/22**}). Thus, Rix LJ

[118] By contrast, the tribunal's factual conclusions in ***Orient-Express*** were that the loss caused by damage to the hotel could be separated from loss caused by the impact of the hurricanes on the city of New Orleans more generally: see Hamblen J at paragraph 53 {**J/106/11**}.

concluded that the terrorist activities were "*an "insured event" <u>for the purposes of the contract as a whole</u>*." The FCA's attempts to take the words "*insured event*" out of the contractual context in which they were used in ***The Silver Cloud*** and apply it to the present facts is therefore hopeless.[119] The court in ***The Silver Cloud*** did not find that "*the underlying cause is something that is insured even if it is not sufficient to trigger cover*" or *"that loss is not intended to be irrecoverable merely because it results fr*om [the underlying cause]".[120] The FCA is reading into the decision what is not there.

(e) Rix LJ's decision in ***The Silver Cloud*** does not, therefore, have the significance which the FCA seeks to attach to it. It was based solely on the construction of the exclusion clause at issue in that case. The "*general reasoning*" of the court did not go "*much further*" as the FCA contends:[121] the issue was very briefly addressed and arose solely in the context of the exclusion.

(f) If the court in ***The Silver Cloud*** had been intending to lay down general principles of insurance law applicable to concurrent causes of loss, it would have no doubt considered all the relevant authority on the issue, and made clear that that was what it was doing.

(g) Moreover, if (as the FCA insists) ***The Silver Cloud*** established binding principles of law, it is somewhat surprising that it has received no substantial judicial treatment in the 17 years since the decision of Tomlinson J. During that time, the case has been mentioned only once, in ***Orient-Express***. In the intervening period, there has been at least one case involving concurrent independent causes (***Greenwich*** (2013) {**K/152**}), in which it was not cited.

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119 FCA Skeleton at [286.2] to [286.4] {**I/1/112-113**}.

120 FCA Skeleton at [286.4(b)] {**I/1/113**}. Note too the unhelpful (to the FCA) use of the term "*insured event*" by Hamblen J in *Orient-Express* at [58] {**J/106/12**} to describe the hurricane, loss resulting from which he held to be not covered.

121 *Ibid.*

All of this supports the view that the FCA has dramatically over-egged the significance of this case.

(h) The FCA's remaining point appears to be that because the finder of fact in that case found two matters to be intertwined in the context of the insuring clauses (and exceptions) in the ***Silver Cloud***, the court in this case should make similar findings of fact in this case, on different facts and in the context of different insuring clauses. Such a technique is obviously not a correct use of authority, as well as being hopeless on the facts, for reasons already given. Note too the FCA's equally impermissible extraction of short phrases from the judgment of Rix LJ used in relation to the clauses in that case, in particular his phrase "*something extra*", which is repeatedly exported by the FCA into the present case (e.g. FCA Skeleton [268.3] {**I/1/112**}).

FUNDAMENTAL PROBLEMS WITH THE FCA'S CASE ON CAUSATION

61. Turning from the legal principles to the specific problems with the FCA's case on causation, it is helpful to start by considering the position as a matter of common sense.

61.1 The policies before the court in this test case clearly do not provide an indemnity against pandemics and all of their consequences. None of the policies contains an insuring clause in such terms. Such cover would be extremely broad and, if it exists at all, it is not provided by the policies in this case.

61.2 It follows that a result which requires the Defendants (subject to other policy terms, such as limits, deductibles, aggregation etc.) to provide an indemnity against pandemics and all of their consequences would mean that something had gone seriously wrong.

61.3 One may test the point as follows. Suppose that there were two insurers side-by-side, one providing general cover for all consequences of a pandemic, the other providing defined BI cover as in the detailed wordings before the Court in this test case (no doubt for a smaller premium than the first insurer). On the FCA's case,

both insurers would end up providing the same cover. This tends to suggest that the FCA's case fails a basic sense-check, and that it cannot be right. Indeed, it is not right.

62. There are four fundamental problems with the FCA's approach to causation, which are summarised and then analysed in further detail below.

62.1 First, the FCA mischaracterises the triggers for coverage under the Defendants' policies.

62.2 Secondly, the FCA mischaracterises the peril as a single cause embracing everything, and therefore having caused all loss.

62.3 Thirdly, a problem flowing from the second fundamental error, the FCA treats all loss in this case as being indivisible on the basis it was all caused by the same thing.

62.4 Finally, the FCA makes the implicit assumption that insofar as proper application of orthodox principles of causation results in there being no cover, the result is somehow intrinsically wrong. In truth, it is the FCA's case that would lead to unfairness.

The FCA's mischaracterisation of the trigger (the <u>real</u> salami slicing)

63. The FCA mischaracterises the trigger for coverage under the Defendants' policies, by engaging in the very "*salami slicing*" with which it charges the Defendants.[122] For example, disease *per se* is held out as a trigger of cover in its own right.[123] The position is put more starkly in the FCA Skeleton (see the examples from paragraph 77 below). This is a mischaracterisation of the coverage afforded by the policies that are before the Court in this test case. In reality, the disease (where it is referred to at all, which is not

122 FCA Skeleton at [215.3] {**I/1/87**}.

123 For example, in the FCA's Reply, the title to Section I is: "*The Disease Trigger*" {**A/14/23**}.

always the case) forms one element of a trigger comprised of multiple essential elements. Using the Hiscox Public Authority clause by way of illustration, it provides (in its most common form) as follows {**B/1/11**}:

> "*We will insure you for **your** financial losses and other items specified in the schedule, resulting solely and directly from an interruption to **your activities** caused by:*
>
> ***your** inability to use the **insured premises** due to restrictions imposed by a public authority during the **period of insurance** following:*
>
> *a. a murder or suicide;*
>
> *b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority;*
>
> *c. injury or illness of any person traceable to food or drink consumed on the **insured premises**;*
>
> *d. defects in the drains or other sanitary arrangements;*
>
> *e. vermin or pests at the **insured premises**.*"

64. Under this clause, the insured must prove that loss has been caused by each of the following: (i) an interruption (ii) caused by inability to use the insured premises (iii) due to restrictions imposed (iv) following (i.e. caused by[124]) an occurrence of a disease. The necessity of the insured proving each of these elements and the causal relations between them self-evidently has the effect of narrowing the cover; the more conditions which have to be present (here four elements and four causal relations), the more limited the circumstances in which the cover will respond.

65. The insured is thus covered only to the extent that all of the strands are present in combination – meaning that the four elements each have to occur and each to be causally related as the clause requires. The insured does not have cover for each strand alone (mere inability to use, mere restrictions or (most importantly) the mere occurrence of a disease). Nor does it have cover where two elements are present but not causally related in the way required. To disregard this feature of the clause is

[124] This point is conceded by the FCA in POC paragraph 60 {**A/2/40**}.

rewriting (and dramatically expanding) the cover. In spatial terms, if each element of the trigger and each causal relation were a separate tile, the squares have to map onto each other, or be superimposed, in order to create cover.

66. In order to apply the "'but for' the insured peril" test in the case of that Public Authority clause, the correct counterfactual is to reverse or subtract the composite fact that (said all in one breath, as it were) the insured's business was interrupted caused by its inability to use the insured premises due to the restrictions imposed following the occurrence of the disease.

67. To the extent, having performed that (limited) subtraction, that the remaining facts in the counterfactual have caused the insured to suffer losses, those losses are (on the principles discussed in paragraphs 19 to 25 above) irrecoverable.

68. Critically, one must not subtract individual elements of that composite fact in isolation, together with their independent consequences. Most importantly, one does not subtract the disease in isolation (and its independent consequences). To do so would be to ignore the chain of events in which the various required conditions of cover are bound together, a chain whose links are causal in nature. The effect of this would be to create extremely wide disease cover – which is essentially what the FCA seeks to do in this case. It is surprising that the FCA accuses some of the Defendants of "*artificially carv[ing] out one of the ingredients for the causation analysis while treating the other ingredients as being relevant for the counterfactual*."[125] In reality, that criticism is more apt to describe the FCA's own case, which is that the "salami slice" of disease should be removed entirely as an element in the chain, and instead treated as an individual element, thereby creating cover for all consequences of disease.

69. The purpose and effect of the FCA's argument is (expressly) to subtract the entirety of COVID-19.[126] It pleads that the application of the 'but for' causation test yields a counterfactual in which there was never a case of COVID-19 anywhere – certainly in the

125 FCA Skeleton at [215.3] {**I/1/87**}, emphasis original.

126 POC paragraph 77 {**A/2/45**}.

UK. That case is carried through to the FCA Skeleton, which says that the correct counterfactual is "*no COVID-19 in the UK and no Government advice, orders, laws or other measures in relation to COVID-19*…"[127]

70. If one were to subtract the existence of the disease in isolation from the counterfactual, one would be redefining (and vastly extending) the nature of the cover. To do this would be to treat the cover (repeating the example in paragraph 65 above) not as superimposed squares, but as single squares all spread out adjacent to each other. The cover would become cover not for the consequences of A causing B causing C causing D, but for *inter alia* all the consequences of A occurring separately, however broad. Indeed, that is the FCA's case. It is true that the FCA's case acknowledges that A must still in point of fact cause B which must cause C which must cause D; but the fallacy in the FCA's position is that, once this condition is satisfied, it seeks an indemnity for all the consequences of A, notwithstanding that the consequences of A causing B causing C causing D were far narrower than all the consequences of A.

71. To illustrate the point, suppose that in a given policy the insured peril is COVID-19 alone (so, there is only A, in the example above, without B, C or D). The insured as a result of COVID-19 suffers a loss of £100. In that case, one must subtract COVID-19, i.e. the whole presence of COVID-19 in the UK is imagined away in the counterfactual. The result is that none of the loss would have occurred, so the insured would recover £100 in full.

72. By contrast, take a policy (like the Hiscox example in paragraph 63 above) that requires A causing B causing C causing D. Suppose that A on its own causes the insured a loss of £100, A+B causes loss of £50, A+B+C causes loss of £20 and A+B+C+D causes loss of £10. The insured has suffered an overall loss of £100. The loss which would have been suffered anyway and therefore fails the 'but for' test is £90. But the FCA is claiming the £100 loss in full.

127 FCA Skeleton at [415] {**I/1/151**}.

73. On the FCA's case, the insured would recover the full £100 in both cases (i.e. paragraphs 71 and 72 above). The fact that the insured peril in the first example is far wider would be of no relevance. That confounds the common sense point in paragraph 61 above, and exposes the fallacy of the FCA's entire approach.

74. In the latter case, where the insured peril is A+B+C+D, it is only that combined set of facts and causal relations that one reverses out in the counterfactual. In that case, if all or nearly all or most of the loss (the Court does not have to decide) would have occurred anyway, then all of that loss fails the 'but for' test.

75. The FCA's case is that where a trigger contains (say) four elements, it is necessary to subtract all four elements individually to construct the counterfactual. For example, one subtracts all of the restrictions, all of the disease etc. This yields a ludicrous result. The truth is that the greater the number of elements and causal relations required by the trigger, the narrower the insured peril must be (not the broader). This is self-evident. The narrower the insured peril, and therefore the more limited the cover, it necessarily follows that the broader the counterfactual becomes (i.e. the smaller the number of facts one reverses to construct it) – since all that is changed or subtracted in order to get to the counterfactual from what actually happened is the narrow insured peril.

76. The result of the fundamentally incorrect approach the FCA takes to the triggers is that (continuing with the Public Authority clause example above), loss caused by A alone is recoverable, and B + C + D, having fulfilled their role in opening the jackpot, have no further part to play in limiting the insured's recovery. The fallacy of this approach may be further illustrated as follows:

    76.1 Take a simple example, as in ***Orient-Express*** {**J/106**}. In that case, the A + B chain was simple: all that was required was physical damage to the hotel (A) causing an interruption (B) causing loss.

    76.2 The insured, however, sought cover for Z + B, where Z was damage not to the hotel but to the vicinity of New Orleans. But the policy only covered A + B, so there

was no cover. Any contrary decision would have been irreconcilable with the insured peril defined in the policy, which called for A + B, not Z + B.

76.3 Returning to this case, suppose that a policy requires A (disease) causing B (the imposition of restrictions on use of the premises by the insured) causing C (inability to use the premises) causing D (an interruption). The policy requires a chain of A + B + C + D.

76.4 Assume for the sake of argument that it is held that (i) Reg 4 of the 26 March Regulations {**J/16/2-3**} causes an inability to use a particular insured premises, but (ii) Regs 6 and 7 {**J/16/4-5**} do not, because they do not amount to restrictions on use of the premises by the insured. All of these Regulations are restrictions caused by A. Reg 4 is *ex hypothesi* B; but Regs 6 and 7 are *ex hypothesi* not B at all – they are Z, (just as in ***Orient-Express***, damage to the rest of New Orleans was Z).

76.5 On the FCA's case, it makes no difference that Regs 6 and 7 do not amount to B, because on its case, provided one has A causing B causing C causing D to some degree, there is thereafter an automatic home-run on <u>all the consequences of A</u>, even though the consequences of A were far more severe. So, on the FCA's case, all the consequences of A + Z + C + D are covered. That cannot be right. It creates extremely broad coverage for all the consequences of disease (A), in spite of the fact that the policy in this example confines the indemnity to the consequences of A + B + C + D.

77. There can be no doubt that the FCA's entire approach to the trigger results (quite deliberately), in the Public Authority clause example given above, in there being cover cover for disease, murder, bad drains, and vermin, rather than only the consequences of specified restrictions caused by those matters, which have specified effects. That is, the FCA's case is that Insurers are liable for all the consequences of A alone. This point

is peppered throughout the FCA Skeleton.[128] For example, at [394.2] the FCA says (in the context of this particular clause) {**I/1/145**}:

> "*Disease is an expressed underlying cause that led to the interruption in the clause. It would render the cover illusory if the interruption that was caused by the public authority restrictions that followed disease had to compete with the disease itself (or its consequences) in a bid to be the sole proximate cause.*"[129]

78. The point is also evident from [420] {**I/1/152**}:

> "*…the cover is "premised" on the notifiable disease and underlying cause provided that it generates the relevant public authority action. All occurrences of disease on the (short) list of notifiable diseases that are sufficient to cause public authority restrictions leading to inability to use the premises would likely have effects on the business other than through public authority action. These will include human behaviours of self-preservation (or their life and property) of customers and staff, government and local authority action that fall short of restrictions leading to inability to use, also the voluntary action that the insured would have taken to deal with the outbreak even without any government intervention*".

79. There, writ large, is the FCA's case that once one has disease (A), and some causal relation exists with B, C and D, cover must necessarily follow for all the consequences of A. A similar point is made in [421]-[422] {**I/1/153-154**}, in the context of vermin and pests:

> "*Similarly, any vermin or pests at the premises where the insured is unable to use the premises through restrictions imposed by a public*

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128 In addition to the examples cited herein, see [241] {**I/1/97**}: "*Common sense causation avoids the absurdity of the but for test's conclusion by aggregating the causes (reflecting the language and common sense) to ask what would have happened but for all the jigsaw pieces. They are either treated as a single cause, alternatively, there are multiple concurrent causes of which each one contributes causally to the whole*." The underlined language is strikingly diffuse. But the FCA's case here amounts to one that an insurer is liable for the consequences of A alone.

129 The reference here to "*an expressed underlying cause*" reflects the point made by the FCA that where the clause in question specifically mentions the underlying cause (e.g. disease, cf. the clause in ***Orient-Express*** which did not expressly refer to hurricanes), its position is somehow stronger. This is wrong: the express mention of an underlying cause makes no logical difference whatever. After all, the "*damage*" in ***Orient-Express*** had to be caused by something.

> *authority…would likely have had reduced turnover even without that authority, since even without being ordered or advised most business owners would voluntarily restrict their business to protect their staff and customers…The trigger of restriction of use through public authority order or advice ensures that claims are only made whether [sic] there is a vermin infestation of suitable seriousness, and provides an easy way of proving that trigger (because the public authority order or advice will be easy to prove). But it is not merely an insurance of the top slice of loss due to the incremental addition of that public authority advice; it is not intended to entail an investigation into a counterfactual of other responses to vermin; it is intended to cover vermin as the insured event*."

80. There again, the FCA's approach results in the Public Authority clause covering the consequences of vermin (A), never mind the fact that A+B+C+ D caused no loss. All of this is thoroughly wrong, and does unacceptable violence to the clearly defined scope of cover in the clause.

The FCA's mischaracterisation of the peril

81. The FCA – after a false start in which it self-defeatingly admits in POC paragraph 1 {**A/2/3**} that the BI losses arose from COVID-19 (which is indisputably an uninsured peril) – seeks to get round the 'but for' rule by characterising everything that happened as one indivisible peril: the disease itself, the entirety of the government reaction, the economic and social consequences. This approach is epitomised in POC paragraph 56, which pleads that:

> "*…the public authority actions are part of an indivisible and interlinked strategy and package of national measures which it is impossible, and contrary to the contracting parties' intentions, to divorce for the purposes of calculating the 'but for' counterfactual or for the purposes of proximate causation.*"[130]

82. The point is put even more starkly in the FCA Skeleton at [225] {**I/1/91**}:

130 {**A/2/41**}.

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

83. This is the most transparent reverse-engineering, designed to shoe-horn all the possible causes of loss into the narrow and limited insured perils. The FCA paints with the broadest possible brush, in particular merging (i) different stages and grades of government response (by the way presumably also extending indefinitely into the future), and (ii) the government's actions with the cause of those actions. This is wrongly to present as a single cause what is in truth a whole portmanteau of different causes, all blended together by the FCA simply in order to maximise recovery. It is wrong for the following reasons:

83.1 How one characterises events depends on the perspective one is adopting (see Lord Hoffmann's use of the tool of "*purpose*" in the context of issues such as causation in ***Abertillery*** (paragraph 22 above). A court approaching causation in order to decide whether an insurer is liable under a contract of indemnity insurance has an entirely different perspective to an historian.

83.2 The FCA's blurrings fail an obvious sense-check, even before one moves on to consider its characterisation in the light of the correct perspective.

83.3 The right perspective in the present context is the agreed ambit of the perils insured. If the wording entails narrow and limited perils, it follows that these dictate the required perspective. It is simply to ignore the parties' bargain to insist on a grand historical sweep. The FCA's counterfactual – extending to the hypothesis that there was never a case of COVID-19 in the UK – thus bears no relation to the ambit of the cover.

83.4 Insurers have not insured against the disease at large, but only in a specified area or against (for example) government or other authority action of a specified nature. Those insurers who have insured not against advice or guidance but only against mandatory regulations or orders of a certain kind are entitled to insist that

these limitations are brought into account, both in characterising the peril and in limiting the indemnity through proper application of the 'but for' test.

83.5 The FCA's approach is particularly unsuitable given the use of words such as "*incident*", "*occurrence*", "*vicinity*", "*restrictions imposed*", plus narrow conditions such as inability to use or denial of or hindrance in access, and the inclusion of contractual radiuses. Instead, the FCA goes back to find the broadest originating or unifying cause, rather as parties used unsuccessfully to argue that words such as "*event*" were to be treated as broad aggregating terms.

83.6 The Court of Appeal has made clear on several occasions that the peril insured against is not simply an event that causes loss to the insured, but is determined by the specific wording used in the policy. For example, in ***Astrazeneca Insurance Co Ltd* v *XL Insurance (Bermuda) Ltd*** [2014] Lloyd's Rep. I.R. 509, Christopher Clarke LJ said (at [32] {**K/154/8-9**}):

> *"The liability which is the subject of coverage under Article I must be 'encompassed by an Occurrence'. There has, therefore, to be an 'occurrence'. This may be an actual or alleged personal injury, which is actually or allegedly attributable to an actual or alleged event. But the policy does not provide cover for occurrences. The occurrence is the shell within which the pearl of liability must be found; or, to use the metaphor adopted by the judge, the occurrence is the gateway to coverage. What the occurrence does not do is to identify that which is to be the subject of indemnity. In Yorkshire Water v Sun Alliance, this court exposed the fallacy of treating an 'event' or an 'occurrence' as the peril insured against'.*

83.7 In ***Yorkshire Water v Sun Alliance*** [1997] 2 Lloyd's Rep 21, the attempt to re-write the peril insured against was said to be supported by US cases. Stuart-Smith LJ noted as follows (at page 28 {**K/86/8**}):

> *"… what is clear is that the American courts adopt a much more benign attitude towards the insured; this seems to be based variously on the 'folly' argument in Leebov or 'general principles of law and equity' (Slay at p. 1368) or that insurance contracts are 'contract of adhesion between parties who are not equally situated' giving rise to the*

principle 'that doubts as to the existence or extent of coverage must generally be resolved in favour of insured', or because the courts have 'adopted the principle of giving effect to the objectively reasonable expectations of the insured for the purpose of renderings fair interpretation of the boundaries of insurance cover' (Broadwell at p. 80). For the most part these notions which reflect a substantial element of public policy are not part of the principles of construction of contracts under English law."

83.8 The FCA's case is likewise based upon notions which find no support in English law principles on the construction of insurance policies.

The FCA's mischaracterisation of all loss as being indivisible

84. The FCA mischaracterises all loss in this case as being indivisible, on the basis (it is said) that it all flowed from a single cause, namely COVID-19. This appears most obviously from paragraph 53 of the POC, which pleads:

"As a matter of the proper construction of the Wordings and/or the law, both for the purposes of considering whether causation is sufficiently direct, and for considering the appropriate counterfactual to any applicable 'but for' test:

53.1. there is only one proximate, effective, operative or dominant cause of the assumed losses, namely the (nationwide) COVID-19 disease including its local presence or manifestation, and the restrictions due to an emergency, danger or threat to life due to the harm potentially caused by the disease…"[131]

85. The same point is strewn throughout the FCA Skeleton, in even starker terms. Thus, at [225] {**I/1/91**} it is said that "*the single proximate cause is the disease everywhere and the Government and human response to it."* In other words, it is axiomatically asserted that all the loss can only have had the same cause, and is thus indivisible.

131 {**A/2/35**}

86. The characterisation of all loss as indivisible, apparently on the basis it was all caused by events that were inextricably linked is plainly wrong. The concept of indivisible loss is a creature of tort law,[132] where it is occasionally encountered, but which has no place in indemnity insurance, where the parties have specifically agreed that the insurer will be only liable for loss caused by some things, and therefore not by others. In any event, this is not a case of indivisible loss (which is a question of fact[133]). In ***Rahman v Arearose Ltd*** [2001] QB 351 {**K/99**}, Laws LJ said that loss qualifies as indivisible only where "*there is simply no rational basis for an objective apportionment of causative responsibility for the injury between the tortfeasors*".

87. Cases in which loss has been held to be indivisible are rare. A paradigm case is mesothelioma. What makes it an indivisible injury is that it is (probably) caused by a single fibre of asbestos, which causes the transformation of a normal cell into a malignant one.[134] This was clearly seen in ***Barker v Corus*** at first instance, in which Moses J applied ***Dingle v Associated Newspapers Ltd*** on the basis that mesothelioma was an indivisible injury.[135] That single fibre of asbestos is a long way removed from the multiple different causes of the policyholders' loss that are likely to have operated over the past several months in this case.

88. The authorities show a clear readiness to treat loss as divisible if there are multiple causes of different aspects of the loss. Thus, for example:

88.1 In ***Rahman***, the claimant was assaulted by two youths in the fast-food restaurant in which he worked and suffered a serious facial injury. His employers were held liable in negligence for not putting in place sufficient protection. His injuries were

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132 ***Dingle v Associated Newspapers Ltd*** [1961] 2 QB 162, *per* Devlin LJ at 188–189 {**K/58/27-28**}.

133 *Ibid.*

134 ***Barker***, *per* Baroness Hale at [121] {**K/126**}; see also ***IEG***, *per* Lord Sumption at [130] {**K/158/64**}. Although it has more recently been said that the process of causation may involve different fibres acting in a way which gives rise to a series of as many as six or seven genetic alterations, ending with a malignant cell in the pleura: see ***Zurich Insurance v International Energy Group*** [2015] UKSA 33 {**K/158**}, *per* Lord Mance at [1] {**K/158/19**}, referring to the appendix to the judgment of Lord Phillips in ***Sienkiewicz***.

135 The decision of Moses J is summarised by Lord Hoffmann at [26]-[28] {**K/126/16-17**}.

then negligently treated in hospital, causing him to become blind in one eye. He also developed PTSD, a severe depressive disorder, a specific phobia and an enduring personality change. One of the issues was whether this was indivisible loss. On the agreed expert evidence, the defendants' respective torts were the causes of distinct aspects of the claimant's overall psychiatric condition and neither had caused the whole of it. Laws LJ therefore concluded (at [23] {**K/99/14**}) that it was not a case of indivisible loss.

88.2 In ***Wright v Cambridge Medical Group*** [2013] QB 312 {**K/153**}, a GP negligently delayed referring a young child to hospital for treatment. Later, when the patient was referred, the hospital treated her negligently. The claimant sued only the GP, not the hospital. On appeal, the claimant argued that it was a case of indivisible loss, in view of which (applying ***Dingle***) she should make a full recovery against the GP. Lord Neuberger held that the loss was divisible (at [52] {**K/153/17**}). There was (i) injury caused by the GP's failure to refer the patient (namely the additional pain and suffering over the period of delay which might also have led to the need for some surgical intervention); and (ii) (distinctly) the permanent hip injury resulting from the negligent treatment by the hospital. In a claim against the GP only, the claimant could recover for the first type of loss, but not the second.

88.3 Finally, it is worth noting that in ***Orient-Express,*** Hamblen J at [53] {**J/106/11**} was unreceptive to a submission that the losses could not sensibly be separated out (and indeed the tribunal had engaged in the exercise of separating out losses caused by damage to the hotel from losses that would have been incurred in any event).

This case cannot be presented as an axiomatic case of indivisible loss

89. It is perfectly possible here to conceive of separate causes of separate elements of loss (most obviously different causes over time.) This is not *a priori* a case in which all policyholders have suffered one indivisible loss. Far from it.

89.1 As the authorities discussed above show, the courts tend only to find that loss is when there is simply "*no rational basis for an objective apportionment*".[136]

89.2 The present case is obviously not such a case, most clearly because the losses took place over a long period of time.

89.3 The loss is, furthermore, financial, which is inherently divisible. It is quite different from a singular personal injury such as a broken leg, or an injury to reputation as in a defamation action.

90. It follows that whatever the breadth of the insured peril on which the or some assureds *ex hypothesi* succeed, it remains open for insurers to argue that much of the loss in any given case will have been solely caused by COVID-19 itself, including the impact of the pandemic on public confidence and economic activity. That argument will no doubt examine the position within the UK before the imposition of restrictions, and the experience of countries such as Sweden, where no comparable restrictions were imposed. That is all an argument for another day, and other tribunals. All that the Defendants seek at this stage is the recognition that different losses caused to insureds will or may well have had different causes.

91. The narrower the court's construction of the insured peril(s) in any given case, the greater the impact of the argument that at least the great majority of any insured's loss was caused by COVID-19 itself, including the impact of the pandemic on public confidence and economic activity, together with those government measures in response which did not form part of the insured peril(s). The burden at all times remains on the insured to prove that all of its loss was caused by an insured peril (see paragraph 26 above).

136 ***Rahman***, *per* Laws LJ at [19] {**K/99/12-13**}.

The FCA's case would lead to unfairness

92. The discussion above illustrates that the Defendants' case relies upon perfectly normal application of orthodox principles of contract law and causation. There is no unfairness in this. In ***Orient-Express***, Hamblen J rightly held (at [38] {**J/106/9**}) that there was nothing in that case unfair in applying the 'but for' test: see paragraph 59.10(c) above.

93. Here the wordings require loss to have been caused by interruption caused by (say) inability to use premises caused by restrictions imposed caused by an occurrence of disease – and by no other causal chain. To compensate the insured for all the consequences of the underlying cause, namely the first element in the causal chain is impermissible in principle.

94. Even if it were said to be unfair in the abstract to disallow recovery for the consequences of concurrent independent causes, here there are contractual provisions which mandate that outcome. Indeed it is inherent in the nature of indemnity insurance (see paragraph 23.2 above). The trends clauses only make more explicit what is unmistakably implicit anyway: see paragraph 59 above. There is no principle of construction which allows the court to ignore the terms of the parties' bargain.

95. Thus, in reality it is the FCA's case that would lead to injustice, by imposing upon the Defendants liability for losses they never agreed to cover. By contrast, the Defendants' case is an orthodox application of core principles which themselves exist to avoid unfairness. The court should reject the FCA's invitation to embrace what amounts to a set of heterodox, unprincipled propositions with potentially far-reaching and unpredictable results ("*knock-on consequences which we are not in a position to predict or take into account*").[137]

All Counsel for the Defendants

137 Lord Sumption in ***IEG*** at [114] {**K/158/57**}.

14 July 2020